

PENNY-WISE, POUND-FOOLISH: BUILDER 'SAVING' ON NHBRC ACCREDITATION FEES BATTLES TO CLAIM PAYMENT

De Kock v Olivier (21144/2022) [2024] ZAWCHC 351 (6 November 2024)

Builders embarking on projects to build homes are obliged to register with the National Home Builders Registration Council ('the NHBRC'), and pay certain fees in respect of building projects to be undertaken. This is in order to establish a system of protection for consumers, being those for whom new homes are erected. The failure to adhere to these prescripts renders a claim for remuneration precarious. The judgment below relates to the initial skirmishes between such an unregistered builder, who sought to curb expenses by not registering with the NHBRC, and his client – demonstrating the likely insurmountable hurdle in the claim for payment.

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

FACTS

De Kock, a builder, had instituted legal proceedings against his client, Olivier, for payment of money owing in terms of a building contract. The contract was premised on the acceptance of a quote that De Kock had issued to Olivier.

Building work commenced in April 2021, but by December that year, the relationship had soured and Olivier instructed De Kock to cease building works.

This occasioned De Kock to issue summons for payment of remuneration due to him. The first summons reflected "CJ Konstruksie", trading as "Bold 'n New Investments 47 CC" as the plaintiff.

Olivier raised an exception to the CC's particulars of claim, taking the point that that the building contract was subject to the terms of the Housing Consumers Protection Measures Act 95 of 1998 ("the Act"), that the CC was therefore obliged to allege that it was a registered home builder as defined by the Act, and that having failed to do so, the particulars of claim disclosed no cause of action. There was a second ground of exception that the alleged oral agreement did not comply with sections 13 and 14 of the Act and therefore that no cause of action was disclosed.

The CC withdrew the action and issued a new summons in which the plaintiff was now reflected as De Kock, in his personal capacity, trading under the name of "CJ Konstruksie". He averred therein that he had complied with the requirements of the Act (although, later, this appeared not to have been the case).

De Kock filed an exception to the particulars of claim in the new summons. Contending that the written quote (which was the basis of their agreement) refers to the building of a "woonhuis," and that the agreement as alleged does not comply with the formalities required in section 13 of the Act, it was invalid or unenforceable. A second ground of exception was that there is no averment that De Kock complied with the enrolment requirement of section 14(1) of the Act before commencing construction, with the result that he is not entitled to any consideration by virtue of section 13(7)(b) of the Act.

In response, De Kock proposed various amendments to his particulars of claim, all of which aimed to distance the building project from the Act. He sought to argue that the Act did not find application because a dwelling unit was already in existence when the contract was concluded and that "alterations and renovations" did not constitute the construction of the dwelling unit as contemplated in the definition of "home" in section 1 of the Act;

Olivier filed an objection to the proposed amendments, the central theme being that the proposed amendment of the nature of the contract was inconsistent with the written quote, and that De Kock therefore remained obliged to comply with the Act.

The central issue in the present application was what the nature of the building work was, in other words, De Kock's application to amend the description of the content of the contract from "the construction of a dwelling" to "alterations and renovations to an already existing dwelling"; and that the "alterations and renovations" did not constitute the construction of a dwelling unit for purposes of the Act.

HELD

- The Act, which is consumer protection legislation, regulates "home builders" by requiring them to be registered with the National Home Builders Registration Council ("the Council"). The "business of a home builder" is defined to mean, inter alia, "to construct or to undertake to construct a home or to cause a home to be constructed for any person". A "home", in turn, is defined to the extent relevant as "any dwelling unit constructed or to be constructed by a homebuilder ... for residential purposes or partially for residential purposes ..."
- A person who undertakes the construction of a home is not entitled to any consideration in respect thereof unless they are a registered home builder (section 10(1)(b)).
- Moreover, in terms of section 13(7)(b), a home builder may not receive "any other consideration" unless the requirements of sections 14(1) or 14(2) have been complied with. These pertain to the enrolment of the project with the Council.
- It follows from this that where one is dealing with claim for consideration arising from an agreement for the "construction" of a "home" as defined, unless one can demonstrate both registration as a home builder and the enrolment of the project, such a claim cannot succeed.
- De Kock sought to plead facts which differentiate the subject of the agreement from the "construction" of a "home." The thesis was that the mere alteration or renovation of an existing dwelling falls outside that ambit. The Court noted as follows in this regard:

"There appears not to be authority addressing the limits of the Act with reference to entirely new buildings, on the one hand, and renovations of existing buildings on the other. I am prepared to accept for present purposes, but without deciding the point, that not every item of work done by a builder or artisan or tradesperson in relation to a dwelling unit will necessarily constitute the construction of a home for purposes of the Act. Examples given in argument as to what would probably fall outside the Act involved the ad hoc replacement of windows or painting works. On the other hand, clearly where a person constructs an entirely new home from the foundations up, that would fall squarely within the ambit of the construction of a home. Between these extremes may be a range of factual circumstances which could fall on one or the other side of the dividing line. The extent of any pre-existing structure, and the nature of the work to be done in relation to it (e.g. structural as opposed to cosmetic) will be instructive and each case will turn on its own facts. Given the consumer protection flavour of the Act, however, I would venture to suggest that a court will not be quick to accept that a project involving significant building work, including laying foundations and installing structural elements, may be freed from the strictures of the Act merely because elements of an existing dwelling are retained."

- On the facts presented, it was clear that the building work was substantial and that the quote itself, prepared by De Kock, referred to the "bou van nuwe woonhuis". De Kock referred to the building of a dwelling in both the summonses issued, prior to applying for amendment thereof. De Kock further did not proffer any facts to indicate why this is not so, apart from his application to amend his particulars of claim in that regard.

CONCLUSION

In the circumstances, the application for an amendment of the particulars of claim, had to fail.