

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

13/02/2015

CASE NO: A471/13

In the matter between:

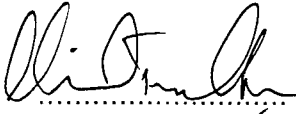
MOIRA GRANNY SEAPE

First Appellant

AHANANG HARDWARE & CONSTRUCTION CC

Second Appellant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
13/02/15 DATE		 SIGNATURE

THE HEAD: SPECIAL INVESTIGATING UNIT

First Respondent

MINISTER FOR HUMAN SETTLEMENTS

Second Respondent

PRESIDENT OF THE REPUBLIC OF

SOUTH AFRICA

Third Respondent

NATIONAL HOME BUILDERS REGISTRATION

COUNCIL (NHBR)

Fourth Respondent

JUDGMENT

Tuchten J:

- 1 The appellants sought an order in the court below (Strijdom AJ) declaring that Proclamation no. R7 of 2007 (as extended by Proclamation no. R35 of 2010) does not mandate the Special

Investigating Unit (SIU) to investigate the affairs of the fourth respondent (the Council) and the appellants respectively, interdicts directed at enforcing the declaration they sought and an order compelling the first respondent to release to the appellants a certain report compiled in about March or April 2011 relating to the first appellant's alleged conflict of interest in her office in the Council.

- 2 The first appellant was appointed as a councillor and chairperson of the Council for a period of three years beginning on 1 May 2007. The second appellant was at the relevant time wholly owned by the first appellant and carried on business in the subsidy housing construction industry.
- 3 In May 2010, a member of Parliament referred to the second respondent (the Minister) allegations of irregularities within the Council. It was alleged that the first appellant was party to certain of these irregularities.
- 4 The Minister in turn referred the allegations to the SIU, whose statutory duty it is to investigate such allegations. In terms of the Special Investigating Units and Special Tribunals Act, 74 of 1996, the third respondent (the President) may whenever he or she deems it necessary on account of certain grounds, establish an SIU and refer

the matter to an existing SIU for investigation. Acting under this measure, the then President established the SIU to perform the duties and exercise the powers and functions conferred upon the SIU from time to time. The acting President decided to have the allegations investigated and, for this purpose, issued Proclamation no. R7 of 2007. The period of matters to be investigated was later extended by Proclamation no. 35 of 2010.

- 5 The SIU went about the duties entrusted to it, as it perceived them to be, and compiled a report. On 2 April 2010 the first appellant was notified by the chief of staff of the SIU that the SIU had furnished the Minister with its report. The first appellant asked for a copy of the report but the SIU has refused to provide the first appellant with one.

- 6 However the matter reached the newspapers, where the alleged contents of the report were reported. We can infer that the report showed the first appellant in a bad light because she complains that her family has been adversely affected by the bad publicity. On 28 June 2011, the Minister held a media briefing and in July 2011 held a press conference. During the course of these he referred to the report which, the Minister said, revealed serious discrepancies which warranted proper investigation and revealed that the first appellant

had tendered her resignation and was under investigation for possible conflict of interest and corruption.

7 This, and other public utterances, prompted the first appellant to seek access to the report. They did this by correspondence but although invited to do so, they did not invoke the provisions of the Promotion of access to Information Act, 2 of 2000 (PAIA) or comply with the requirements of PAIA. Access was refused. The appellants then brought the present application.

8 Before the case was called in the court below, the appellants and the first respondent entered into a settlement agreement. It appears that the present head of the SIU had been instructed by the former head of the SIU to settle the matter. Pursuant to that instruction, a draft settlement was approved by the appellants and the first respondent (through the present head of the SIU) handed the settlement up to court. The settlement agreement was made an order of court.

9 This has become relevant, because by notice of motion delivered to the presiding judge in this appeal during the early afternoon on the day before the appeal was due to be heard, the first respondent sought leave to file heads of argument out of time. The substance of this application was that the first respondent be allowed to resile from

the settlement and re-enter the fray. We refused the application, ruling that while the order of court in relation to the settlement between the appellants and the first respondent stood (I might add that no proceedings to set aside that order of court have been instituted), it was simply not competent to permit the first respondent once again to join issue with the appellants.

- 10 When the appeal was called, counsel appeared for the Minister specifically to inform the court that the Minister had decided not to oppose the appeal. The President and the NHBRC abided, as they did in the court below.
- 11 The main issue before the court below was whether the SIU had been lawfully mandated under the earlier Proclamation to investigate the affairs of the first appellant and the Council. The provisions of the later Proclamation do not affect this question. The issue turns on the proper interpretation of Proclamation R7 of 2007. It reads in relevant part under the heading SPECIAL INVESTIGATING UNITS AND SPECIAL TRIBUNALS ACT 1996 (ACT NO. 74 OF 1996: REFERRAL OF MATTERS TO EXISTING SPECIAL INVESTIGATING UNIT AND SPECIAL TRIBUNAL:

WHEREAS allegations as contemplated in section 2(2) of the
Special Investigating Units and Special Tribunals Act, 1996

(Act No. 74 of 1996) (hereinafter referred to as "the Act"), have been made in respect of the development and delivery of low cost housing in South Africa through the National Department of Housing, the Provincial Departments of Housing, the former Housing Development Boards and Corporations and Local Authorities and their appointed agents (hereinafter referred to as the "Institutions");

AND WHEREAS the Institutions suffered losses that may be recovered;

AND WHEREAS I deem it necessary that the said allegations should be investigated and justiciable civil disputes emanating from such investigation should be adjudicated upon;

Now therefore I hereby, under section 2(1) of the Act, refer the matters mentioned in the Schedule to the Special Investigating Unit established by Proclamation No. R. 118 of 31 July 2001 and determine that, for the purposes of the investigation of the matters, the terms of reference of the Special Investigating Unit are to investigate as contemplated in the Act any -

- (a) serious maladministration in connection with the affairs of the Institutions;
- (b) improper or unlawful conduct by officers and/or employees of the Institutions;
- (c) unlawful appropriation or expenditure of public money or property;
- (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing on State property;
- (e) intentional or negligent loss of public money or damage to public property;
- (f) offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and

Combatting of Corrupt Activities Act, 2004, and which offences were committed in connection with the affairs of the Institutions; or

- (g) unlawful or improper conduct by any person, which has caused or may cause serious harm to the interests of the public or any category thereof,

which have taken place between 1994 and the date of publication of this Proclamation, and to exercise or perform all the functions and powers assigned to or conferred upon the said Special Investigating Unit in relation to the said matters in the Schedule, for the purpose of the recovery of any losses suffered by the Institutions.

- 12 The Schedule mentioned in the body of the Proclamation lists several different causes of “[l]oss of State funds” and “[m]ismanagement and misuse of the State’s low cost housing scheme” and, in numbered paragraph 3,

The conduct of officials, employees and municipal councillors of the Institutions and their approved agents responsible for or involved in the administration of the State’s low cost housing schemes and in the payment of subsidies under such schemes, which has resulted in losses of or lack of control over property or money allocated for such schemes.

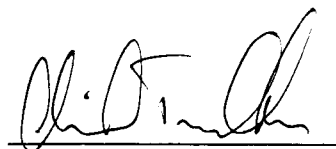
- 13 The court below found that the President could not have intended by the Proclamation to recover losses suffered as a result of the conduct of officials and employees of the appointed agents of local authorities

but not as a result of the conduct of the officials and employees of the authorised agents of the national and provincial departments of the former housing boards and corporations.

- 14 With this conclusion I agree. But the point taken by the appellants is that the conduct of the NHBRC, its councillors and chairperson and the appointed agents of the NHBRC is not covered by the Proclamation because the NHBRC is not one of the Institutions identified in the Proclamation. In my view this point is well taken.
- 15 The preamble recites that allegations were made in relation to the Institutions, amongst which the NHBRC is not included. The intention of the Proclamation as a whole is to create a framework for the investigation of those very allegations. So although certain of subparagraphs (a) to (g), in which the scope of the investigation is identified, do not specifically mention that the investigation is to take place in relation to the Institutions, the Proclamation cannot be interpreted to mean that, eg, *any* unlawful or improper conduct by any person, which has caused or may cause serious harm to the interests of the public or any category thereof (subparagraph (g)) is a proper subject for investigation or that *any* "Institution" may lawfully be investigated pursuant to the Proclamation..

- 16 Because the NHBRC is not one of the Institutions listed in the Proclamation and the first appellant was not an agent of any Institution listed in the Proclamation, prayer 1 of the appellants' notice of motion before the court below should therefore have been granted.
- 17 In prayer 2, the appellants sought an order directing the first respondent and his SIU forthwith to cease their investigation. That investigation has ceased, pursuant to the settlement, but I think, in the light of the procedural developments I have described above, that such an order in terms of prayer 2, suitably adapted, be made.
- 18 There remains for consideration the relief for access to the report. The court below, correctly in my view, found that the appellants ought to have invoked the provisions of PAIA. As they did not, they have not made out a case for access to the report and cannot succeed in relation to this relief. I cannot of course express any opinion on whether, if PAIA had been invoked and its procedures followed, the appellants would have succeeded.
- 19 No costs are sought, either in this court or in the court below.
- 20 I therefore propose the following order:

- 1 The appeal succeeds. The order of the court below is replaced with the following:
 - A It is declared that Proclamation no. R7 of 2007, as extended by Proclamation no. R35 of 2010, does not mandate the Special Investigating Unit headed by the first respondent to investigate the affairs of the National Home Builders Registration Council or the applicants;
 - B The first respondent and the Special Investigating Unit of which he is the head are directed to refrain from investigating the affairs of the appellants in relation to the National Home Builders Registration Council unless duly authorised to do so;
 - C Prayer 3 of the notice of motion is refused.
- 2 There will be no order as to costs either in relation to the appeal or in relation to the proceedings in the court below.

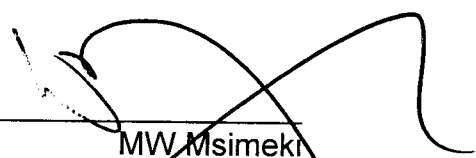


NB Tuchten
Judge of the High Court
13 February 2015

I agree. It is so ordered.


C Pretorius
Judge of the High Court
13 February 2015

I agree.


MW Msimeki
Judge of the High Court
13 February 2015