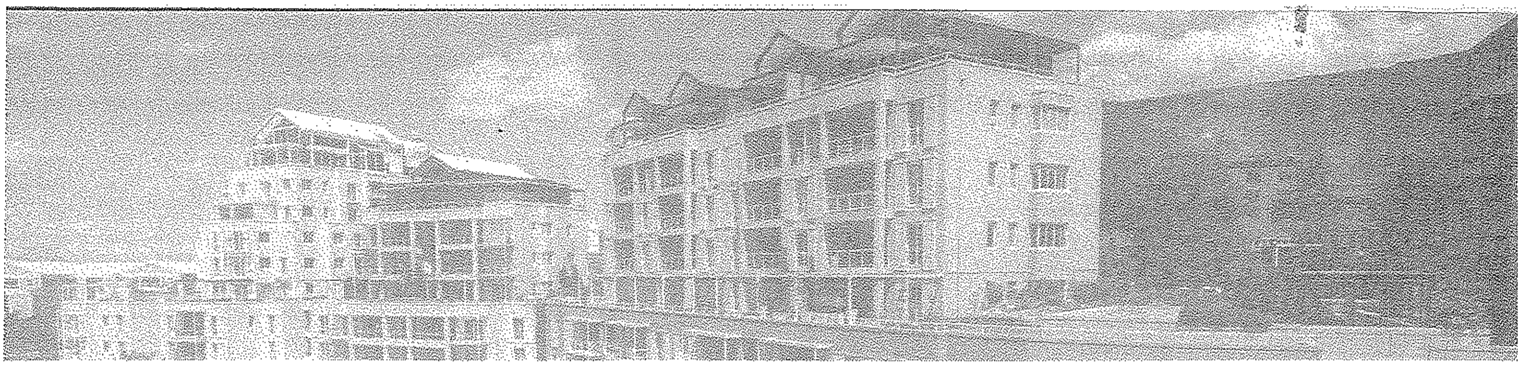

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NHBRC REGISTRATION: NOT ONLY A "NICE TO HAVE"

Developers and builders are generally aware of their obligations to both register and enrol an intended building project with the National Home Builders Registration Council ("NHBRC") created in terms of the Housing Consumers Protection Measures Act 95 of 1998 ("the Act"). The obligation to register and enrol is part of the Act's regulatory system aimed at protecting consumers from substandard building work.

Very recently, the Constitutional Court had to pronounce on the consequences of a failure to be registered with the Council when concluding a building agreement with a housing consumer. The outcome is severe and developers and builders must note this. In this article, this judgment, as well as another recent NHBRC-related judgment dealing with the guarantee in respect of major building works, is discussed.

NHBRC registration requirements: the Constitutional Court judgment

The Act requires *all home builders to be registered* with the Council.

A home builder is defined as, amongst others, a person who carries on the business of a home builder, which, in turn, means to construct or undertake to construct a home or to cause a home to be constructed for any person, to construct a home for the purposes of sale, leasing, renting out or otherwise disposing of such a home and to sell or otherwise dispose of such a home as a principal.

The Act enforces the registration requirements by stipulating that that no person shall carry on the business of a home builder or 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. As summarised by one commentator, the motto here is "Prevention . . . because there is no Cure"![1]

In *Hubbard v Cool Ideas 1168 CC*[2], Cool Ideas, a property developer, entered into a building contract with a Ms Hubbard. Cool Ideas was not registered with the NHBRC at the time.

Cool Ideas enlisted the services of a building construction company, Velvori Construction CC, which was registered as a home builder with the NHBRC, to undertake the construction of Ms Hubbard's home.

The building works were completed in October 2008. Ms Hubbard took issue with the quality of the work and refused to make final payment. She instituted arbitration proceedings in terms of an arbitration clause in the building contract, claiming the costs of remedial work. Cool Ideas counter-claimed for the balance of the contract price and the arbitrator ultimately found in favour of Cool Ideas. Ms Hubbard, however, ignored the arbitral award and Cool Ideas approached the South Gauteng High Court, Johannesburg for an order enforcing the same. Ms Hubbard opposed the application, contending that Cool Ideas was not a registered home builder in terms of the Act. Cool Ideas thereupon registered during the litigation proceedings and argued that the construction was done by Velvori, which was a registered home builder. The High Court granted the order and made the arbitral award an order of court.

Ms Hubbard appealed to the Supreme Court of Appeal. There the majority upheld her appeal, stating that the purpose of the Act was to protect consumers and therefore both Cool Ideas and Velvori were required to be registered before commencing with construction: enforcing the arbitral award, would disregard a clear prohibition in law. Even though the developer had subcontracted a builder who was so registered, it also had to be registered in order to receive a consideration "in terms of an agreement with a housing consumer in respect of the sale or construction of a home."

Cool Ideas sought leave to appeal but the SCA refused. It then successfully applied to the Constitutional Court for leave to appeal, which was granted but the appeal itself was dismissed. In order to reach this conclusion, the Court interpreted the statute purposively, stating that the Act was placed on the statute book in order to protect housing consumers and that depriving unregistered home builders of their right to claim payment for the homes in question was not unconstitutional. The Court held that the agreements concluded between the home builder and the housing consumer remained valid but that the home builder could not enforce its rights.

(Consumers can verify a builder's registration with the NHBRC on their website at www.nhbrc.org.za)

Deemed warranties and the standard of building work

Builder registration and home enrolment with the NHBRC provides consumers with various benefits, including a warranty in respect of major structural defects which present within 5 years after date of occupation, together with warranties in respect of smaller defects. The warranties are automatically afforded to consumers, ie they are "deemed" warranties which means that, by law, a builder must, amongst other things:

- rectify certain defects that occur in the first three months after occupation;
- rectify any roof leaks that occur in the first twelve months after occupation; and
- rectify any major structural defects that occur in the first five years after occupation.

Other benefits include:

- the requirement that the builder complies with the NHBRC's Home Builders Manual, which sets minimum quality standards;
- quality inspections during construction by NHBRC Inspectors – a minimum of 4 inspections should be carried out and consumers and home builders are encouraged to demand an inspection from the NHBRC during construction; and
- access to NHBRC-led mediation (and other dispute resolution mechanisms) between the consumer and builder in the event of disputes.

Standard of work

The standard of building work guarantee is described as follows in section 13 of the Act:

"(a) the home, depending on whether it has been constructed or is to be constructed –

(i) is or shall be constructed in a workmanlike manner;

(ii) is or shall be fit for habitation; and

(iii) is or shall be constructed in accordance with –

(aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and

(bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1)."

Major structural defects

Section 17(1) stipulates that the NHBRC may be liable for rectification or costs thereof if a "major structural defect" manifested itself within 5 years of the date of occupation, in the following circumstances:

- It resulted from non-compliance with the NHBRC Technical Requirements and the home builder has been notified accordingly within that period;
- the home builder is in breach of his obligations to rectify the defect;
- the home was constructed by a registered home builder and the home was enrolled with the NHBRC; and

- the home builder no longer exists, was liquidated or is otherwise unable to meet his or her obligations.

The term "major structural defect" is defined in section 1 of the Act to mean "a defect which gives rise or which is likely to give rise to damage of such severity that it affects or is likely to affect the structural integrity of a home and which requires complete or partial rebuilding of the home or extensive repair work to it, subject to the limitations, qualifications or exclusions that may be prescribed by the Minister."

The claim can be entertained to a maximum of "the selling price of the home as declared by the home builder at the time of the enrolment of the home, up to a maximum amount of R500 000" (reg 13).

Case law and "what constitutes a major structural defect?"

It is not always a simple task to determine whether a defect constitutes a major structural defect or not. The recent matter of *Stergianos v National Home Builders Registration Council*[3] is an illustrative case in point.

Stergianos entered into a contract with Herrington Construction CC ("Herrington Construction"), in terms of which the latter would build a home for Stergianos on a property he owned in Wilderness. The home was duly constructed and Stergianos took occupation in December 2005. The home was built on a primary dune adjacent to the Indian Ocean, the erf having a substantial slope with a drop in height of 2,45 metres along the south-north axis of the house itself.

During the course of the first year of Stergianos' occupation of the house, cracks began to develop in the concrete floor slab. These became progressively worse with time and efforts to fill them came to naught as the cracks continued to expand. Stergianos turned to his attorneys for help and a civil engineer was instructed to determine the cause of the cracks. The latter's opinion was that the cause was structural and that the characteristics of the site signalled that it had to be handled with care.

Stergianos was not able to obtain relief from Herrington Construction and he opted to issue summons against the NHBRC, arguing that it was responsible for the rectification of the defects in the home as they were structural in nature, as *per* the provisions of the Act.

The NHBRC refused the claim and argued that the defect did not occur as a result of a structural defect, but was a result of bad workmanship.

The civil engineer, who testified as an expert on behalf of Stergianos, testified that the defects in the concrete floor slab of the home were indeed caused by major structural defects in the substructure of the home and consequent incorrect settling of the slab. The NHBRC's expert, also an engineer, was of the opinion that the cracks were caused by shrinkage as a result of poor workmanship when the concrete slab was poured and the builder's failure to place expansion joints in the slab where they should have been placed. In his view, therefore, the defects in the slab were not structural in nature. Both experts were agreed that, whatever the cause of the cracking, the standard of workmanship of the builder left a lot to be desired. But, on the NHBRC's expert's version, there would be no liability for the Council under section 17.

The Court, in essence, had to choose between the versions of the two expert witnesses. Finding that both were truthful, it ultimately found in favour of Stergianos' engineer's version, taking into account the various tests performed by that engineer to reach his conclusion. The NHBRC was held liable to rectify the structural defects in Stergianos' home – subject to the minimum amount prescribed in the regulations to the Act (reg 13).

Must a builder be registered if renovations are undertaken?

Currently, the Act does not make provision for registration or enrolment of projects where the owner undertakes alterations, conversions or improvements to his home, although discussions in the industry have been underway for quite a while already to include the same requirements for such "lesser" building works.

Conclusion

The Constitutional Court has now held that a home builder who was unregistered when it sold a property to a housing consumer was not entitled to claim the balance of the purchase price. The housing consumer, on the other hand, was not held to be unjustly enriched by the fact that she could now retain the property without having to pay the balance of the purchase price. The Court further held that the home builder's registration subsequent to concluding the agreement with the Housing Consumer did not help the builder. Builders and developers must heed the outcome of this judgment to prevent losses that may otherwise have been recoverable. ❐

Endnotes

1. J Blignaut, *Cape Times*, 5 August 2014.
2. *Cool Ideas 1186 CC v Hubbard and another* 2014 (8) BCLR 869 (CC), 5 June 2014.
3. *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (EC), 16 October 2012.