



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 89999/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 29 MARCH 2021

SIGNATURE:

LESLIE ALEXANDER STUART

First Applicant

ELMO-YORK STUART

Second Applicant

And

NATIONAL HOME BUILDERS REGISTRATION COUNCIL

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicants claim the following relief:

- "1. That the decision by the Respondent dated 2 November 2018, (Annexure "N" to the founding affidavit), declining the Applicants' application for exemption in terms of section 29 read with section 10A and pertaining to sections 10 and 14 of the Housing Consumer Protection Measures Act, Act 95 of 1998, is set aside.*
- 2. It is declared that the Applicants are exempted in terms of section 29 read with section 10A of the Housing Consumers Protection Measures Act, Act 95 of 1998, and that the Applicants are owner builders as defined in the said Act, alternatively it is declared that the Applicants' application for the aforementioned exemption is referred back to the Respondent and same shall make its decision whether or not to exempt the Applicants as aforementioned within thirty days of the date of this order.*
- 3. The Respondent is ordered to pay Applicants' costs of the application."*

Issues common cause or not serious in dispute

- [2] The applicants are the registered owners of an immovable property known as Portion 1 of Stand No. 805, Faerie Glen Ext 1 with street address 469 Vermont Crescent, Faerie Glen, Pretoria.
- [3] The applicants decided to build a residence on the property and to undertake the building work themselves. Upon completion of the building work, the first applicant will reside in the residence.

- [4] The Housing Consumers Protection Measures Act, 95 of 1998 ("the Act"), which was enacted to make provision for the protection of housing consumers against unscrupulous home builders, is applicable to the building works the applicants intend to embark on.
- [5] The Act has various sections that need to be complied with prior to the commencement of a building project. Bearing the object of the Act in mind, section 10A read with section 29 of the Act, provides that owner builders, such as the applicants, may be exempted from the various mandatory provisions of the Act.
- [6] The applicants duly submitted an application for exemption to the respondent, the National Home Builders Registration Council which was established in terms of section 2 of the Act to *inter alia* represent the interests of housing consumers and to regulate the building industry.
- [7] On 2 November 2018 the respondent communicated its decision to the applicants, to wit:
- "8. After due consideration of your application, the Committee has resolved to decline your application due to your failure to undertake the technical assessment. In light of the above, the granting of your application will not be in the public interest, will undermine the objectives of the Act or the effectiveness of the Council and the refusal to grant the exemption will not extremely prejudice your rights."*

Issue in dispute

- [8] The only issue in dispute is whether the respondent's reason for the denial is reasonable or stands to be reviewed and set aside.
- [9] The requirement that an owner builder must undertake a technical assessment in order to qualify for an exemption in terms of section 29 of the Act, was decisively dealt with in *Ruiters v Minister of Human Settlements and Another* 2016 (1) SA 239 WCC.
- [10] The court had regard to the structure and objectives of the Act and held as follows at paragraphs [61] and [62]:

“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 on lack of technical construction capacity relates only to a home builder. The construction of a building by an owner builder, however, is required to comply with 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 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.”* (footnotes omitted)
- [11] The judgment is well reasoned and Mr Baloyi, counsel for the respondent could not provide any reasons why the *dicta* in the judgment is not applicable to the facts *in casu*.
- [12] In the result, the applicants are entitled to the relief claimed in paragraph 1 of the notice of motion.

Remedy

- [13] Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act, 3 of 2000, (“PAJA”) provides that a court in proceedings for judicial review may order:
- “(c) *setting aside the administrative action and —*
- (ii) *in exceptional cases-*
- (aa) *substituting or varying the administrative action or correcting a defect resulting from the administrative action;”*

[14] In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 CC considered the legal principles applicable to a substitution order as envisaged in section 8(1)(c)(ii)(aa) at paragraph [47]:

"To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."

[15] *In casu*, the respondent had knowledge of the *Ruiters* decision but refused to apply the decision to the facts of this matter because *"it does not agree with the decision"*.

[16] It is disconcerting that an administrative body would venture into the sphere of the judiciary, more especially when there has been a final announcement on the interpretation of an Act that regulates the affairs of the administrative body.

[17] The only reason for denying the applicants' application for exemption was the failure by the respondent to apply the law to the facts. This is not an instance where the factors to be taken into account in reaching a decision falls exclusively within the knowledge of the decision-maker.

[18] It will serve no purpose to refer the matter back to the respondent. To the contrary, a considerable amount of time has lapsed since the decision was taken, namely November 2018 to March 2021 and the interest of justice dictates that the matter should be finalised promptly.

[19] In the result, I am prepared to issue a substitution order as envisaged in section 8(1)(c)(ii)(aa) of PAJA.

ORDER

[20] In the premises, I issue the following order:

1. The decision by the Respondent dated 2 November 2018, declining the Applicant's application for exemption in terms of section 29 read with section 10A of the Housing Consumer Protection Measures Act, Act 95 of 1998, is set aside.
2. It is declared that the Applicants are exempted in terms of section 29 read with section 10A of the Housing Consumers Protection Measures Act, Act 95 of 1998, from complying with the provisions of the Act.
3. The Respondent is ordered to pay the costs of the application.



A handwritten signature in black ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line. To the left of the signature is a large, stylized circular mark, possibly a stamp or a large letter 'C'.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

16 March 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES:

29 March 2021

APPEARANCES

Counsel for the Applicants:

Instructed by:

. Advocate D. van den Boogert

E.Y. Stuart Inc. Attorneys

Counsel for the Respondent:

Instructed by:

Advocate F. Baloyi

Matabane Incorporated