

SUMMARY OF THE JUDGMENT

www.stbb.co.za

>> PROPERTY LAW UPDATE

LEASE INVALIDATED BY ABSENCE OF APPROVED BUILDING PLANS AND OCCUPATION CERTIFICATE?

Wierda Road West Properties (Pty) Ltd v SizweNtsalubaGobodo Inc (1156/2016) [2017] ZASCA 170 (1 December 2017)

It is generally appreciated that when you build or renovate, it is a requirement to obtain building plan approval from the local authority first. So too, when a new building is erected, it is necessary to obtain an occupancy certificate which confirms, amongst other things, that it was erected in compliance with building legislation. The question in the appeal in this matter was whether the absence of these pre-requisites in respect of leased premises rendered the lease agreement invalid, thereby absolving the tenant from the obligation to pay rental.

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

FACTS

Wierda Road West Properties (Pty) Ltd ('Wierda') instituted action against SizweNtsalubaGobodo Inc ('Sizwe') for some R 7 million in respect of outstanding rentals and municipal charges arising from the lease of its property to Sizwe.

Sizwe is a merged entity, comprising Gobodo Incorporated (Gobodo) and SizweNtsaluba VSP.

Wierda is a property-owning company entirely owned by the shareholders of the erstwhile Gobodo. Wierda purchased the property in 2009 with a view to house Gobodo, whose premises at that time had become too small. Wierda undertook the refurbishing of the property at Gobodo's instance and Gobodo moved in during August 2010. (Later, in June 2011, Gobodo merged with another company to form Sizwe and the latter concluded a new lease agreement in respect of the property with Wierda in August 2012).

In the course of the refurbishment it was discovered that there were no building plans in respect of the new wing added to the property by the previous owner. Despite concerted efforts, Wierda was unable to get building plans from the seller and it consequently instructed its architects to draw plans for the new additions to submit them to the City Council of Johannesburg for approval.

Wierda experienced serious problems getting the plans approved - there were as many as 12 separate approvals required. The building plans were finally approved during mid-2015. Without approved plans Wierda could not obtain an occupancy certificate. This was because section 14(1)(a) of the National Building Regulations and Building Standards Act

('the Act') rendered the granting of an occupancy certificate subject, amongst others, to the requirement that the building concerned was erected in accordance with approved building plans.

All the shareholders in Gobodo were shareholders of Wierda and five of them were appointed as its directors. All the Gobodo shareholders were aware of the absence of an occupancy certificate as was the City Council. In fact, its inspectors came to the property to make an assessment of the situation and there was no objection to occupation.

Sizwe vacated the premises without notice to Wierda. Evidence indicated that this was because they sought new premises. In court, they argued that had they known of the absence of the building plans and an occupancy certificate, they would never have signed the agreement and that the agreement was void. (It was however not Sizwe's case that the property was not safe for occupation.)

The High Court had found the lease agreement to be valid but unenforceable, due to the contravention of section 4(1) of the Act (the lack of approved building plans in respect of the leased property) and section 14(1) of the Act (the lack of an occupancy certificate in respect of the leased property). Wierda appealed.

The issues in the appeal were, in essence:

- a) Was the agreement *void ab initio* due to the contraventions of section 4(1), read with sections 4(4) or 14(1) and 14(4) of the Act;
- b) Did the failure to obtain an occupancy certificate render the property not suitable for the purposes for which it was let; and
- c) In respect of the cross-appeal, whether the High Court erred in its finding that the agreement was not invalid, but merely unenforceable.

Relevant sections from the Act

Section 14(1)(a) reads:

*'(1) A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building –
(a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7 . . .'*

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'.

Section 4(4) 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.'

Section 14(4)(a) reads:

'The owner of any building, or any person having an interest therein, erected or being erected with the approval of a local authority, who occupies or uses such building or permits the occupation or use of such building –

(i) Unless a certificate of occupancy has been issued in terms of subsection (1)(a) in respect of such building;

(ii) . . .

(iii) . . .

(iv) . . .

shall be guilty of an offence.'

HELD:

- The primary thrust of the attack against the lease agreement was the non-compliance with sections 4 and 14 of the Act. It was contended that non-compliance rendered the agreement void ab initio and that this conclusion followed from the penal sanctions imposed in these sections.
- It was however questionable whether either section applied in the present instance. First, section 4(1) applies to a person who *erects* a building. And the penalty provision in section 4(4) also referred to any person *erecting* any building. Wierda did not 'erect' the building in question, within the definition of the word 'erection' in the Act. Second, section 14(1)(a) provides that an occupancy certificate may be issued if the local authority is 'of the opinion that such building has been *erected in accordance with the provisions of this Act . . .*' in addition, section 14(4)(a), which contains the penal sanction, refers 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 . . .*' It was also common cause that, in the present instance, the building in

question had been erected without the requisite plans, i.e. without the approval of the local authority. Section 14(4)(a) therefore deals with instances of occupancy without an occupancy certificate, but where there are approved plans in place.

- However, even if sections 4(1) and 14(1) were to apply in the present matter (although the Court finds that they do not), there were compelling considerations why the lease agreement in the present matter was indeed valid and enforceable.
- The penal sanctions in these legislative provisions (sections 4(4) and 14(4)(a) respectively), were clearly regarded by the legislature as adequate sanction in cases where these provisions are contravened. What was also clear from the wording was that the legislature did not intend private contracts of, for example, leases, which contravene these sections, to be invalid as a further sanction.
- There was further no 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.

CONTACT US

■ CAPE TOWN
Tel: 021 406 9100

■ SOMERSET MALL
Tel: 021 850 6400

■ TYGER VALLEY
Tel: 021 943 3800

■ FOURWAYS
Tel: 010 001 2632

■ CLAREMONT
Tel: 021 673 4700

■ STELLENBOSCH
Tel: 021 001 1170

■ MENLYN
Tel: 012 348 1682

■ CENTURION
Tel: 012 001 1546

■ FISH HOEK
Tel: 021 784 1580

■ BLOUBERG
Tel: 021 521 4000

■ ILLOVO
Tel: 011 219 6200

■ BEDFORDVIEW
Tel: 011 453 0577