

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3164/2014

In the matter between:

WOODGLAZE TRADING (PROPRIETARY) LIMITED

APPLICANT

and

JAMES MATSHEKGA N.O.

FIRST RESPONDENT

**NATIONAL HOME BUILDERS REGISTRATION
COUNCIL (NHBRC)**

SECOND RESPONDENT

JUDGMENT

Delivered on: 02 March 2015

OLSEN J

[1] In terms of s 14 (1) of the Housing Consumers Protection Measures Act, 1998 ("the Act") a home builder shall not commence the construction of a home falling within a category prescribed by the Minister unless that proposed home has first been enrolled with the National Home Builders Registration Council, which is the second respondent in these proceedings. The applicant is such a home builder (duly registered as such under the Act), and it commenced construction of 96 residential units on property known as Erf 173 Newlands West, KwaZulu-Natal without having enrolled them as required by s 14 (1) of the Act. This was discovered by the second respondent at a stage when the construction of the units was far advanced, and resulted in the

applicant facing 96 charges of commencing construction without enrolment as required by the Act. These charges were laid before the second respondent's disciplinary committee which was chaired by the first respondent. A penalty by way of a fine of R15 000 for each unit was imposed (i.e. R1 440 000 in all). In this application the applicant seeks an order reviewing and setting aside the decision on the penalty. When the application was launched the applicant also sought an order reviewing the suspension of the applicant's registration as a home builder, but I was advised that there was no need for such relief as that aspect of the matter had been resolved.

[2] It is not disputed that the units were liable to be enrolled. Indeed, the applicant pleaded guilty to the charges (albeit with a gloss on the plea, which I will deal with later).

[3] There is no issue between the parties as to the applicant's right of access to court for purposes of review, if for no other reason than that such proceedings are specifically sanctioned by s 22 (1) of the Act. I therefore turn to the grounds of review.

Usurping the Magistrate's Jurisdiction

[4] Section 21 of the Act deals with offences. It is provided for in s 21(1) (b) that any person who contravenes s 14 (1) of the Act shall be guilty of an offence and liable on conviction to a fine not exceeding R25 000, or to imprisonment for a period not exceeding one year, on each charge. Sub-section 21 (2) provides that a Magistrates Court shall have jurisdiction to impose any such penalty. The applicant argues that the second respondent's disciplinary committee (and the second respondent) had no jurisdiction or power to impose any penalty as contemplated by s 21 of the Act.

[5] In respect of each count the charge put to the applicant before the disciplinary committee read in its material part as follows.

"The home builder is hereby charged under the provisions of the

Housing Consumers Protection Measures Act 95 of 1998 (“the Act”) as amended read together with General Regulations 20658 as published in Government Gazette No. 1409 of 1 December 1999. ... In that on or about 15 November 2013, during a routine inspection the home builder was found to have commenced construction of 96 residential units situated at Erf 173 Newlands West, KwaZulu-Natal, without having enrolled the said units with the NHBRC prior to commencement of construction thereof. ... The home builder failed to make an application for enrolment of the above units in respect of all 96 counts, at least 15 days prior to commencement of construction. Thereby contravening s 14 (1) of the Act which states ...”

[6] The regulations referred to in the charge sheet are headed “Regulations Regarding NHBRC Disciplinary Proceedings”. They contain fairly detailed provisions governing processes before, during and after a hearing to be conducted by the disciplinary committee. Regulations 3 (9) to (12) read as follows:

- “(9) The committee must make its findings based on the balance of probabilities.
- (10) In the pleading of a charge, the home builder may in addition to any other plea, plead that it has previously been found guilty or not guilty on the charge.
- (11) In the event of criminal proceedings being instituted against the home builder in terms of section 21 of the Act, the committee must, in determining the penalty for contravention, have regard to any sentence imposed by a competent court and bear in mind the cumulative effect of any penalty and any such sentence to avoid double jeopardy.
- (12) A court in imposing any sentence in terms of section 21 of the Act shall similarly have regard to any penalty imposed by the committee.”

[7] Regulation 6 deals with penalties, and the three allowed to be imposed are:

- (a) a warning;
- (b) a fine not exceeding R25 000; or
- (c) withdrawal of registration.

[8] It is clear that s 21 of the Act creates offences, and stipulates maximum sentences that may be imposed on conviction. There is no dispute between the parties as to the proposition that guilt would have to be established beyond a reasonable doubt in order to secure a conviction. The disciplinary procedures adopted in the regulations are of a different hue altogether. A finding that a home builder is guilty of the charges put to it does not result in a criminal conviction. The civil standard of proof suffices. A finding against a home builder results in a penalty, not a sentence. It is clear that what is contemplated is an administrative penalty.

[9] Nothing in the charge sheet, and nothing in the papers, indicates that there was any intention on the part of the disciplinary committee to act under s 21 of the Act. The second respondent and its disciplinary committee did not purport to usurp the jurisdiction which a court of law would have exercised if the applicant had been charged under s 21 of the Act.

[10] There is nothing in s 21 of the Act which expressly or impliedly conveys that any misconduct rendered an offence by the section must be dealt with by a criminal court, or not at all.

[11] In my view there is no merit in the argument that the decision in question was made in the wrongful exercise of the court's jurisdiction established by s 21 of the Act.

The Second Respondent's Code of Conduct

[12] Counsel for the applicant took a new line on the issue of jurisdiction in his heads of argument, and pursued it in oral argument. The regulations to which I have referred were made in terms of s 7 (2) of the Act. Section 7 (2) (c) is the relevant one, and is to the effect that the Minister shall prescribe:

“procedures for disciplinary proceedings before the disciplinary committee in respect of alleged misconduct of home builders and make provision for fines and other penalties to be imposed on home builders who contravene the code of conduct prescribed by the Council”.

The argument is that the disciplinary committee made no findings of misconduct in relation to the code of conduct, which is a necessary precondition to the exercise of the power to impose a fine under the regulations read together with s 7 (2) (c) of the Act. The code of conduct was not mentioned in the charge sheet.

[13] This new argument, which recognises the validity of administrative penalties, but confines them to breaches of the second respondent’s code of conduct, was not raised in the founding papers. It accordingly attracted an objection from counsel for the respondents. The point was entirely new. Not only was it not raised in the founding papers; the point is jurisdictional in nature, and it was not raised before the disciplinary committee. In the result there was no call on the respondents to produce the Council’s code of conduct.

[14] In my view the respondents’ objection is good. There is no doubt that the code of conduct would have been presented by the respondents in answer to the founding affidavits if it had been contended that the penalties imposed by the disciplinary committee fall to be set aside because the misconduct in respect of which they were imposed did not amount to a breach of the second respondent’s code of conduct. The code of conduct applicable at the material time was that published in Government Gazette No. 30697 of 1 February 2008. The code was published in accordance with s 7 (1) (ix) of the Act, which is to the effect that the second respondent may, by publication in the gazette, prescribe a code of conduct. Article 2 (b) of the code, read with the definition of the term “the Act” in Article 1, is to the effect that a home builder must honour all the obligations imposed on it in terms of the Act and

comply with all the duties of a home builder set out in the Act. Clearly a breach of the obligation imposed by s 14 (1) of the Act amounts to a breach of the second respondent's code of conduct.

[15] In the result the new ground of review cannot succeed either:

(a) because, if it is permissible for this court to take judicial notice of the code of conduct under s 5 (1) of the Civil Proceedings Evidence Act, 1965, I must conclude that a charge that there has been a contravention of s 14 (1) of the Act amounts to a charge of contravening the code of conduct; or

(b) because the failure of the applicant to raise this issue in its founding papers meant that the respondents were deprived of the opportunity of answering the challenge *inter alia* by producing a copy of the Gazette as contemplated by s 5 (2) of the Civil Proceedings Evidence Act; which renders the failure to raise this ground of review in the founding papers fatal to the argument. (*Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635 – 636.)

Ninety Six Counts as One?

[16] The applicant raised two further grounds of review which are related. They have to do with the fact that there were 96 counts and not one.

[17] According to the founding affidavit, prior to pleading guilty to each of the 96 counts, the applicant, through its attorney, argued that the 96 counts relate to 96 apartments in one development; and that in the circumstances there should have been only one charge. This contention was based upon the proposition that (I quote from the founding affidavit) “there would only be one intention to commit the unlawful action and not 96 intentions to do so, 96 times and therefore all of the charges should really be one count and not 96 counts”. It was contended that the first respondent was “emphatic” that the hearing should proceed upon the basis that 96 charges were legitimately put,

but that the point at issue should be taken into account when considering the penalty. The contention is that in the circumstances the applicant was “forced to plead guilty”, which would undoubtedly constitute an irregularity if it were true.

[18] What the record reveals is that the first respondent put it to the meeting (rightly or wrongly) that his understanding of the submission made by the applicant’s attorney was not that the charges should be consolidated into one, but that, when accepting the pleas of guilty to the charges as framed (which the applicant had already indicated it would and did tender), the disciplinary committee was being asked to bear in mind that the failure to enrol, and the intention in that regard, was with respect to a single development comprised of 96 units. The applicant’s attorney was asked whether the first respondent had understood him correctly and an affirmative answer was given by the applicant’s attorney; whereupon the pleas of guilty to 96 charges were accepted. There is no evidence of any compulsion. It was open to the applicant’s attorney to state that the applicant would be willing to plead guilty to a single charge with respect to the entire development, but would otherwise plead not guilty upon the basis that 96 charges could not legitimately be put to the applicant. The attorney did not do so.

[19] The related complaint is that the disciplinary committee misdirected itself in not regarding the 96 charges as one for the purposes of sentence. The implication of the argument was spelt out in the founding papers, where it was stated that it was compulsory for the disciplinary committee to regard the 96 charges as one for the purpose of sentence, as a result of which the disciplinary committee could not impose a fine of more than R25 000, being the maximum stipulated in the regulations for a single act of misconduct.

[20] Section 14 (1) of the Act requires the enrolment of a “home”. A home is defined in s 1 as a “dwelling unit constructed or to be constructed by a home builder”. At the hearing before the disciplinary committee the applicant’s attorney rightly conceded that each of the 96 units was a home and had to be enrolled. In my view there is no doubt at all about the

proposition that the failure to enrol any one unit was on its own a breach of the provisions of s 14 (1) of the Act liable to be charged as misconduct. At the hearing the applicant's attorney called no evidence in support of its proposition that, as a matter of fact, there was only a single intentional act, namely, not to register or enrol a development. Section 14 (1) of the Act does not deal at all with the enrolment or registration of "developments". The applicant self-evidently intended not to register each one of the 96 homes.

[21] The respondents did not argue that it was not within the power of the committee in its discretion to treat the 96 counts as one for the purposes of sentence. Indeed the disciplinary committee had done that on a previous occasion when, in August 2013, the applicant was found guilty of the same breaches of the Act in respect of a development containing 42 units. On that occasion a fine of R15 000 was imposed in respect of the 42 counts taken as one for the purpose of sentence. In the argument before the disciplinary committee on this occasion a Ms Lugaju, who was introduced as the "disciplinary hearing prosecutor", classified that earlier sentence as lenient and argued that as a result of that earlier case the applicant could have been in no doubt with effect from August 2013 of its obligation to register rental units (as opposed to units constructed for sale). She argued that the fact that the applicant had not voluntarily applied for late enrolment of the 96 units now in issue indicated that the applicant was *mala fide*, and that in the circumstances the ultimate penalty of deregistration of the applicant as a home builder was called for. That appears to have been an outcome which the applicant had to avoid at all costs. In answering the applicant's attorney argued that a fine in a substantial sum with a "large portion" suspended would be appropriate. He argued that the disciplinary committee had a wide discretion in imposing a fine of up to R25 000 per count. Withdrawal of the applicant's registration was, the attorney argued, a penalty to be reserved for what he called "extreme cases". The disciplinary committee appears to have accepted this argument. In my view the argument undoubtedly involved a concession that it would not be proper to take all counts as one as that would limit the total fine to R25 000. In the circumstances it is not open to the applicant to argue in the present proceedings that the disciplinary committee

misdirected itself in not exercising a discretion to regard all 96 counts as one for the purposes of fixing a penalty.

[22] I should add that the applicant did not proffer any authority for the proposition that it was compulsory in the circumstances for the disciplinary committee to regard all 96 counts as one for the purposes of determining penalties. I know of no such authority.

Harsh Penalties

[23] In argument the applicant's counsel made submissions of the kind normally made in criminal appeals on sentence, in support of the proposition that the penalties were tainted by "serious misdirection and failure to properly apply their minds", and that they fall to be reviewed and set aside on that account. In essence the complaint is that the disciplinary committee focused on teaching the applicant a lesson and giving a message to the public at large; and that the committee failed to take other relevant factors into account, and overlooked the cumulative effect of the fines. As a result, it is argued, the cumulative effect is unduly harsh. In support of these arguments applicant's counsel referred to *S v Young* 1977 (1) SA 602 (A) at 610 and *S v Fourie* 2001 (2) SACR 118 (SCA) para 20.

[24] Putting aside the fact that in my view these submissions are based upon an erroneous analysis of the reasons for the decision given by the disciplinary committee, the difficulties the applicant confronts in advancing these arguments are:

- (a) that these grounds of review were not raised at all in the papers which were confined to the more technical issues discussed above; and
- (b) even if one were to take a charitable view of the papers, and regard them as advancing the proposition that the penalty should be reviewed and set aside at least upon the basis of

harshness, no factual foundation has been laid which would enable a court of law to conclude that in this particular case the disciplinary committee, a specialist tribunal, overstepped the mark.

[25] When considering a criminal appeal the court has a body of law and precedent to guide it in making an assessment as to whether a complaint that a sentence is too harsh can be sustained. In the present instance the court is confronted with a decision of a specialist tribunal made in a particular context where the tribunal (two of whose members are technical assessors) makes a decision on penalty against the background of a specialist's knowledge which, it must be said, must also have been available to the applicant as an experienced home builder. The papers in this application, and the record of the proceedings delivered to the registrar, are devoid of information which is presumably material to a consideration of whether or not the penalty per unit, or the penalties cumulatively, met the exigencies of the occasion.

[26] There are some photographs of the buildings in the papers. If the photographs are representative of the entire development one can see that the development is very large indeed, which is unsurprising given that 96 homes are contained in it. All that can be said on the papers is that the investment in the structures must be very substantial indeed. I have no idea of what each unit is worth. I have no idea of what rental return is expected from them. One would think that this information would influence one's thinking on the question as to whether a fine of R15 000 per unit, and cumulatively 96 times that amount, is so harsh that no reasonable disciplinary committee could have thought it appropriate.

[27] The papers are devoid of any information concerning the financial risks attaching to any unit which might not have been built in accordance with the standards set by the second respondent. This, one would think, is also relevant if the argument is that the fine is too harsh, especially bearing in mind the fact that the Act is designed to protect housing consumers, and that it does this *inter alia* through the regulation of the building industry and by

maintaining minimum standards for home builders. (See in this regard *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) paras 29 and 30.)

[28] In the circumstances, and without thereby necessarily holding that the penalties imposed by the first respondent's committee were appropriate, I find that the argument that the decision on the penalties is reviewable because it is too harsh, or because the disciplinary committee misdirected itself by not taking into account all relevant factors, must fail.

In the circumstances, I make the following order:

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

OLSEN J

Date of Hearing: FRIDAY, 30 JANUARY 2015

Date of Judgment: MONDAY, 02 MARCH 2015

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