

SUMMARY OF THE JUDGMENT

RULES FOR OWNER BUILDER'S EXEMPTION FROM NHBRC LAWS

Ruiters v Minister of Human Settlements and Another (13669/14) [2015] ZAWCHC 107 (12 August 2015)

The dispute in this matter dealt with the NHBRC's argument that an owner builder has to apply for late enrolment if he failed to register with the Council before commencing building work. As the Act allows owner builders to be exempted, upon application, from compliance with the enrolment requirements that apply in respect of home builders, the owner builder argued that he need not apply for late enrolment. The outcome highlights the correct procedure in such instances.

The Judgment can be viewed [here](#).

FACTS

In February 2012, the City of Cape Town approved Ruiters' building plans for a new house and he thereafter commenced with the construction.

In August 2012, the National Home Builders Registration Council (NHBRC) served a notice of non-compliance with the provisions of section 14(1) of the Housing Consumers Protection Measures Act (HCPMA) on him. The non-compliance related to the fact that, as a home builder, Ruiters had commenced the construction of a home prior to enrolment thereof with the NHBRC. Ruiters was given 7 days in which to comply.

Ruiters contended that he was an "owner builder" as defined, i.e. "a person who builds a home for occupation by himself" and that he was thus exempted from the requirement to comply with sections 10 and 14 of the HCPMA, which applied to home builders (as opposed to owner builders) and required them to register with the NHBRC and enroll the homes to be constructed, prior to commencing the actual building activities.

Ruiters accordingly submitted an exemption application (in terms of sections 10A and 29 of the HCPMA) to the NHBRC. In the application, he stated that he was an owner builder building his own house in stages, as funds became available and that 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. In addition, in order to be exempted from the requirements of section 29 of the HCPMA, he 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; 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 would have to comply with the requirements of the National Building Regulations and Building Standards Act (the Building Regulations Act); and he would be responsible for administering the whole building project. He indemnified the Council and held it free from blame against any claim that might arise out of the granting of the exemption.

The NHBRC rejected the application. The requirements for satisfying the Council in an exemption (contained in subsections 29(a), (b) and (c)) were however not dealt with; rather, the rejection was based on a reliance on section 10A of the Act, the NHBRC holding that sections 10 and 14 of the Act prohibited the commencement of construction of a home prior to the registration of a home builder and enrolment of a home and that accordingly, an exemption application from application of sections 10 and 14 of the Act, could only be made prior to construction.

Ruiters was thus requested to bring an application for late enrolment of his property, in terms of section 14A of the Act.

Ruiters lodged an appeal with the Minister against the decision of the NHBRC. The NHBRC submitted a report on the appeal to the Minister in which it gave its reasons for rejecting the application. The report concluded that it was only authorised (in terms of its 2004 guideline) to grant exemption from sections 10 and 14 of the Act where an applicant had not yet commenced with the construction of a home. The Council pointed out that in Ruiters' application, he had indicated that he had already commenced construction. As a result, the Council rejected the application in line with the 2004 policy.

The NHBRC stated further that its amended 2012 guideline did provide for the possibility of owner builder exemption, even where construction of a home had commenced. Since Ruiters' application predated the date of the amended policy, and since the council had rejected several other similar applications on this basis, the NHBRC's recommendation remained that the appeal should be dismissed, to avoid a flood of similar applications were they to approve Ruiters' application retrospectively.

The Minister issued a ruling in favour of the finding made by the NHBRC.

Ruiters approached the court seeking a review and setting aside the Minister's decision.

The following sections from the HCPMA are relevant:

1. Section 10A provides that an owner builder may, in terms of section 29, apply to the Council for exemption from sections 10 and 14.

2. Section 29 provides that the Council may, on application made to it, exempt a person or a home from any provision of the Act, if it was 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
(c) should the exemption not be granted, the effect would be extremely prejudicial to the interest of the applicant and housing consumers.”
3. Section 14A allows for late enrolment and non-declared enrolment and authorises the NHBRC to require a home builder to satisfy the Council that a construction (that was started before the home builder submitted an application for enrolment of the home) was in accordance with the NHBRC technical requirements; and to take measures to manage the risks pertaining to the fund.
4. Sections 10(1) and (2) require home builders to register with the Council prior to carrying on business as a home builder or receiving any consideration in respect of a building project.

HELD:***The Housing Consumers Protection Measures Act***

- The HCPMA seeks to protect housing consumers and to provide for the establishment and functions of the NHBRC.
- The Act requires registration of home builders and confirmation of their alignment to the Council's building skill and expertise specifications, to prevent housing consumers and the Council from being exposed to unacceptable risks.
- Housing consumers are protected by the requirement that, amongst other things, the home builder must ensure that a written agreement for the construction or sale of the home by the home builder, is entered into with the consumer. This agreement is deemed to include warranties, enforceable by the housing consumer against the home builder, 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.
- The Council manages a fund that was established to provide assistance to housing consumers when a home builder fails to rectify major structural defects caused by non-compliance with NHBRC technical requirements occurring within a given time period.

Application of the Principles

- From the aforementioned 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 protective provisions of the Act to owner builders; nor are any duties placed upon them. In fact, initially owner builders were not regulated by the Act and it was only in the 2008 amendments that such regulation was introduced.
- The Act deals with owner builders by imposing requirements on them by which potential prejudice to housing consumers is eliminated where the authenticity of a builder's status as an owner builder has not been established.
- The current definition of a home builder includes an owner builder conditionally. The definition reads:

"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."
- As a result, all persons who construct or sell new homes are subject to regulation in terms of the Act. This includes an owner builder who is treated as a home builder until application is made for exemption.
- The consequences arising from part (b) of the above definition of home builder is that: (i) if an owner builder has not applied for exemption he or she remains subject to the duties resting upon a home builder and the consequence of breach of such duties; (ii) if such application for exemption has been successfully made, no such duties or consequences arise.
- Applied to the facts, it was clear that the HCPMA does not deprive an owner builder of the liberty, as land owner, to build on the property merely because he did not fulfil the duties of registration and enrolment before he applied for exemption. Therefore, were Ruiters to satisfy the Council that he is an owner builder, immunity from the provisions of sections 10(2) and 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 section 14A.
- In an exemption application, 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).
- The Council did not consider the criteria listed in section 29 when rejecting Ruiters' application for exemption. However, an undertaking such as the one made by

Ruiters, 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.

- The Council based its rejection on the ground that Ruiters commenced building before making his application for exemption, despite the Act not authorizing a rejection on this ground. Nor does it prohibit an owner builder from commencing building before making application for exemption.

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 matter was accordingly referred back to the Council for reconsideration.

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