

## The Housing Consumer Protection Bill – What is in this pipeline?

Towards the end of 2019, the Department of Human Settlements published the Housing Consumer Protection Bill ('the Bill'). After some amendments, the Bill was sent to the National Council of Provinces for concurrence in March 2023. When it is passed in parliament and signed into law by the President, it will repeal the Housing Consumers Protection Measures Act 95 of 1998 ('the HCPMA'). In this article we look at some of the prominent changes introduced by the Bill and comment on provisions that impose significant new obligations on estate agents, conveyancers and the Registrar of Deeds.

### 1. What does the Bill set out to achieve?

**The main aim of the Bill, similar to that of the current Act, is to provide for the protection of housing consumers, in other words, those for whom homes are built.** In the Bill's preamble, its additional aims are listed, being to:

- provide for the registration of homebuilders;
- provide for the enrolment of homes in order to be covered by the home warranty fund;
- provide for the regulation of the conduct of homebuilders;
- provide for the continuance of the home warranty fund;
- provide for claims against the fund;
- to provide for the funds of the Council and for the management of those funds;
- provide for procurement and contractual matters in relation to the building of a home;
- provide for the enforcement of this Act;
- provide for the enforcement of the Act; and
- repeal the Housing Consumers Protection Measures Act, 1998.

Little herein appears, on the face of it, to constitute a notable variation from the current Act: Enrolment of homes and registration of homebuilders remain compliance requirements, claims against a warranty fund may be lodged by consumers in certain instances, and a regulatory body remains. There are however quite a few changes in the details of the proposed new legislation and these are highlighted below.

### 2. The Bill has a wider reach than the current Act

#### *Definition of 'build', 'homebuilder' and 'home'*

The HCPMA essentially aims to regulate persons who are in the business of home building. In order to achieve this, the Act requires builders who erect homes to register with council, to pay annual fees, and to enrol every home that they have contracted to build. The Act allows for owner builders (i.e., an owner that builds a home himself for occupation, or a builder who is not registered with the NHBC who assists the owner in building a home for his own occupation) to be exempted from the requirement to comply with the Act.

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Homebuilding is not defined in the Act but the wording of the Act refers to the construction of homes which, in turn, refers to erecting a home from the start.

Against this background, the pool of builders who will be required to comply with the new provisions, is extended. This is achieved by the broad new definitions of the terms 'build', 'homebuilder' and 'home'. The wider application is achieved as follows:

- Firstly, by defining the word 'build' to include the building of a new home as *well as* the "installation, repair, renovation, alteration or extension" of a home, in so far as the proposed building work will require that the owner must obtain municipal approval of the proposed building plans. (It is recorded in the definition that the terms 'construct' and 'construction' carry the same meaning as 'build'.) In addition, where the building activities relate to the conversion of commercial premises to a home, compliance with the new law will be required.
- In the second place, the scope is extended by *not* providing an exclusion for owner builders. A person who uses his own labour to build a home for his own occupation, will no longer enjoy exemption.<sup>1</sup>
- Thirdly, it is informative to refer to the range of building activities which will require the builder to comply with the new provisions. Whilst the HCPMA regulates homebuilders who erect homes for 'residential or partially residential' purposes from the beginning, the Bill extends its application to regulate building activity which constitutes the "installation, repair, renovation, alteration or extension" of a 'home', the latter term including:
  - a home forming part of a housing programme initiated by an organ of the state;
  - a private drainage system from home to the municipal connection;
  - water services in connection with the home from point of supply to point of discharge at fixtures and appliances;
  - any ancillary building including but not limited to storerooms, covered walkways, garages, and common facilities;
  - any retaining walls required for structural integrity; and
  - any adjacent building or wall on common property that has the potential to damage the home should it for any reason collapse.

There are some exclusions where, if the above work is performed, it would not require compliance with this law. Dwellings that do not have an own bathroom or kitchen; temporary buildings (as defined in the National Building Regulations and Building Standards Act), shacks and caravans are excluded, as well as hotels and motels.
- In the fourth place, no exemptions exist from the requirement to register with the NHBC and to enroll homes for those who do not construct homes, but who

<sup>1</sup> The Minister may, in terms of powers bestowed on him in section 2(5) of the Bill, grant exemptions from compliance "in exceptional circumstances".

specialize in renovation or alteration work to homes. (As mentioned, in the present Act a homebuilder is understood to be someone who carries on the business of a home builder and who builds homes from scratch.) ‘Homebuilders’ must register. ‘Homebuilders’ are defined as persons that *build homes*, the latter two words carrying broad definitions as highlighted above.

- Lastly, note that a ‘developer’ is now defined in the Bill and refers to a person or organ of state that “*initiates or executes a project*” that aims to provide homes for housing consumers. Although residential property developers are presently required to comply with the HCPMA because of their building activities, there is no definition specifically for a developer. In future, also the developer initiating the project must register, whether or not it is also the builder.

### **3. Warranty fund**

In section 35, the Bill provides that the existing warranty fund shall remain in place. The types of claims for substandard building work allowed in terms of the Bill, is the same as those in the current Act, but with some adaptations. Presently the warranty covers major structural defects (for 5 years from the date of occupation) if it resulted from non-compliance with the NHBC Technical Requirements, as well as roof leaks (for a 12-month period) if the problem is attributable to inadequate workmanship, design or materials.

In the Bill, the time periods in which the warranty in respect of major structural defects will be in place, is altered to start running from the date that construction commences until five years after finalisation of the construction. In the case of roof leaks, the duration of the warranty cover is similarly extended to commence from the time of construction of the roof until 24 months after finalisation of the construction of the home.

Clause 49(3) states that should a housing consumer detect a major structural defect after occupation of the home, and has to vacate the home and move into suitable alternative accommodation for repairs to take place, then either:

- (i) the homebuilder or developer; or
- (ii) in the case where both the homebuilder and the developer are involved, both are jointly and severally liable for the reasonable cost of that relocation and accommodation.

### **4. Grading and a public register**

All registered builders’ details must be reflected on a public register which the National Home Building Regulatory Council must maintain. The register must now also include a grading of the relevant builder.

It is not indicated in the Bill how the grading of homebuilders will be determined, except that the grading categories and criteria will be made by the Board (of the National Home Building Regulatory Council) on recommendation of the Council. The Bill further indicates that:

- If a home builder fails to complete a project within the time agreed upon, the consumer may report this to the Council and it could affect the builder's grading.
- The Council may differentiate between different categories of enrolment fees in relation to different categories of homes and different categories of homebuilders and developers based on grading status.

## 5. Obligations on conveyancers and the Registrar of Deeds

In section 18 of the current Act, an obligation is imposed on conveyancers attending to bond registrations for 'housing consumers' who are borrowing funds to purchase a home from a home builder (such as plot-and-plan transactions), to ensure that the home builder is registered in terms of the Act and the home enrolled. Failure to comply is an offence (section 21) and the conveyancer can be fined up to R25 000.

Clause 84 of the Bill takes this obligation further. It requires of conveyancers, both in the registration of a mortgage bond *and* transfer of ownership, to determine whether the home on the property being transferred or mortgaged, is a home which has to be enrolled. If it transpires that it is such a home and it is not enrolled, the conveyancer has an obligation to inform the Council and the Registrar of Deeds accordingly. The Council may report a conveyancer who does not comply with the provisions of this clause to the applicable law council. Similarly, estate agents selling homes are also tasked with determining whether the home was enrolled, and to advise the Council of a transgression.

A parallel duty is placed on the Registrar of Deeds, before he or she registers a deed, to determine whether that registration relates to a home which has to be enrolled as required in the Bill. No registration is allowed in the case of non-compliance. (In conveyancing practice this will presumably involve a new practice requirement from the Deeds Office to demand that conveyancers either certify regarding enrolment, where required; or that conveyancers provide some certification from the Council or builder to this effect.)

It appears that, inadvertently, the conveyancer will be required to police compliance with the municipal requirement to obtain approved building plans, for the benefit of the local authority and purchaser! This is likely to cause long delays in the registration process. Perhaps exemptions will in due course be made to exclude instances where the conveyancing transaction does not relate to the transfer of a newly erected home and one will watch this space.

If these parties do not comply with this duty, they may be reported to the Property Practitioners Regulatory Authority, the Financial Service Board, the Law Society or the

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Auditor-General (as applicable). This extends the watchdog function over homebuilders and developers further to also include these parties who now have an obligation to confirm compliance with the Bill.

## **CONCLUSION**

The Bill introduces many far-reaching changes to the existing system of consumer protection for housing consumers. Some of these relate to the duties of conveyancers when registering transfers of property or mortgage bonds. The additional duties are quite substantial, and the extent thereof possibly unintended. Changes may still be forthcoming and we will in due course furnish a further discussion of the provisions.