

**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)**

Case No.: 28811/2007

In the matter between:

LEAS: MAURICE t/a BUILD4YOU

Plaintiff

and

VAN KERCKHOVEN: ROELAND HH
VAN KERCKHOVEN: TINA

First Defendant
Second Defendant

JUDGMENT

C.J. CLAASSEN J

[1] This is an exception taken by the defendant to the plaintiff's particulars of claim. The plaintiff as a building contractor instituted an action against the first and second defendants for damages in an amount of R904 469-94. The cause of action is alleged to have arisen from an oral agreement concluded between the parties during July 2006 in terms whereof the plaintiff undertook to construct a second storey onto the defendant's dwelling in accordance with certain plans and specifications and for the supply of the material in connection

therewith. Subsequent thereto and during July to November 2006 the parties concluded further oral agreements in terms whereof the plaintiff was to execute certain extra work in addition to the principal work of constructing the second storey to the defendant's dwelling.

[2] The plaintiff commenced the principal and additional work and defendants affected payment to the plaintiff in respect thereof in amounts totalling R935 000-00. However on 5 December 2006 the defendants wrongfully repudiated the agreements which repudiation was accepted by the plaintiff. The plaintiff cancelled the agreements during December 2006/January 2007 and claimed the damages aforesaid.

THE EXCEPTION

[3] Relying on the provisions of the Housing Consumers Protection Measures Act 95 of 1998 ("the Act"), the defendants excepted to the plaintiff's particulars of claim on the basis that it disclosed no cause of action. on the following basis.

1. In terms of the Act the plaintiff is a "home builder" and the defendants "housing consumers" as defined therein.
2. The dwelling house is a "home" as defined in the Act.

3. The plaintiff does not plead that it is a registered home builder pursuant to the provisions of the Act.
4. In terms of section 10 of the Act the plaintiff is not entitled to carry on the business of a home builder or receive any consideration in terms of any agreement with the defendants in respect of the construction of a home unless it is a registered home builder.
5. The construction of a second storey onto the dwelling as pleaded by the plaintiff amounts to the business of a home builder in that:
 - 5.1. The dwelling erected at the defendant's residential address constitutes a "home" as defined in the terms of the Act;
and
 - 5.2 The construction of a second storey onto the dwelling amounts to "the construction of a home" as envisaged in terms of the Act.
6. The oral agreements relied upon by the plaintiff are agreements "with the housing consumer in respect of the construction of a

home” as envisaged in the Act.

7. The plaintiffs claim against the defendants, being payment of damages suffered by the plaintiff consequent upon the repudiation of the oral agreements by the defendants:

- 7.1 Is “in respect of carrying on the business of a home builder” as envisaged in terms of the Act; and

- 7.2 Amounts to a claim for “consideration in terms of an agreement with a housing consumer in respect of the construction of a home” as envisaged in terms of the Act.

8. In the premises it is alleged that the plaintiffs particulars of claim do not disclose a cause of action against the defendant.

THE ACT

- [4] It is necessary to refer to the relevant provisions of the Act in order to evaluate the validity or otherwise of the exception. Section 1 of the Act contains the following definitions:

“Business of a home builder means –

- (a) to construct or to undertake to construct a home or to cause a home to be constructed for any person;
- (b) to construct a home for purposes of sale or otherwise disposing of such home;
- (c) to sell or to otherwise dispose of a home contemplated in paragraph (a) or (b) as a principal or
- (d) to conduct any other activity that may be prescribed by the Minister for the purposes of this definition,

But does not include –

- (i) The *bona fide* building of a home by any person for occupation by that person;
- (ii) The *bona fide* assistance to a person contemplated in paragraph (i) by a person who is not a registered home builder, in the building of a home; or
- (iii) The sale or disposal by a housing consumer of his or her *bona fide* home;

Home means any dwelling unit constructed or to be constructed by a home builder, after the commencement of this Act for residential purposes or partially for residential purposes, including any structure prescribed by the Minister for the purposes of this definition or for the purposes of any specific provision of this Act, but does not include any category of dwelling unit prescribed by the Minister;

Home builder means a person who carries on the business of a home builder;

Housing consumer means a person who is in the process of acquiring or has acquired a home and includes such persons’ successor in title;

Registered home builder means a home builder registered with the Council in terms of this Act.”

[5] The preamble to the Act provides that the purpose of the Act is “to make provision for the protection of housing consumers; and to provide for the establishment and functions of the National Home Builders Registration

Council....” Pursuant to this purpose such a council is established in terms of section 2 of the Act. In section 3 of the Act the objects of the council are set out *inter alia* as follows:

- “3, The objects of the Council shall be –
- (a) to represent the interests of housing consumers by providing warranty protection against defects in **new homes**;
 -
 - (j) in particular, to achieve the stated objects of this section in the **subsidy housing sector.**” (My emphasis)

[6] The powers of the Council are set out in section 5. *Inter alia*, it is given the following powers in terms of section 5(4):

- “(4) Council shall –
-
- (d) Establish, maintain and administer a fund contemplated in section 15(4) to provide assistance to housing consumers under circumstances where home builders fail to meet their obligations in terms of section 13(2)(b)(i);
 - (e) Assist in the resolution of disputes between registered home builders and housing consumers;
 -
 - (j) Investigate, at the request of the Minister, the integration of the register of home builders into a possible register of builders and make recommendations to the Minister;
 -
- (5) The Council may –

- (c) Establish, maintain and administer different funds for different purposes contemplated in section 15(5)”

[7] The regulating measures afforded by the Act to the Council are set out in section 7. It provides for the publication in the gazette by the Council of certain rules in regard to the conduct of registered home builders, the procedures for their registration, the enrolment fees to be paid etc. In particular it also provides for rules in regard to the following:

“7(1) The Council may, by publication in the gazette –

- (a) make Rules –

.....

- (v) prescribing procedures for the consideration of application for assistance by housing consumers from its funds or a fund;
- (vi) prescribing the procedures for resolution of disputes by conciliation or arbitration and providing for the payment and refunding of the deposits or fees for such conciliation or arbitration;
- (vii) prescribing procedure to be complied with by housing consumers, relating to the lodgement of complaints with the Council;
- (viii) recommending terms to be included in or excluded from agreements between home builders and housing consumers in respect of the construction or sale of homes.....”

[8] Section 7 also prescribes the powers of the Minister in relation to certain matters *inter alia*:

“7(2) The Minister shall prescribe –

.....

- (c) 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;
- (d) Requirements applying to a home builder for the design and construction of **prescribed homes** in respect of structural strength and stability, serviceability, materials, behaviour in fire, drainage and storm water management; and
- (e) The minimum and maximum amounts which may be expended under section 17(1) in respect of any home pursuant to the failure of a home builder to meet his or her obligations in terms of section 13(2)(b)(i).”

[9] Chapter II of the Act provides for the registration of home builders and the publication of a “Home Building Manual” containing certain technical requirements and guidelines with which registered home builders are to comply. Of relevance to the present case is section 10(1) which provides as follows:

“10(1) No person shall –

- (a) carry on the business of a home builder; or
 - (b) receive any consideration in terms of any agreement with the housing consumer in respect of the sale or construction of a home,
- unless that person is a registered home builder.”

[10] Chapter III of the Act deals with the conclusion of agreements and implied terms and the enrolment of a particular home or category of home as prescribed with the minister for the purposes of the Act.

[11] Chapter IV deals with the establishment of the various funds which will be utilised for the payment of claims instituted by housing consumers for refunds or other remedies in the event of a home builder breaching any of its duties to housing consumers in terms of the Act. The Act envisages in section 22 that housing consumers would lodge complaints against home builders with the Council, who will the adjudicate such complaints, “without prejudice to the Constitutional right of any person to gain access to a court of law...”. In the event of such dispute being dealt with by the Council, a housing consumer or a home builder may refer any such decision or action by the Council to the Public Protector for review or any decision of the Council to arbitration.

Finally section 21 creates certain criminal offences in the following terms:

“21(1) Any person who –

- (a) knowingly withholds information required in terms of this Act or furnishes information that he or she knows to be false or misleading; or
- (b) contravenes a provision of section 10(1) or (2), 13(7),
and every director, trustee, managing member or officer of a home builder who knowingly permits such contravention, shall be guilty of an offence and liable on conviction to a fine not exceeding R25 000-00, or to imprisonment for a period not exceeding 1 year, on each charge.”

INTERPRETATION OF THE ACT

[12] It seems trite that the Act was promulgated as a result of numerous

complaints against building companies ranging from corruption to unprofessional conduct, especially in the construction of large scale housing projects for sub-economic housing schemes.¹ The Act came into force on 4 June 1999.

[13] On a conspectus of the provisions referred to above, it is clear that the Act purports to regulate the building industry in such a way that protection is afforded to housing consumers who are in the process of acquiring or have acquired a home.² The definition of a “housing consumer” would appear to be referring to homes built for first-time purchasers and/or their successors in title. It is the original home builder of that particular home which attracts liability to the first-time purchaser and/or successors in title of that particular home. This interpretation is supported by the fact that section 3(a) objectifies the duties of the Council to “new homes” only. From this provision it seems plain that the liabilities of home builders are restricted to the construction of a new home only. Subsequent additions to or renovation of the original new home by a different building contractor is excluded from the provisions of the Act. This, in my view, is also confirmed by the definition of the “business” of a home builder which refers to the construction of a home and not to the renovation of or addition to a home. If the Legislator intended the ambit of the Act to be extended to subsequent additions to or renovations of already constructed

1 See annual survey of South African Law 1998 page 287.

2 See definition of “housing consumer” in section 1 of the Act.

homes, it could easily have included the words “addition to” or “renovation of” to the definitions of the business of a home builder, “home” and “housing consumer”.

[14] Although the reference of any dispute arising out of the construction of a home to the civil courts are not excluded³. It would seem that the scheme of the Act is an attempt to protect housing consumers from having to seek redress against deficient building construction of their homes via expensive court procedures by allowing them to refer such disputes to the Council for resolution. Considering the extensive provisions for the establishment of funds and dispute resolution provisions by the Council for the payment and resolution of claims by housing consumers, it follows that the Act is aimed at protecting the large amount of relative indigent home purchasers rather than existing home owners who are able due to affluence to extend or renovate their existing homes. The extensive provisions dealing with subsidy driven housing confirms, in my view, this interpretation. Subsidies are generally intended for the acquisition by indigent members of the public to obtain adequate housing in line with the State’s duties set out in section 26 of the Constitution of the Republic of South Africa 1996 which provides as follows:

“26(1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures, within

³ See section 7(4)(c) and section 22(1) of the Act.

its available resources, to achieve the progressive realization of this right.”

It seems inconceivable that the State would regard it as “within its available resources” to protect housing consumers who are able to afford extensions, additions or renovations of existing homes already owned by them.

THE LAW

[14] Counsel for the excipient relied on **I S and G M Construction CC vs Tunmer** 2003 5 218 (WLD). In that case the defendant similarly took exception to the plaintiff’s particulars of claim for failure to allege that it was a registered home builder. The exception was upheld by Goldblatt J on the basis that section 10(1) required a home builder plaintiff to allege and prove that it is in fact a registered home builder in terms of the provisions of the Act before being entitled to claim remuneration due and owing in terms of a building contract for the erection of a dwelling house. The facts of that case are, however, distinguishable on the basis that the plaintiff in that case relied on a written building agreement to erect a dwelling house i.e. a new home. In the present instance the plaintiff relies on a building contract for the erection of a second storey to an existing home.

[15] An exception to a pleading is only upheld if upon any reasonable reading of the pleading, no cause of action is disclosed. In the present case I

am of the view that the particulars of claim can be read as disclosing a cause of action based upon oral agreements for the construction of an addition to or renovation of an existing home. If so read, the provisions of the Act are not applicable, as I have held above that the Act applies to liabilities imposed upon home builders of new homes and not to the construction of subsequent to or renovations of homes by subsequent builders.

[16] Counsel for the excipient argued that the contention that the construction of merely a second storey to a dwelling does not amount to the construction of a home as envisaged by the Act, nullifies the intention of the Legislator or i.e. the protection of housing consumers by ensuring that persons should construct homes have appropriate financial technical construction and management capacity for the specific business carried on by a home builder in order to prevent housing consumers and the Council from being exposed to unacceptable risks.⁴ It was further contended that the effect of such a contention would be that if the construction of a dwelling is effected in stages by different builders none of these builders would be required to be registered home builders, whereas if one builder constructed the entire dwelling from start to finish this builder would have to be a registered home builder.

[17] In my view the aforesaid argument holds no water for the following reasons:

⁴ See section 10(3)(c) of the Act.

1. If the home contemplated in the argument of counsel is a new home, then the provisions of the Act will apply to each and every builder involved in the various stages of completing the home. The Act does not differentiate between a situation where a new home is built by one or many home builders. In my view, if a home is built in stages and it is a new home, then all the builders participating in each stage of its construction, will be subject to the provisions of the Act.
2. The argument by counsel does not distinguish between the construction of a new home and the construction of subsequent additions to or renovations of an already existing home by a subsequent home builder. For the reasons set out above, I am of the view that the provisions of the Act were never intended to regulate the subsequent addition to or renovation of a completed home by any subsequent home builder.

[18] For the reasons set out above I am therefore of the view that the exception was not well taken and that it should be dismissed. I therefore make the following order:

The exception is dismissed with costs.

**THUS DATED AND SIGNED AT JOHANNESBURG ON THIS04th..
DAY OF JUNE 2008**

C.J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the excipient/defendants: Adv. L. Hollander

Attorneys for the exceptient/defendants: Routledge Modise

Counsel for the plaintiff: Adv. H.B. Marais

Attorneys for the plaintiff: De Jager - Du Plessis

The matter was argued on 18 March 2008

Exception taken to a particulars of claim by a building contractor for payment under oral building agreements for failure to state that the builder was registered under the provisions of the Housing Consumers Protection Measures Act No. 95 of 1998. The Case of **I S and G M Construction CC v Tunmer** 2003 5 SA 218 (WLD) distinguished on the facts. Held that the provisions of the Act apply only to new homes and not to the addition to and/or renovation of existing homes by a subsequent building contractor who was not involved in the building of the original home. Exception dismissed with costs.

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