NHBRC ENROLMENT CERTIFICATE: ISSUING OF AMENDED VERSION WHEN SELLING VALUE DIFFERS FROM ENROLMENT VALUE

Uniqon Wonings (Pty) Ltd v National Home Builders Registration Council (2019/35086) [2019] ZAGPPHC 211 (10 June 2019)

This judgment deals with an acrimonious battle between a developer and the NHBRC, the former seeking the issue of revised enrolment certificates from the NHBRC, as the selling price of units it erected differed from the value declared on enrolment.

The Judgment can be viewed here.

FACTS

Background

Home builders must enrol homes with the National Home Builders Registration Council ('the NHBRC'). Section 14(1) of the Housing Consumers Protection Measures Act ('the Act') prohibits a home builder from commencing with the construction of a home (falling within any category of home that may be prescribed by the Minister for purposes of this section) unless -

i. he has submitted the prescribed documents and fee to the NHBRC;

ii. the NHBRC has accepted the documents and has issued the prescribed certificate of proof of enrolment to the home builder.

In submitting a home for enrolment, which must occur fifteen (15) days prior to the commencement of construction, the supporting documents must include the home builder's determination of what it believes to be the estimated selling price of the unit to be enrolled. This determination is to be supported by a feasibility study. The NHBRC will then issue an invoice to the home builder for the payment of enrolment fees, calculated on the estimated selling price and the fee must be paid either in full directly to the NHBRC or, in the case of a sectional development, a phased payment option exists. The NHBRC would then finally consider the application and if in order, issue an enrolment certificate. (*The importance of this certificate otherwise, from a practical conveyancing point of view, is that section 18 of the Act prohibits registration of a mortgage bond by a financial institution in favour of a consumer in respect of a home purchased from a home builder, unless the financial institution is satisfied that: (i) the home builder is registered in terms of the Act; (ii) the home is or shall be enrolled with the NHBRC; and (iii) that the prescribed fees have been or shall be paid. In addition, a conveyancer attending to the registration of a mortgage bond in favour of such institution must ensure that the abovementioned requirements have been met.)*

Later, once the construction of the home has been completed, the home builder (developer) will sell the house to a consumer. On conclusion of the sale agreement with its confirmation of the actual selling price, the home builder has a statutory duty in terms of the NHBRC's Rule 12(4) to declare this actual selling price to the NHBRC. If it differs from the prior estimated selling price, the difference must be paid by the home builder to the NHBRC upon the issue of an invoice.

In this matter

Uniqon Wonings (Pty) Ltd ('Uniqon'), a property developer, is a home builder registered with the NHBRC (as required in section 10 of the Act). In February 2018, Uniqon launched an urgent application against the NHBRC for delivery of certificates of proof of enrolment of certain properties situate in Centurion.

Uniqon furnished the NHBRC with a spreadsheet of the properties it sold and in respect of which transfer has taken place but, in December 2018, the NHBRC insisted on copies of the purchase agreements as proof of the actual selling prices. Then, during April 2019, the NHBRC refused to issue invoices for the difference between the estimated enrolment fee and the enrolment fee calculated on the actual selling price, despite the spreadsheets having been furnished to it.

The NHBRC relied on the following provisions:

- Rule 12(4) - which requires, <u>in a sectional title development or phased sectional title development</u>, that the home builder must return the payment form with full payment of the outstanding amount and declaring the difference between the actual selling prices compared with the expected selling prices and make payment of the difference. Or, it could have used the payment mechanism for phased sectional title development schemes allowing payment of 20% of the total enrolment fee in cash and 80% by bank guarantee, based on the estimated selling price. Uniqon did not make use of this mechanism and paid the enrolment fee upfront. As such, this rule was inapplicable in the present matter.

- Regulation 2(5) - which further states that if a deed of sale does not exist at the time of enrolment for sectional title homes or homes built in speculation of sale, (i) the enrolment fee must be determined with reference to the expected selling price; (ii) the home builder must submit marketing brochures reflecting selling prices or extracts from the feasibility studies reflecting details relating to selling prices, in order to enable the Council to compare proposed selling prices with actual selling prices. Regulation 2(6) - which states that where an under-declaration of the selling price in respect of homes has occurred, the home builder must, on demand of the NHBRC, pay the difference in enrolment fees. Here the NHBRC argued that Rule 2(6) only applied where 'under-declaration' of the selling price has occurred, i.e. where the home builder has incorrectly declared the actual or estimated selling price at the time of enrolment. It is of the view that it does not apply where for <u>other</u> reasons, a false or inaccurate declaration, declared at the time of enrolment, is not the same as the actual price such as where the home builder underestimates the selling price in order to reduce the enrolment fee payable or where the estimated selling price has changed due to factors outside the home builder's control such as an improvement in the housing market.

Uniqon disagreed and asked the Court to invoke the relevant parts of the judgment in *Renico Construction (Pty) Ltd v The National Home Builders Registration Council*. In the latter matter, the NHBRC had issued a certificate of proof of enrolment based on an expected price; but since the certificate had been issued it had concluded a sale in respect of two units at a selling price that was higher than the price that was anticipated. *Renico* therefore sought an amended enrolment certificate or a letter from the NHBRC confirming *Renico's* compliance with the Act, which the NHBRC contended was *ultra vires* the Act. *Renico* then applied to Court, and the NHBRC was ordered to issue certificates of compliance in respect of the two units where *Renico* had already paid the difference in the enrolment fee. The Court was of the view that such matters must be approached on a pragmatic basis and on a basis, as regulator, of assisting those who are regulated to achieve legitimate objects that are required in terms of the Act.

This despite, the NHBRC argued in this matter that although it has a duty to assist, it could only assist Uniqon by issuing what was suggested in the *Renico* matter, i.e. a certified document or some other form of confirmation, as it alleged that it was unable to furnish a new certificate of compliance as the under-declaration did not fall within the scope of the Act.

To this Uniqon responded that such confirmation or certification would not suffice as it was not acceptable to the Banking Association of South Africa.

Uniqon thus sought an order obliging the NHBRC to provide it with 'correct and accurate enrolment certificates' in respect of units forming part of three developments.

HELD

- It is an obligation of the NHBRC to provide confirmation of compliance as an incident of its powers and duties under the Act. It does not restrict the issue of amended enrolment certificates to under-declarations made due to factors other than market fluctuations.

- The basis on which the NHBRC resisted the issue of new certificates could not be upheld. The NHBRC is obliged to assist home builders with compliance.

CONCLUSION

The NHBRC was accordingly ordered to issue the certificates and was also ordered to pay attorney and client costs due to its ineffectual attitude, despite the decision in the *Renico* case (*supra*).