IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 18256/14

In the matter between:

W G G ELIOT	Applicant

and

G WALTERS N.O.	First Respondent
D MOORE	Second Respondent
NATIONAL HOME BUILDERS REGISTRATION COUNCIL	Third Respondent
MINISTER OF HUMAN SETTLEMENTS	Fourth Respondent

Date of hearing: 23 August 2017

Date of judgment: 22 November 2017

JUDGMENT

SAVAGE J:

Introduction

[1] This matter has its genesis in a written construction management contract ('the contract') entered into on 26 November 2006 between the applicant, Mr W G G Eliot, in the name of L'Agulhas Construction Management Services ('L'Agulhas'), and the second respondent, Ms Dorinda Moore, as the owner of erf 1416, consolidated from erf 910, Napier, Western Cape ('the property'). In terms of this contract, the applicant was to manage both the renovation of an existing house situated on the property owned by Ms Moore ('the main house') and the construction of a new house and garage on the same property ('the new house and garage'), with the building work itself undertaken by Mr E G Lakey, a registered home builder.

[2] The application is concerned with the registration of the applicant and the enrolment of the construction of the new house and garage with the third respondent, the National Home Builders Registration Council ('NHBRC'), with no dispute that the renovation undertaken to the main house is not subject to the provisions of the Housing Consumers Protection Measures Act 95 of 1998 ('the Act'). The applicant seeks an order -

1. Declaring that he was a registered home builder during 2007, alternatively directing NHBRC to register the applicant as a home builder for the year 2007;

2. reviewing and setting aside, in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), the failure of the NHBRC to enrol the new dwelling and garage on, erf 1416, consolidated from erf 910, Napier, owned by Ms Moore, and directing the NHBRC to enrol the new dwelling and garage in terms of s14A of the Act;

   alternatively,

   reviewing and setting aside, in terms of PAJA:

i. the decision of a committee of the NHBRC, purportedly taken on 18 July 2013 and communicated to the applicant on 4 April 2014 and/or insofar as may be necessary;

ii. the decision of the fourth respondent, the Minister of Human Settlements ('the Minister'), on appeal to her in terms of s 22(5) of the Act, which was communicated to the applicant's attorneys on 4 March 2015;

iii. extending the period of 180 days within which to have brought the application in (ii) above.

3. In the event of the refusal of the relief sought in the above paragraphs, a declaration that the contract entered into by the applicant and Ms Moore on 26 November 2006 is void for illegality to the extent that it concerns homes subject to the Act above.

4. That the costs of this application be borne by the respondents who oppose the relief sought jointly and severally.

[3] The grounds on which the applicant seeks the review and setting aside of the decision of the NHBRC to refuse to late enrol the new home and garage are that -

3.1 the NHBRC failed to give written reasons for the decision and may not rely on new reasons put up in opposing this application; and/or

3.2 the rule that no late enrolments will be granted three months after a home has been completed and occupied, is reviewable since it is impermissible for a public body, on which a discretion is conferred by statute, to treat a general principle laid down for its general guidance as a hard and fast rule to be applied invariably in every case;[1] and/or

[1] *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management, and Others* 2006 (2) SA 191 (SCA) para 10 with reference to *Computer Investors Group Inc and Another v Minister of Finance* 1979 (1) SA 879 (T) at 898C-E.

3.3 the three month cut-off for enrolment of a home with the NHBRC is irrational when an engineer can certify the structural soundness of a building whether 2 days or 4 years after completion; and/or

3.4 the NHBRC has no general discretion to refuse late enrolment on the grounds of lateness, since refusal is limited to reasons of non-compliance with the NHBRC's technical requirements, when the sanction for late enrolment is confined to disciplinary proceedings, withdrawal of registration or payment of a late registration fee.

[4] The grounds on which the applicant seeks, in the alternative, the review and setting aside of the NHBRC's exemption decision, and the decision of the Minister on appeal upholding it, are that:

4.1 the NHBRC committee was materially influenced by an error of law; and/or

4.2 it took irrelevant factors into account and ignored relevant considerations; and/or

4.3 the decision was not rationally connected with the purpose of the empowering provision; and/or

4.4 the decision was not rationally connected to the information before the administrator; and/or

4.5 there was a failure to take a decision; and/or

4.6 the exercise of the power authorised by the empowering provision, in pursuance of which the decision was made, is so unreasonable that no reasonable person could have so exercised the power.

[5] The applicant, following the decision of the Constitutional Court in *Cool Ideas 1186 CC v Hubbard & another (Cool Ideas)*[2], no longer persists with an attack against the constitutionality of certain provisions of the Act; nor, as a result, with his review ground based on the unconstitutionality or unlawfulness of the exemption decision and subsequent appeal.

[2] 2014 (4) SA 474 (CC).

Relevant statutory provisions

The Act

[6] The NHBRC was established with the object of regulating the home building industry *inter alia* to protect housing consumers against defects in new homes and to promote '*ethical and technical standards in the home building industry*'.[3] The powers of the NHBRC are set out in s 5(4) of the Act and include *inter alia* the registration and deregistration of home builders '*in accordance with criteria prescribed by the Minister*', the enrolment and inspection of categories of homes that may be prescribed by the Minister, the administration of a fund to assist housing consumers where home builders fail to meet their obligations in terms of s 13(2)(*b*)(i) and the resolution of disputes between registered home builders and housing consumers.

[7] A 'home builder' is defined in s 1 of the Act as '*(a) a person who carries on the business of a home builder; or (b) an owner builder who has not applied for exemption in terms of section 10A.*'

[8] Section 10 requires the registration of a home builder with the NHBRC, providing that:

> '(1) *No person shall—*
>
> *(a) carry on the business of a home builder; or*
>
> *(b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,*
>
> *unless that person is a registered home builder.*'

[9] Section 13(1) requires that an agreement between a home builder and a housing consumer for the construction of a home by the home builder shall be in writing and signed by the parties, set out all material terms and attach the specifications as to materials to be used in the construction, as well as the approved plans. An agreement is deemed, in s 13(2), to include warranties

[3] Section 3 of the Act.

enforceable by the housing consumer against the home builder in any court. These warranties are, in terms of s13(2)(b), (i) to rectify major structural defects caused by the non-compliance with the NHBRC Technical Requirements for a period set out in the agreement but not less than 5 years from occupation date; (ii) to rectify non-compliance or deviations from the terms, plans or specifications of the agreement or any deficiency related to design, workmanship or material within a period set out in the agreement and not less than three months from the occupation date; and (iii) repair roof leaks within a period set out in the agreement but not less than 12 months from the occupation date.

[10] While in terms of s 13(3), a failure to conclude a written agreement or attach the required annexures, specifications as to materials and plans, does not render the agreement invalid, s 13(6) provides that any provision in an agreement '*that excludes or waives any provision of this section shall be null and void.*'

[11] In terms of s 13(7) a home builder may not demand or receive either a deposit or any other consideration for the construction or sale of a home unless an agreement has been concluded with the housing consumer and the provisions of section 14(1) or (2)[4] have been complied with.

[12] Section 14(1) provides that a home builder '*shall not commence the construction of a home*' unless it has been enrolled by the NHBRC and a certificate of proof of enrolment has been issued by the NHBRC, with the NHBRC permitted, in terms of s 14(8), to refuse to enrol a home for enrolment while the home builder's registration is suspended in terms of s 11(3).

[13] The definition of *'late enrolment'* was inserted into the Act on 16 November 2007,[5] with the term stated to mean '*the submission by a home*

[4] Section 14(2) is concerned with the construction of a home financed solely by a state housing subsidy.
[5] In terms of the Housing Consumers Protection Measures Amendment Act 17 of 2007.

builder of a request for a particular home to be entered into the records of the Council after construction of such home has started in contravention of section 14'. S 14A, also inserted into the Act in 2007, provides that:

'(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.'

[14] S 14A(3) permits the NHBRC to prescribe disciplinary measures for late enrolment and non-declared late enrolment.

[15] The NHBRC is required, by s 15(4), to establish a fund to assist housing consumers where a home builder fails to meet his or her obligations, under s 13(2)(b)(i), to rectify major structural defects. In terms of s 17(1) the NHBRC is required to pay out of that fund an amount to rectify a defect where the home builder has not done so, the home builder was registered as such and at the occupation date the home was enrolled with the NHBRC.

[16] Section 29 allows '*a person or a home*' to be exempted from '*any provision of this Act*', with this power vested in the Minister until 2007 but from 2007 the provision was amended to substitute the Minister for the NHBRC. Section 29 provides that:

'(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 in a 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

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

[17] Section 10A, inserted into the Act in November 2007, permits an owner builder to apply to the NHBRC for exemption from sections 10 and 14 of the Act.

[18] Section 22 (5) provides that any person who feels aggrieved with a decision of the NHBRC made in terms of s 29, may within 60 days from the date on which the decision was made known, lodge an appeal in writing with the Minister against the decision.

[19] In terms of s 21(1) withholding information in terms of the Act, furnishing false or misleading information, or contravening s 10(1) or (2) (registration of home builders), s 13(7) (receiving a deposit or consideration when an agreement has not been concluded with the housing consumer), or s 14(1) or (2) (commencing with construction when the home has not been enrolled with the NHBRC), is an offence in respect of which a person is liable on conviction to a fine not exceeding R25 000, or to imprisonment for a period not exceeding one year, on each charge.

[20] Where registration has been finally declined or withdrawn, a home builder may lodge an appeal with the High Court in terms of s 22(2).

Regulations

[21] Regulation 11 of the General Regulations Regarding Housing Consumer Protection Measures[6] provides the terms and conditions for registration as a home builder, including provisional registration, with the

[6] Published under GN R1406 in *GG* 20658 of 1 December 1999.

NHBRC required to issue a registration certificate in terms of regulation 11(11) '(w)*here the Council has determined that a home builder meets the requirements of section 10...*'.

[22] Regulation 12(2) requires the NHBRC to notify a home builder of the obligation to renew its registration one month before expiry of the registration and issue two further notices in terms of regulation 12(3) '*to remind the home builder of the need to renew.*' Where a home builder has not renewed registration the NHBRC may, in accordance with regulation 12 (6), withdraw registration '*...after instituting disciplinary proceedings in terms of section 11 of the Act*'. The failure to renew annual registration does not, in terms of regulation 12(7), affect the obligations of the home builder at the time in respect of housing consumers or the NHBRC. If a home builder has been registered but has failed to renew registration and wishes to re-register, regulation 12(8) provides that an application may be made to the NHBRC for registration; and in terms of regulation 12(9) the NHBRC '*must...consider the home builder's registration against the requirements of registration in terms of section 10 of the Act having regard to the previous registration history of the home builder.*'

NHBRC Rules

[23] The NHBRC Rules[7] provide *inter alia* for procedures for registration, the expiry of registration and enrolment. Rule 14 concerns late enrolments. It permits a home builder to submit an application for the enrolment of a home '*after construction has started*', with the NHBRC required to satisfy itself that the construction was undertaken in accordance with its technical requirements '*so as to take prudent measures, contemplated in section 16(1) of the Act, to manage the risks pertaining to the fund*'. Provision is made for the payment of a late enrolment fee for a special inspection of the construction undertaken to determine compliance with the NHBRC technical requirements, s 14(3). If inspection requires that work undertaken be exposed, the costs thereof are, in

[7] Published under GN R1408 in *GG* 20658 of 1 December 1999 and amended by GN R1516 *GG* 20736 24 December 1999.

terms of Rule 14(6), for the home builder. Rule 15 is concerned with non-declared late enrolments and Rule 16 with circumstances in which a home builder is guilty of consistent late enrolment, in which case the NHBRC may withdraw registration or suspend the enrolments due to the home builder. If in terms of Rule 16(3) the NHBRC rejects the late enrolment of a home '*due to non-compliance with the NHBRC technical requirements*', disciplinary proceedings against the home builder and prosecution under s 21 are to be considered.

Background

[24] The applicant drafted the contract between L'Agulhas, as contractor, and Ms Moore, as client, without legal advice. While in terms of the contract the applicant was to perform the work, the physical building work was undertaken by Mr Lakey, who was registered as a home builder with the NHBRC as from April 2004.

[25] Clause 4 of the contract stated that:

> '*4. COMPLIANCE WITH LAWS AND REGULATIONS*
>
> *(a) In the execution of this contract the contractor shall be entirely responsible for satisfying the requirements, whether as to payments or any amounts due or falling due otherwise, of all applicable legislation, such as but not confined to, the Unemployment Insurance Act, the Basic Conditions of Employment Act, the OHS Act etc. and any regulations made thereunder with the exception of the enrolment of the works with the NHBRC as may be required.*
>
> *(b) The contractor hereby indemnifies the client against loss or damage arising out of any breach, non-observance or non-performance of any of the provisions of the above Acts, but not confined to the above, by the contractor or his servants or agents with the exclusion of the requirements of the NHBRC.*'

[26] In his founding affidavit the applicant stated that in drafting the contract he relied on his *'layman's knowledge'* of the Act, and that, while he was aware

that he had to register as a home builder and have the new house and the garage enrolled with the NHBRC, '(m)*istakenly, I thought I could pass the responsibility of enrolling the structures to the second respondent. Mr Moore himself undertook to ensure that the new house and garage were enrolled with the NHBRC*'. This is denied by Mr Moore who, in his answering affidavit filed on behalf of his wife, the contents of which are confirmed by her, stated that he was told by the applicant that enrolment with the NHBRC was only necessary if a mortgage bond was sought and since it was not, no enrolment was required.

[27] The applicant entered into a verbal partnership agreement with Mr Rodney Adriaanzen in 2004 to build homes under the name of the partnership, L'Agulhas. For the period 19 November 2004 until 19 November 2006, L'Agulhas was registered with the NHBRC but it did not trade and no home was built in the name of L'Agulhas over this period of registration. In terms of its '*provisional*' registration, L'Agulhas was permitted, according to the NHBRC, to construct one house initially to be inspected by the NHBRC to assess the building capabilities of the registered home builder, prior to its registration being extended to the construction of further homes.

[28] When the contract was entered into on 26 November 2006, seven days after the end of L'Agulhas' period of registration on 19 November 2006, L'Agulhas had not renewed its registration with the NHBRC. The NHBRC did not give notice, in terms of regulation 12(2), to L'Agulhas one month before expiry of its registration, nor did it issue two further notices in terms of regulation 12(3) '*to remind the home builder of the need to renew.*'

[29] Since the new house and garage was to be a once-off building exercise, the applicant stated that he considered himself '*both justified and legally entitled to contract out of the provisions of the Act*' and the construction of the new house and garage was not enrolled with the NHBRC as required by the Act.

[30] On 3 August 2007 the contract was cancelled by Ms Moore. Towards the end of 2007 the new house and garage was completed and occupied. The applicant disputed the lawfulness of the cancellation of the contract, claiming that it amounted to a repudiation and that it was premature in that he had not been provided with an opportunity to rectify alleged defects as required by clause 8(b) of the contract. At the time of cancellation, Ms Moore was indebted to the applicant in the amount of R207 479,58. When the amount was not paid, the applicant invoked the arbitration clause in the contract. However, shortly after the appointment of the first respondent, Mr G Walters, as arbitrator the applicant decided not to proceed with the arbitration given the expense of arbitration in relation to the amount claimed. Ms Moore, however, in March 2009, instituted a counterclaim against the applicant for defective performance, which was opposed by the applicant, and the arbitration proceeded in respect of this counterclaim over four days from 20 July 2010 until 23 March 2011.

[31] On 25 March 2011 the applicant sought to purge his default with the NHBRC in as far as the registration status of L'Agulhas was concerned by settling the back payment of registration fees for the years 2007 to 2011 inclusive. The payment of the outstanding fees for the years 2007 until 2011 was accepted by the NHBRC and provisional registration certificates for the years in question were issued to L'Agulhas in due course. On 3 June 2011, more than three years after the cancellation of the contract, Ms Moore re-opened her case to allege non-compliance by the applicant with the Act in not being registered as a home builder and in failing to enrol the new house and garage with the NHBRC, as a result of which it was alleged that he was not entitled to receive any remuneration for construction in terms of s 10(1) and s 13(7) of the Act. On 29 June 2011 the applicant notified the NHBRC that the L'Agulhas partnership had been dissolved and that his status was that of sole proprietor trading as L'Agulhas.

[32] On 14 October 2011 the arbitrator adjourned proceedings to allow the applicant to apply to the NHBRC for the late enrolment of the new house and

garage. That application was made on 8 November 2011. The NHBRC advised the applicant that the application was incomplete as certain dates had been omitted and that the NHBRC did not allow late enrolment where structures had been inhabited for a period in excess of three months. An application for a mandamus launched by the applicant was withdrawn after it was opposed on the basis that the applicant should have sought relief on review and that internal remedies had not been exhausted by him. On 8 February 2012 the applicant was informed by the NHBRC's legal advisor, Mr Hulisani Mmbara, that the NHBRC did not permit the late enrolment of homes inhabited for longer than three months. No written reasons were received from the NHBRC for its refused to enrol the new house and garage.

[33] On 15 May 2012 the applicant applied to the arbitrator for the referral of the issue as to whether sections of the Act were unconstitutional. The application was dismissed but the applicant was given 15 days to apply for a stay of the arbitration proceedings in order to have the issues determined by the Court. In a notice to amend filed on 16 July 2012 the applicant sought declaratory relief that he was registered as a home builder and the review of refusal to enrol the new home and garage.

[34] On 8 March 2013 the applicant applied in terms of s 29 to the NHBRC for an exemption from the provisions of s 10 and s 13 of the Act. On 16 July 2013 the present application to Court was postponed as the NHBRC had not furnished details of its decision. Although in terms of s 29(2) the NHBRC was required to inform the applicant of the outcome within 60 days, almost a year later, on 4 April 2014, an unsigned minute of the NHBRC registrations committee meeting held on 18 July 2013 was provided to the applicant. In this minute it was recorded as follows:

> '***10.15*** ***W. G. G. Eliot, Stand 910, Napier, Western Cape***
>
> *10.15.1* *The Committee noted that the application was for exemption from enrolment in terms of s29 of the Act. The application was received on 08/03/2013.*

10.15.2 The Committee noted that the applicant was not the registered owner of the property in question and therefore did not meet the requirements of section 29 read together with section 10A of the Act. The Committee further noted that the NHBRC questionnaire submitted the application was not signed by the applicant.

Resolution

10.15.3 The Committee resolved to decline the granting of exemption as the property was not registered in the name of the applicant and therefore, the Committee was unable to verify that the applicant was the owner of the property as required by s29 of the Act.'

[35] Section 10A was inserted when the Act was amended in 2007 and concerns owner builders. It did not apply to the applicant, who was not an owner builder. On 24 April 2014 the applicant appealed the NHBRC's refusal to grant him an exemption from the registration and enrolment provisions, set out in s 10 and s 13 of the Act, to the Minister. In this appeal he stated that the granting of an exemption would be in the public interest, would not undermine the objects of the Act or the effectiveness of the NHBRC and that if it was not granted it would be '*extremely prejudicial*' to the applicant and housing consumers.

[36] On 4 March 2015 the Minister, acting in terms of s 22(5), dismissed the appeal against the NHBRC's refusal to grant the applicant's exemption application on the basis that the application had been –

> '*...correctly denied...on the reasons...given. Further, the requirements for an exemption do not appear to have been satisfied. In addition, no home builder as contemplated in the Act is denied his or her remuneration. In the case of Mr Eliot, his claim against Ms Moore can be pursued unless it has prescribed.*'

[37] While the Minister initially opposed the matter on the basis that the applicant had sought, by way of alternative relief, a declaration that s 10(1)(b) and s 13(7) of the Act were unconstitutional and invalid, the applicant did not

purse this attack on the constitutionality of the provisions following the decision of the Constitutional Court in *Cool Ideas*.[8] Instead, as against the Minister, the applicant persisted with his application that the decision of the Minister to dismiss the applicant's appeal against the refusal of the NHBRC to exempt him from the provisions of s 10 and s13 of the Act be reviewed and set aside. This review application was opposed by the Minister.

Discussion

Application to amend

[38] The applicant's original notice of motion was served and filed on 4 July 2012. On 16 July 2012 two additional prayers were introduced. The relief sought was further amended on 11 April 2014. The applicant then, on 27 October 2015, applied to further amend the relief sought by him, this time with opposition from the NHBRC on the basis of its lateness and that it was '*impermissible in law*'. At the hearing of the matter the NHBRC persisted with its opposition to the amendment sought.

[39] The Court's latitude under Rule 28 to grant amendments to a pleading or document,[9] even at the hearing of a matter,[10] is subject to the general rule that an amendment will be allowed where it permits a proper ventilation of the dispute and is not *mala fide* or causes prejudice or injustice which cannot be compensated by an order for costs and, where appropriate, a postponement.

[40] Over a period of five years, the applicant's case has expanded and contracted, with the relief sought by him steadily altered along the way to respond to various events as they have occurred. This has created a less than satisfactory situation in which the respondents have been required to respond to a moving target as the applicant's case has altered. However, various postponements agreed between the parties and granted by the Court

[8] *Cool Ideas* n 2.
[9] Herbstein & Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal* 5ed (2009) at 558 suggest that the term 'pleading' does not include documents including notices of motion and affidavits.
[10] *Whittaker v Roos and Another* 1911 TPD 1092 at 1102.

have provided the respondents with the appropriate opportunity to answer to the applicant's case and with the matter now before the Court, the view I take is that, with no *mala fides*, there is no prejudice to be suffered in granting the applicant's application to amend his notice of motion. This allows a proper ventilation of the matter, with all affidavits and extensive heads of argument filed.[11] The amendment as sought by the applicant is for these reasons allowed.

Declaratory relief: registration as home builder

[41] The applicant seeks, in the first instance, in this matter that this Court make a declaration to the effect that he was a registered home builder during 2007. The Act establishes the NHBRC to protect housing consumers against defects in new homes and to promote '*ethical and technical standards in the home building industry*'.[12] As was stated by the Constitutional Court in *Cool Ideas*,[13] the provisions of the statute '*lead one to the ineluctable conclusion that the statute envisions registration of a home builder before construction commences*'. S 10(1) states as much.

[42] It is not disputed that L'Agulhas was registered, with the applicant as one of its two partners, as a home builder for the period from 19 November 2004 until 19 November 2006, seven days prior to conclusion of the contract with Ms Moore. The NHBRC did not withdraw or cancel L'Agulhas' registration in terms of s 11(1)(c), read with regulation 12(6), and it did not notify the partners of L'Agulhas, in the manner contemplated in regulations 12(2) and (3) of their obligation to renew NHBRC membership one month before the expiry of such membership and then on a two further occasions before the end of the registration period.

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[11] See *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 638A-B; *Devonia Shipping Lt v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369F; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 9.
[12] Section 3 of the Act.
[13] *Cool Ideas* n 2 para 33.

[43] On 25 March 2011, the NHBRC accepted the applicant's back payment of registration fees for the years 2007 to 2011 and issued registration certificates to the applicant as a sole proprietor trading under the name of L'Agulhas and with the same registration number as had been issued previously to the partnership. Although the NHBRC contended that it was the entity L'Agulhas that was registered until 19 November 2006 and not the applicant, a partnership has no legal persona outside of its partners. It must therefore follow that the applicant, as a partner in L'Agulhas, was registered with the NHBRC trading under the name L'Agulhas from 2004 until 19 November 2006.

[44] The NHBRC, in these proceedings, relied on the fact that the partnership had been dissolved in 2005 to support its contention that the registration of L'Agulhas was no longer valid and could not be renewed. However, it is clear that this is not borne out by the NHBRC's own conduct. On 25 March 2011, it accepted retrospective payments from the applicant as a sole proprietor trading under the name and registration number of L'Agulhas and the NHBRC thereafter issued, of its own accord, backdated registration certificates to the applicant, in such capacity, for the years 2007 and following. In so doing, it is apparent that the NHBRC accepted that the applicant was entitled to remedy his registration lapse and take the necessary steps to regularise and backdate his registration status.

[45] The NHBRC's contention that the Act does not allow for retrospective registration, and that the applicant cannot therefore be registered with it, flies in the face of its own conduct and does not accord with the regulations made under the Act from which it is apparent that there is a recognition that registration lapses will occur, with the NHBRC required to send renewal reminders and permitted to suspend emoluments where these reminders have not been complied with in order to encourage compliance.[14] There is no expiry provision contained in the Act and neither the Act, nor the regulations made in terms of it, provide that a failure to renew membership means that

[14] Regulation 12(4).

registration cannot be restored or backdated. Furthermore, since regulation 12(6) provides that where there has been a failure to renew registration, the NHBRC may withdraw the registration of the home builder only after disciplinary proceedings have been instituted in terms of s 11, it is apparent that the statutory scheme contemplates that although a registration period has lapsed, it is only following disciplinary proceedings that registration may be suspended. From this it is apparent that there is an interregnum which operates between the end of a registration period and the suspension of registration, with the end of the registration period not, of its own accord, resulting in the suspension or expiry of registration.

[46] With no automatic expiry provision found in either the Act or its regulations, and no condonation mechanism to be complied with before the late payment of fees is accepted by the NHBRC and registration regularised, it is clear that there is no bar on late registration payments being made and accepted by the NHBRC. Consequently, the registration of a home builder may be retrospectively regularised by the NHBRC following receipt of backdated registration payment.

[47] Were the Act to be interpreted differently this would have the potential to cause unduly harsh and oppressive consequences, for example where registration was late by one day, nor would it reflect an appropriate regard for the purpose of the statute and the nature of and context within which the building industry operates. The fact that regulation 12(7) provides that the failure to renew registration does not affect the obligations of the home builder in respect of housing consumers of the NHBRC, supports such a conclusion since it clearly contemplates that renewal delays may occur during which time other obligations remain in place.

[48] For these reasons it follows that in issuing registration certificates to the applicant from 2007 as the sole proprietor under the name of L'Agulhas, the NHBRC registered the applicant as a home builder retrospectively for such period. No other interpretation can, in my mind, be given to the decision

made by the NHBRC in 2011 to issue the applicant with backdated registration certificates. In such circumstances, there is no reason as to why the applicant is not entitled to the declaratory relief that he seeks in the form of an order that he has been registered by the NHBRC as a home builder for 2007.

Review of decision to refuse enrolment and appeal decision

[49] It is important at the outset to re-state that, in respect of the enrolment relief sought, the application is for the review of the enrolment decision and is not an appeal. In seeking the review and setting aside of the decision of the NHBRC to refuse to late enrol the new home and garage, the applicant places reliance on *Jicama 17 (Pty) Ltd v West Coast District Municipality*,[15] contending that it is impermissible for the NHBRC to put up new reasons in opposing the review application and to rely on these reasons in the review application. The new reasons put up were that the applicant was not registered as a home builder; construction had been completed four years before; the consumer would be prejudiced in that she would not be able to enforce her rights in terms of s 17 in respect of leaks or structural defects; and reliance was placed by the applicant on one expert, the engineer, Mr Humbly.

[50] The applicant contends, however, that the substantial basis for the decision is the three-month rule and that the decision to refuse late enrolment on this basis must fall. This is so since it is impermissible for a public body, on which a discretion is conferred by statute, to treat a general principle laid down for its general guidance, as a hard and fast rule to be applied invariably in every case.[16] The applicant submits that the three-month rule is irrational, with the cut-off irrational in that engineers can certify the structural soundness of a building whether 2 days or 4 years after completion. Finally, the applicant states that given that the NHBRC has no general discretion to refuse late enrolment, enrolment may not be refused on the grounds of lateness when refusal may only be for non-compliance with the NHBRC's technical

[15] 2006 (1) SA 116 (C) para 7.
[16] *Foodcorp* n 1 para 10 with reference to *Computer Investors Group Inc.*

requirements, which did not occur in this matter; and when the sanction for late enrolment is confined to either disciplinary proceedings, the withdrawal of registration or payment of a late registration fee.

[51] Enrolment of a home with the NHBRC is obligatory, with s 14(1) providing that a home builder '*shall not commence the construction of a home*' prior to it having been enrolled and a certificate of proof of enrolment having been issued by the NHBRC; and where a home is not enrolled in terms of s 14(1), a home builder may not, in terms of s 13(7)(b), receive any consideration for the construction of the home. In *Cool Ideas*, in respect of a failure to register as a home builder under s 10(1)(b), it was stated that -

> '... *the law cannot countenance a situation where, on a case-by-case basis, equity and fairness considerations are invoked to circumvent and subvert the plain meaning of a statutory provision which is rationally connected to the legitimate purpose it seeks to achieve, as is the case here. To do so would be to undermine one of the essential fundamentals of the rule of law, namely the principle of legality.*'[17]

[52] At the applicant's instance, it was expressly recorded in the contract that he was not responsible for the enrolment of the home with the NHBRC and he did not indemnify Ms Moore for any failure to comply with the Act. While he claimed in his founding papers that he thought he could pass responsibility for enrolment to Ms Moore (or Mr Moore), this was strongly denied by her, and, on his own version, the applicant considered himself '*both justified and legally entitled to contract out of the provisions of the Act*'. It was only when it became apparent that he could not, as a result, receive outstanding payment for construction undertaken that the applicant sought to regularise his registration status and enrol the new home and garage already constructed with the NHBRC.

[53] There is no dispute in this matter that Ms Moore could not be deprived of protection which the legislature considered should, as a matter of policy, be

[17] *Cool Ideas* n 2 para 52.

afforded by law to her as a housing consumer.[18] In issue is whether the NHBC's refusal to enrol the new house and garage more than four years after construction had been completed falls to be set aside on review or not.

[54] It was only on 8 November 2011, four years after construction had been completed and the new house and garage occupied, that the applicant sought the late enrolment of the construction following the issue having been raised at arbitration. In response to his application he was informed by the NHBRC that it did not accept applications for enrolment when construction was completed and the home occupied; and then on 8 February 2012 by the NHBRC's legal advisor that the NHBRC would not enrol homes inhabited for longer than three months. No written reasons were provided for the refusal to late enrol the construction.

[55] S 33(2) of the Constitution entitles a person whose rights have been adversely affected by administrative action to be given written reasons. In giving content to this provision, s 5(2) of PAJA requires that '*adequate reasons*' for administrative action are to be given in writing; and if not it is, in terms of s 5(3), to '*be presumed in any proceedings for judicial review that the administrative action was taken without good reason*'. This is, however, made subject to the proviso in s 5(4) that there may be a departure '*from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances*', in which case the person making the request is to be informed of such departure forthwith.

[56] At their core, reasons are required to explain why action was taken.[19] In *Commissioner, South African Police Service, and Others v Maimela and Another*[20] it was stated that the adequacy of reasons depends '*on a variety of factors, such as the factual context of the administrative action, the nature and*

[18] See *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) para 10.
[19] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 40.
[20] 2003 (5) SA 480 (T) at 485J-486A.

complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action'. In *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*[21] relevant considerations were considered to include –

> '*[t]he purpose for which reasons are intended, the stage at which these reasons are given, and what further remedies are available to contest the administrative decision are also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for the adequacy of reasons must be an objective one.*'

[57] Following his application, the applicant was made aware that the NHBRC would not late enrol the home, in the first instance as it had been completed and thereafter that it had been occupied for more than three months. This, the applicant accepted, was the substantial basis for the decision. While the reasons given were not in writing, there was no confusion in the mind of the applicant that his enrolment application would not be granted given its lateness. He was expressly told as much. The additional reasons put up later by the NHBRC, which the applicant sought should be ignored, expanded on the reason why the lateness of the application had led to the NHBRC's refusal to late enrol the home. Having regard to the stage at which reasons were given, the purpose for which they were provided and the fact that the applicant exercised his further remedies thereafter in seeking the review of the administrative action, the view I take of the matter is that adequate reasons were provided to the applicant, sufficient for him to understand the basis on which the decision was made and to exercise his rights in relation to it. Consequently, the refusal to enrol does not fall to be reviewed and set aside on this basis.

[58] The applicant contends that the refusal to enrol the new house and garage is also reviewable on the basis that the NHBRC holds no general discretion to refuse late enrolment. In this regard, it was contended that the only basis on which the NHBRC can do so under s 14A is for non-compliance

[21] 2010 (4) SA 327 (CC) para 64.

with its technical requirements, which in respect of the new house and garage were never considered. Furthermore, the sanction for late enrolment provided in s 14A(3) is confined to disciplinary proceedings and the withdrawal of registration but not a refusal to register.

[59] The Act was amended on 16 November 2007[22] to insert s 14A, which became operative on 9 April 2008, by which time the new house and garage had been completed and occupied. S 14A permits a home builder to apply for the late enrolment of a home '*after construction has started*', which application may be granted where the NHBRC is satisfied that the construction undertaken has been in accordance with its technical requirements, with the NHBRC required to take '*prudent measures*' to '*manage the risks of the fund*'.

[60] There is a strong presumption in our law that new legislation is not intended to be retroactive, as well as a presumption against reading legislation as being retrospective. The general rule is that '*a statute is as far as possible to be construed as operating only on facts which come into existence after its passing*'.[23] Since the statute is silent on retrospectivity and the new provision is not simply a procedural one,[24] s 14A cannot be interpreted to operate retrospectively so as to cover applications for the late enrolment of a home where the construction was completed prior to the coming into operation of the amendment. It follows for these reasons that s 14A does not apply in respect of the current matter.

[61] However, late enrolments are permissible under NHBRC Rule 14, which existed prior to the amendment of the Act and remains in force. In terms of the Rule a home builder may submit an application for the enrolment of a home to the Council '*after construction has started*', with the NHBRC required to satisfy itself that the construction was undertaken in accordance with its technical requirements '*so as to take prudent measures, contemplated*

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[22] In terms of the Housing Consumers Protection Measures Amendment Act 17 of 2007.
[23] *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 65.
[24] See *S v Mhlungu (supra)* para 66 where reference is made to *Curtis v Johannesburg Municipality* 1906 TS 308 at 312.

in section 16(1) of the Act, to manage the risks pertaining to the fund'. The Rule provides for the payment of a late enrolment fee so as to fund a special inspection of the construction to determine compliance with the NHBRC technical requirements and with additional costs under Rule 14(6) to be borne by the home builder.

[62] A rationality review, which by its nature prescribes the lowest possible threshold for the validity of executive decisions,[25] is concerned with whether the means employed are rationally related to the purpose for which the power was conferred or the objective sought to be achieved, [26] whereas a review based on reasonableness is concerned with the decision itself, as stated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (Bato Star)*,[27] namely whether it is one that a reasonable decision-maker could not reach.

[63] The purpose of the Act is to regulate the industry and provide appropriate protections to housing consumers which is achieved through a system of registration and enrolment. While Rule 14 permits late enrolment '*after construction has started*', it provides no cut off after which enrolment will not be accepted. Although the applicant takes issue with the three-month rule imposed by the NHBRC, it is material that in this matter the applicant had initially elected not to enrol the new house and garage and that the late enrolment application was made not three months after the start of construction but more than four years after its completion. The requirement of mandatory enrolment prior to construction commencing in the Act, read together with Rule 14 which permits late enrolment '*after construction has started*', supports an interpretation that any delay in enrolment is to fall within the bounds of reasonableness. Were it to be so that enrolment could take place at any time after construction was completed, whether three months or ten years, provided that the NHBRC's technical requirements had been

[25] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 90.
[26] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) paras 29, 32 & 42.
[27] 2004 (4) SA 490 (CC) paras 44-45.

complied with so as to allow it to take prudent risk-management measures, this would not accord with the purpose or objects of the statute in protecting housing consumers.

[64] In refusing to late enrol the new house and garage after an extended delay, I am accordingly satisfied that the NHBRC acted in a manner which was rationally related to the purpose for which the power was conferred on it and the objective which the Act sought to be achieved.[28] The decision was not irrational, nor was it one that a reasonable decision-maker could not reach on the material before him or her.[29] There is no indication that the three-month period was treated as a hard and fast rule to be applied invariably, since the enrolment application in this matter fell far outside any three month bar.

[65] This was not a matter in which a proper decision was not taken or that the decision was contaminated by the incorrect interpretation of the provisions of the Act and factual misinformation.[30] The NHBRC was entitled to have regard to whether there was a case made out on the facts of the matter which warranted such late enrolment. Since enrolment provides housing consumers with protection under the Act and the benefit of recourse from the NHBRC, it was neither irrational nor unreasonable to determine that permitting enrolment '*after construction has started*' did not extend to permitting enrolment more than four years after construction has been completed. This is so since after the start of construction, cannot reasonably be interpreted to mean an extended period, such as four years, after a home has been completed and occupied, more so when the Act provides protections against defects in the construction over lesser periods. Were late enrolment to be permissible at any later stage, including years or even decades after the construction had been finalised, this would not only fail to accord with the express requirement of the

[28] *Democratic Alliance* n 26 paras 29, 32, 42.
[29] *Bato Star* n 27.
[30] *Security Industry Alliance v Private Security Industry Regulatory Authority and Others* 2015 (1) SA 169 (SCA) para 30.

Act that enrolment pre-date construction but would also undermine the intent and purpose of the legislation.

[66] The fact that the NHBRC did not satisfy itself that the construction had been undertaken in accordance with its technical requirements in order to take prudent risk-management measures is of no moment given the extended delay in enrolment. This is so in that even had the construction met technical requirements, the delay was of such a nature that to allow enrolment would not accord with the purpose of the Act. Furthermore, while equity considerations, considered by the Constitutional Court in *Cool Ideas,* were raised by the applicant, this is neither a constitutional challenge nor an appeal. As was stated in *Cool Ideas*, the effect of a refusal to enrol is that the applicant is not entitled under the Act to receive consideration for the work done by him, while it remains open to Ms Moore to sue in terms of the contract. The applicant has open to him other recourse, such as an unfair enrichment action, and whether such action may have prescribed is not an issue for consideration at this time by this Court.

[67] In the circumstances, I am satisfied that the decision of the NHBRC to refuse the late enrolment of the new house and garage more than four years after the completion of construction was neither irrational, unreasonable nor procedurally unfair. There existed sufficient connection between the means chosen and the objective sought to be achieved in the decision arrived at by the decision-maker as to meet the requirement of rationality. Furthermore, the decision fell within the bounds of reasonableness required, insofar as it was not a decision which a reasonable decision-maker could not reach on the material before him or her. It follows for these reasons that the application for the review of the enrolment decision must fail.

Alternative relief: review of exemption decision

[68] In the alternative, the applicant seeks the review and setting aside of the decision of the committee of the NHBRC taken on 18 July 2013 and the decision on appeal taken by the Minister in terms of s 22(5), communicated to

the applicant on 4 March 2015, as a result of which the applicant's application in terms of s 29 to be exempted from registration as a home builder and enrolment of the new house and garage was refused. The applicant also seeks an order in terms of s 9 of PAJA extending the period of 180 days within which to have brought the application to review the decision of the Minister on appeal.

[69] The grounds on which the applicant seeks the review of the exemption decision, and the appeal upholding it, includes that the NHBRC committee was materially influenced by an error of law; took irrelevant factors into account and ignored relevant considerations; that the decision was not rationally connected with the purpose of the empowering provision; that it was not rationally connected to the information before the administrator, which failed to take a decision; and/or that the exercise of the power authorised by the empowering provision, in pursuance of which the decision was made, is so unreasonable that no reasonable person could have so exercised the power.

[70] In opposing the application, both the NHBRC and the Minister contend that the decisions taken do not fall to be reviewed and that no reviewable irregularity has been demonstrated when the legislature did not intend that a home builder be exempted from the Act when its purpose is to regulate the industry and protect the interests of the consumer. It is submitted that the objects of the Act would be defeated, if the exemption was granted, and risks to consumers would increase, as would the financial burden on the regulatory regime. In addition, systemic risk would arise, which would place legitimate claims in jeopardy were exemption applications of this nature sought to be granted. The NHBRC and the Minister consequently submit that since the criteria set out in s 29 were not met, there was no reason to grant the applicant an exemption from the provisions of s 10 and s 13 having regard to the history of the matter, from which it was apparent that the applicant's predicament was of his own making; and even if s 10A was erroneously referred to, it does not follow that the applicant is entitled to the relief sought.

[71] Although the applicant was informed of the Minister's decision on 4 March 2015, his notice of amendment dated 26 October 2015 in which he sought the review of the appeal decision, was filed more than six weeks after the decision was communicated to him. In this delay he failed to comply with s 7(1) of PAJA which requires that review proceedings in s 6(1) be instituted '*without unreasonable delay and not later than 180 days*' after the conclusion of internal remedies, or where no such remedies exist, he became aware of the action taken. S 9 contemplates an extension of the 180-day period by agreement between the parties or the court '*where the interests of justice so require*'.

[72] The applicant sought the extension of the 180-day period on the basis that the delay of 39 court days was minimal and would cause no prejudice. The Minister, with reference to *Aurecon South Africa (Pty) Ltd v Cape Town City,*[31] opposed such extension contending that a proper case had not been made out by the applicant justifying the delay, and therefore the relief sought, since a case for extension was not made in the affidavit filed, had preceded the amendment relief. It is contended further that with no explanation for the delay or why an extension of time would be in the interests of justice, the applicant's reliance on prejudice as the sole basis on which to grant the extension was not dispositive of the interests of justice enquiry.

[73] Whether it is in the interests of justice to condone a delay depends on the facts and circumstances of a case, with the factors relevant to the enquiry generally including the nature of the relief sought, the extent and reason for the delay, its effect on the administration of justice and other litigants, the importance of the issue raised and the prospects of success.[32] As was emphasised in *Merafong City Local Municipality v AngloGold Ashanti Limited,*[33] -

[31] 2016 (2) SA 199 (SCA) para 17.
[32] *Ibid.*
[33] 2017 (2) SA 211 (CC) para 73.

> *'(t)he rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'*

[74] As was stated in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal,*[34] courts should be slow to allow procedural obstacles to prevent it from considering a challenge to the lawfulness of an exercise of public power. This is, in my mind, such a matter. Having regard to the extent of the delay, issues of prejudice and the merits of the matter, I can find no reason as to why the interests of justice do not justify the extension of the 180 day period under PAJA should not be granted in this matter.[35] The period of delay is limited, there is very limited prejudice caused by it and the application is one which, it appears to me, warrants the consideration of this Court. It is apparent that the applicant was intent on pursuing the remedies available him, even if no clear explanation was put up on affidavit as to why the delay arose. Consequently, the application to extend the 180-day period within which to pursue the review in this matter is granted.

[75] In considering the application to review the NHBRC's refusal to grant an exemption to the applicant and the Minister's subsequent dismissal of the appeal, the starting point is s 29, which is formulated in general terms. The provision permits the exemption of "*a person or a home*" from the provisions of the Act if the NHBRC is satisfied that this would be in the public interest, would not undermine the objectives of the Act or its effectiveness, and, if not granted, would be "*extremely prejudicial to the interests of the applicant and housing consumers*".

[76] The applicant sought to be exempted from the provisions of s 10 and s 13 on the basis that: the actual building work had been undertaken by Mr

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[34] 2014 (5) SA 579 (CC) para 45.
[35] See in this regard *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC) paras 48-53; see too *Aurecon* n 31 para 17.

Lakey, who was a registered home builder; the firm L'Agulhas had been registered as a partnership and late registration fees had been paid to the NHBRC in respect of L'Agulhas, which had its status amended to a sole proprietorship; Ms Moore repudiated the contract on 3 August 2007 and owed the applicant in excess of R200 000,00; the late enrolment of the home was sought but was apparently too late; an engineer, Mr Humbly, had approved the construction work carried out in terms of the contract; Ms Moore would suffer no prejudice as the building was constructed soundly, as is apparent from Mr Humbly's report; and that exemption was sought for the contract only and did not therefore undermine the objectives of the Act. Although this Court has determined that the applicant has been registered as a home builder for the year 2007, the review against the exemption application is nevertheless considered given that, regardless of any declaratory relief granted, the applicant seeks to be exempted from the provisions of the Act.

[77] The applicant contends that the decision of the NHBRC to refuse the exemption application is reviewable on the basis that it was materially influence by an error of law insofar as the committee relied on s 10A which pertained to owner builders. However, for an administrative action to be set aside merely due to an error in law, the decision must have been materially influenced by that error of law making it susceptible to review.[36] As much was stated in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*:[37]

> *'... a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2)(d)... permits administrative action to be reviewed and set aside only where it is "materially influenced by an error of law". An error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision, despite the error of law.'* [38]

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[36] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) para 91.
[37] *Ibid.*
[38] See too *Liberty Life Association of Africa Ltd v Kachelhoffer and Others* [2004] 10 BLLR 1043 (C).

[78] The applicant submits that the reason advanced by the NHBRC committee for the exemption application being declined was based on an erroneous consideration that the applicant was an owner builder, that no other factors were taken into account and that had it not been for this error of law the application would have been granted.

[79] Quite clearly the reliance by the NHBRC committee on s 10A was erroneous, since what served before the committee, and then the Minister on appeal, was an exemption application by a home builder and not an owner builder. However, from the record of the information considered by the Minister on appeal it is apparent that the facts of the matter, the Act and whether its objectives or effectiveness would be undermined, the public interest and the issues of prejudice set out in s 29, were considered by the Minister on appeal. This led the Minister to find that the requirements for exemption had not been satisfied and that '*no home builder as contemplated in the Act is denied his or her remuneration. In the case of Mr Eliot, his claim against Ms Moore can be pursued unless it has prescribed.*'

[80] The applicant submits further that the decision made was not rationally connected to the purpose of the empowering provision or the information before the committee as envisaged by s 6(2)(f)(ii)(bb) and (cc) of PAJA, in that an engineer had confirmed that the construction was free of defects and the applicant was not the owner of the property. To the extent that he was not granted the exemption, the applicant contends that there was a failure to take a decision, with none of the factors put before the committee considered by it. As a result, the decision of the NHBRC and the Minister amounted to a failure to apply their minds to the application which constituted in the circumstances, the applicant contends, a failure to take a decision.

[81] In a review on grounds of rationality, the test is objective and there should be a sufficient connection between the means chosen and the objective sought to be achieved. This requires that the process is rationally related to the achievement of the purpose and it is not open to this Court to

interfere with a decision simply because it disagrees with it.[39] A less onerous standard than reasonableness imposes[40] and it being immaterial whether the functionary acted in the belief, in good faith, that the action was rational.[41] It is not open to the Court to prescribe the weight to be attached to each consideration in circumstances in which it is for the decision-maker to take relevant considerations into account.[42] This is so since rationality concerns testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved.[43] In a reasonableness review, *Bato Star*[44] made it clear that a decision will be reviewable if it is one that a reasonable decision-maker could not reach.

[82] Having regard to the purpose and objects of the Act and the absence of exceptional circumstances,[45] the decision to refuse the exemption and the decision to dismiss the appeal thereafter were decisions which were not only rationally connected to the purpose of the empowering provision but also fell within the ambit of reasonableness required. This is so in that on the facts of the matter and on the material before the decision-maker, I am unable to find that the decision of the committee, or the decision of the Minister, to the effect that the applicant had failed to show exceptional circumstances to justify the grant of the exemption application on appeal, was either irrational or unreasonable. The applicant's reliance on a report that the construction was solid and free of defects, did not explain why the applicant should be exempted from the Act when its seeks to protect consumers and regulate the industry. The fact that Mr Lakey was registered as a home builder did not alter

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[39] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) para 69; *Pharmaceutical Manufacturers* n 25 para 90; *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) para 51.
[40] *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SA 265 (CC) para 46; *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) para 67; *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC).
[41] *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) paras 20-21.
[42] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) paras 20-22.
[43] *Motau* n 39 para 69.
[44] *Bato Star* n 27 para 44.
[45] See *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another* 2002 (6) SA 150 (C) at 154H-I.

this fact given that the contract had expressly stated that the construction undertaken by the applicant would not be enrolled with the NHBRC. In such circumstances, the failure to grant the exemption could not be extremely prejudicial to the interests of the applicant when it was the applicant who had from the outset elected to exclude the mandatory provisions of the Act. The recognition that this was a predicament of his own making cannot be faulted. While the committee erroneously cited s 10A as the reason for refusal of the application, the applicant had placed before it material which set out the basis of the application. That information consequently served before the committee. Furthermore, on appeal it is apparent that a full record was placed before the Minister and from that record it is apparent that appropriate regard was had to the requirements of s 29, even if the reference made by the committee to s 10A was not corrected. The fact remained that from the record it is clear that the applicant was recognised not as an owner builder, but as a home builder. For these reasons, I am satisfied that it has been shown that the Minister took into account the relevant information before her in arriving at a decision which was based on all such material; and that the decision was neither irrational nor unreasonable.

[83] For these reasons, the review application in respect of both decisions must fail.

Declaration that contract void

[84] The applicant sought, in the further alternative, an order that the contract entered into between L'Agulhas and Ms Moore on 26 November 2006 be declared void for illegality to the extent that it concerned homes subject to the Act. Relying on *Cool Ideas*[46] the applicant contends that the Constitutional Court, by a majority of 6-5, held that it would be unfair to bar one party to a contract from claiming payment while allowing the other party to hold such party to performance. Ms Moore opposes the relief sought contending that the application had been brought to frustrate her from receiving payment to which she was entitled when there was no basis on

[46] *Cool Ideas* n 2 para 129.

which to declare the contract void for illegality. Furthermore, she submits that by virtue of s 13(6), any provision in an agreement that excludes or waives any provision of s 13 is null and void, with it the provision and not the entire contract that declared as such. Since the validity of the underlying building contract was confirmed in *Cool Ideas*, there is no reason as to why the contract in this matter should be declared null and void.

[85] Since the contract as a whole is not in conflict with the provisions of the Act, and since it is still possible to execute the main aim of the agreement, I can find no basis on which to grant the further alternative relief sought and to find the contract void for illegality.[47] More so, when as was noted by the Minister, the applicant is entitled to pursue his claim against Ms Moore unless it has prescribed.

Costs

[86] In *The Trustees of the Time Being of The Biowatch Trust v The Registrar, Genetic Resources (Amicus Curiae: The Open Democracy Advice Centre)*[48] it was stated that –

> *'... the judicial officer may not, as he or she pleases, deprive a successful party of its costs. He or she must do so for reasons which he or she must set out or state. It similarly follows that, although ordinarily a successful party will be awarded its costs, it does not follow that that will always be the case.'*

[87] The Court in that matter cautioned as to the '*chilling effect*' of a cost order where parties seek to assert their constitutional rights, even unsuccessfully. [49] More recently, in *Ferguson and Others v Rhodes University* [50] and *Hotz and Others v University of Cape Town*, [51] the Constitutional Court took account of the fact that the respondent was a public

[47] *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A); *S v Galgut's Garage (Pty) Ltd and Another* 1969 (2) SA 459 (A).
[48] 2008 JDR 0442 (T) para 31.
[49] *Ibid* paras 58-59.
[50] (CCT187/17) [2017] ZACC 39 (7 November 2017).
[51] 2017 (7) BCLR 815 (CC) para 22.

institution, to find that the general, although not inflexible, rule remains that in constitutional litigation an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs.

[88] While the applicant initially attacked the constitutionality of s 10(1)(b) and s 13(7) of the Act, following the decision of the Constitutional Court in *Cool Ideas*[52] he no longer pursued such challenge. Although the Minister seeks costs in respect of the constitutional challenge, I am not persuaded that a costs order against the applicant, insofar as opposition to that challenge is concerned, would be in the interests of justice given the nature of the relief sought.

[89] Having regard to the issue of costs in respect of the remainder of the application, the case which the respondents have been called upon by the applicant to meet has evolved over the course of some five years. Having been unsuccessful in this application, I can find no reason as to why the ordinary rule on costs should not apply with the result that the respondents, as successful litigants, should be entitled to their costs.

Order

[90] For these reasons the following order is made:

1. The applicant's amendment application is granted.
2. It is declared that the applicant, Mr W G G Eliot, was a registered home builder during 2007.
3. The application to review and set aside the third respondent's failure to enrol the new dwelling and garage on, erf 1416, consolidated from erf 910, Napier, owned by the second respondent, Ms Dorinda Moore, is dismissed.
4. The application to review and set aside the decision of a committee of the third respondent, the National Home Builders

[52] *Op cit.*

Registration Council, taken on 18 July 2013, and communicated to the applicant on 4 April 2014, is dismissed.

5. The period of 180 days, within which the applicant was required to have brought the application to review the decision of the fourth respondent, the Minister of Human Settlements, is extended.

6. The application to review and set aside the decision of the fourth respondent on appeal, communicated to the applicant's attorneys on 4 March 2015, is dismissed.

7. The application to declare the contract entered into by the applicant and the second respondent on 26 November 2006 void for illegality, is dismissed.

8. The applicant is to pay the respondents' costs, save for those costs pertaining to the respondents' opposition to the applicant's challenge to the constitutionality of s 10 and s 13 of the Housing Consumers Protection Measures Act 95 of 1998.

K M SAVAGE
Judge of the High Court

Appearances:

Applicant:	H J de Waal
	Instructed by Bowman Gilfillan
Second Respondent:	F S G Sievers
	Instructed by Botha Attorneys
Third Respondent:	M Salie SC
	Instructed by Robert Charles Attorneys
Fourth Respondent:	K Pillay