

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

DOES ABSENCE OF APPROVED PLANS AND OCCUPANCY CERTIFICATE INVALIDATE A LEASE?

**Wierda Road West Properties (Pty) Ltd v SizweNtsalubaGobodo Inc
(1156/2016) [2017] ZASCA 170; 2018 (3) SA 95 (SCA) (1 December
2017)**

The Supreme Court of Appeal was asked here to determine whether a tenant can escape its liabilities under a lease agreement by arguing that the lease agreement was invalid or at least unenforceable as there were no approved building plans or an occupancy certificate (as required in terms of the provisions of the National Building Regulations and Building Standards Act) in respect of the leased premises. Considering the penalties that are provided for in the Act for non-compliance, the Court held that it was not warranted to read into the wording of the Act that the legislature intended a further penalty of invalidity to follow.

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

FACTS

Wierda West Road Properties (Pty) Ltd (Wierda) (the landlord) sued its tenant, SizweNtsalubaGobodo Inc (SNG) for unpaid rentals and municipal charges arising from their written lease agreement.

SNG raised a number of defences and a counterclaim, all premised on the lease agreement being void from the outset (ab initio) and therefore unenforceable. SNG contended that this was so because the lease contravened section 14(1)(a) of the National Building Regulations and Building Standards Act 103 of 1977 (the Act) in that no occupancy certificate had been issued prior to the occupation thereof, which was an offence under section 14(4)(a).

During the trial it transpired that there were also no approved building plans for a part of the property as required by section 4(1) of the Act, which SNG advanced as a further ground to invalidate the agreement, being an offence under section 14(4) of the Act. It was however common cause that Wierda had not erected the building itself, and that SNG had been aware of the absence of an occupancy certificate without raising objection.

PNG also placed specific reliance on the judgment in *Berg River Municipality v Zelpy* where it was held that section 4(1) of the Act impliedly prohibited the use and occupation of the property where approved building plans were lacking.

The court *a quo* concluded that the agreement was not invalid but was unenforceable, and accordingly dismissed Wierda's action and also SGN's counterclaim. In this appeal to the Supreme Court of Appeal, Wierda appeals against the High Court's dismissal of its claim and SNG raised a cross-appeal against the High Court's finding that the lease was not invalid.

The main issues before the Court were whether sections 4(1) and 14(1) applied, and if so, whether the agreement was *void ab initio* due to the contraventions of the Act.

HELD:

- It was questionable whether either of the sections applied in the present instance.
- Section 4(1) reads as follows: "*(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.*" This section applies to a person who erected a building.
- Similarly, the penalty provision in section 4(4) also refers to any person erecting any building. This section reads: "*Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building.*"
- It was common cause that Wierda did not erect the building in question, within the definition of the word 'erection' in section 1 of the Act.
- Section 14(1)(a) provides that an occupancy certificate may be issued if the local authority was '*of the opinion that such building has been erected in accordance with the provisions of this Act . . .*'. (Section 14(4)(a), which contains the penal sanction, referred to '*[t]he owner of any building, or any person having an interest therein, erected or being erected with the approval of a local authority . . .*')
- Section 14(4)(a) therefore deals with instances of occupancy without an occupancy certificate, but where there were approved plans in place.
- However, in the present instance the building in question had been erected without the requisite plans, i.e. without the approval of the local authority.
- Non-compliance with sections 4(1) and 14(1) does however not render the parties' lease agreement void and unenforceable. There is no basis to justify reading an implied meaning into section 4(1) that the use or occupancy of a building which has

no approved plans, is prohibited.

- Furthermore, SNG was at liberty to request the local authority to pursue the remedies available to it in terms of the Act, had the need arisen to do so. It did not do so and, with full knowledge of the lack of an occupancy certificate, had consented to use and occupation under the prevailing circumstances. SNG received exactly what it had bargained for – office accommodation refurbished to its needs, in a building with an outstanding occupancy certificate which, to its knowledge, the owner (Wierda) was in the process of obtaining. SNG never complained of this alleged unfitness for letting, and only did so after it had vacated the property and to avoid the consequences of being held to a contract it had freely entered into.
- The penal sanctions in sections 4(4) and 14(4)(a) were clearly regarded by the legislature as adequate sanction in cases where these provisions were contravened.
- It was also clear that the legislature did not intend for private contracts, such as a lease which contravene these sections, to be invalidated as a further sanction. Neither was there a justifiable basis for reading an implied meaning into section 4(1) that the use or occupancy of a building which has no approved plans is prohibited.

The SCA consequently upheld the appeal with costs and dismissed the cross-appeal with costs.

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