

WARNING BELLS FOR HOME BUILDERS AND THEIR CLIENTS

Rabe Bouers CC v Chaya (2328/2015) [2020] ZALMPPHC 83 (30 October 2020)

The Housing Consumers Protection Measures Act has a double-edged sword. If the home builder is not registered with the NHBRC, has not paid the fees and enrolled the homes that he is building for a housing consumer (his client), then the builder may not demand payment from him. By the same token, such non-compliance also reduces the housing consumer's recourse against the NHBRC in the event of poor workmanship. The judgment illustrates the considerations practically.

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

FACTS

Rabe Bouers CC (the CC) is a homebuilder. It instituted an action against Mr Chaya, as a housing consumer, claiming payment of some R1,1 million in respect of building services rendered.

Mr Chaya raised a special plea that the CC, as a homebuilder, was precluded from receiving payment in terms of any agreement with him, as a housing consumer, in respect of the construction of homes because the CC did not comply with the provisions of the Housing Consumers Protection Measures Act, No 95 of 1998 ('the Act').

The CC's case was that it had entered into an oral building agreement with Mr Chaya for five homes. The CC was registered as a homebuilder with the National Builders Registration Council (NHBRC) as required in section 10 of the Act. However, the CC never enrolled the 5 homes constructed for Mr Chaya with the NHBRC as required by section 14(1) of the Act. The CC presented to the NHBRC that another entity, TCO Construction, acted as the homebuilder for the five houses of Mr Chaya and enrolled the five houses under the name of TCO Construction, because, at that stage, the CC was involved in a dispute with the NHBRC and therefore arranged for the enrollment under the name of TCO Construction.

The Act

"13. Conclusion of agreements and implied terms - (1) A home builder shall ensure that **the agreement** concluded between the home builder and a housing consumer **for the construction or sale of a home by that home builder** -

- (a) **shall be in writing** and signed by the parties
- (b) shall set out all material terms, including the financial obligations of the housing consumers
- (c)

(7) A home builder **may not** -

- (a) **demand or receive** from a housing consumer **any deposit** for construction or sale of a home unless an agreement between the home builder and the housing consumer has been concluded in terms of subsection (1) and (2); and
- (b) **receive any other consideration** unless the provisions of section 14 (1) or (2) as the case may be, have been complied with ".

Section 14 (1) of the Act provides:

"14. **Enrolment** - (1) A home builder shall not commence the construction of a home falling within any category of home that may be prescribed by the Minister for the purpose of this section unless -

- (a) the **home builder has submitted the prescribed documents**, information and fee to the Council in the prescribed manner;
- (b) the **Council has accepted the submission** contemplated in paragraph (a) and has entered it in the records of the Council; and
- (c) the **Council has issued a certificate of proof of enrolment** in the prescribed form and manner to the home builder. "

The penalty provision provided in Section 21 of the Act stipulates as follows:

"21. **Offences** - (1) Any person who -

- (a) knowingly withholds information required in terms of this Act or furnishes information that he or she knows to be false or misleading; or
- (b) **contravenes section 10(1)** or (2), 13(7), **14(1)** or (2), 18(1) or (2) or 19(5), and every director, trustee, managing member or officer of home builder who knowingly permits such contravention, shall be **guilty of an offence** and liable on conviction to a fine not exceeding R25 000 or to imprisonment for a period not exceeding one year, on each charge.

HELD

- The purpose and objective of the Act is the protection of consumers against home builders who construct homes with structural defects; to provide consumers with information about competent builders; and to give effect to the rights of consumers.
- In order to achieve this outcome, the Act requires registration of home builders and enrolment of houses being built to ensure that the aims and objects of the Act are optimally achieved.
- It has been established that such registration is required before a home builder may commence construction. The homebuilder must also enrol the home with the Council, pay the prescribed fee and otherwise fulfil the requirements laid down in section 14(1), which entails showing that the proposed building specification will not be substandard and will meet the necessary specifications. Without homes being enrolled under section 14, inspectors would be unable to identify them or fulfil their duties or obligations under this section. This is a clear indication that it is intended that all homes must be enrolled as prescribed.
- The Constitutional Court confirmed the purpose of the Act to be that a home builder who did not comply with the registration requirements is not entitled to claim compensation or payment for services rendered.
- In the present case it is common cause that the CC did not enrol the five homes constructed for Mr Chaya with the NHBRC. The enrolment was with a different entity, namely TCO Construction. Section 13(7) of the Act prohibits the CC in the present case from receiving any consideration from Mr Chaya, the housing consumer, in respect of the construction of homes unless the CC complied with the provisions of section 14(1). Section 14(1) stipulates that the CC, as the homebuilder that constructed the homes for Mr Chaya had

to enrol the homes before construction may have been proceeded with. This was not done.

- The test applicable to absolution from the instance is connected with the burden of proof resting on the CC. It failed to discharge the burden of proof and it was therefore barred from receiving any consideration from a housing consumer (Mr Chaya) in terms of any agreement between the homebuilder and housing consumer in respect of the construction of a home.

CONCLUSION

Absolution from the instance was granted in favour of Mr Chaya.