

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A5016/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

25 MAY 2016

FHD VAN OOSTEN

In the matter between

EDWARD MARTIN KEYROUZ

APPELLANT

And

ROBIN WHITEHORN

RESPONDENT

Housing - section 10(1)(b) of the Housing Consumer's Protection Act 95 of 1998 - dispute between the appellant, as the home builder, and the respondent, as the housing consumer - the respondent as the home consumer, notwithstanding the home builder's non-compliance with s 10(1), remains entitled to claim damages from the home builder for breach of the contract.

J U D G M E N T

VAN OOSTEN J:

[1] The crisp issue in this appeal concerns the applicability of s 10(1)(b) of the Housing Consumer's Protection Act 95 of 1998 (the Act) to the facts of this matter. The Constitutional Court has recently pronounced on the proper interpretation of the section, in *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), and it

is accordingly only necessary to briefly summarise the facts of this matter in order to determine whether the section is of application.

[2] The nub of this case concerns a building dispute between the appellant, as the home builder, and the respondent, as the housing consumer. A building contract was concluded between them in October 2007, which was subsequently amplified, in terms of which the appellant undertook to construct a dwelling for and on behalf of the respondent, at a cost of R5 000-00 per square metre. The construction commenced but a dispute arose between the parties. The respondent alleged that the appellant had repudiated the contract, which he accepted resulting in the cancellation of the contract. On 4 July 2012 the parties, by way of an agreement, referred the dispute to arbitration. The respondent (the claimant in the arbitration proceedings) claimed damages from the appellant in the sum of R3 865 375-22, together with interest thereon and costs, arising from the appellant's alleged repudiation of the building contract. The arbitration hearing proceeded and an interim award was made by the arbitrator that the respondent had duly proven the building contract and that the parties to the agreement were the appellant and the respondent. On 25 April 2013 a final award was made against the appellant for payment of the respondent's damages as claimed. In August 2013 the appellant launched an application to this court for the review of the final award. The matter came before Robinson AJ who, on 12 November 2014, dismissed the application for review. The appellant unsuccessfully sought leave to appeal before Robinson AJ and a petition for leave to appeal was lodged to the Supreme Court of Appeal which, on 27 February 2015, was granted, limited to the following issues:

'Whether in the light of the arbitrator's finding that the contract was concluded between Mr Keyrouz, acting personally, and Mr Whitehorn, and the fact that Mr Keyrouz was not registered as a home builder, (1) the effect of s 10(1) of the Housing Consumers Protection Measures Act 95 of 1998 was to preclude the arbitrator from making an award of damages in terms of that contract and whether (2) this amounted to a ground for setting aside his award in terms of the Arbitration Act 42 of 1965.'

[3] Against this background I now turn to the issues this court is required to determine. Section 10(1) of the Act provides:

'No person shall:

- (a) carry on the business of a home builder; or
- (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home, unless the person is a registered home builder.'

In *Cool Ideas* the purpose of the Act, with reference to its name and preamble, was confirmed to be the protection of housing consumers (para 29). It was further stated that the entire legislative scheme is predicated upon a building contract between a registered home builder and a housing consumer being concluded. Failure to register would result in the home builder being ineligible to seek consideration for work done in terms of a building agreement. The majority of the court held that although a distinction needs to be drawn between the building contract and the arbitration agreement, the underlying building contract remains valid and extant, even though the home builder is in law precluded from seeking consideration for the work done due to its failure to register as a home builder prior to the commencement of the building works (para 45-51).

[4] Applying the above *dicta* to the facts of the present matter leads to the conclusion that the appellant, who was not registered as a home builder, would not be entitled to claim consideration for the work done. The building contract, however, remained extant. Juxtaposed hereto, the respondent as the home consumer, notwithstanding the home builder's non-compliance with s 10(1), remains entitled to claim damages from the home builder for breach of the contract. The Act does not in any way affect the rights of the home consumer to claim from the home builder under the agreement, in particular damages for breach of contract. The arbitrator was accordingly not precluded from making an award of damages in favour of the respondent from which it follows that there are no grounds for setting aside the award in terms of the Arbitration Act 42 of 1965.

[5] It follows that the appeal cannot succeed.

[6] In the result the following order is made:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs of the appeal including the costs consequent upon the employment of senior counsel.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

P BORUCHOWITZ
JUDGE OF THE HIGH COURT

I agree.

HJ DE VOS
JUDGE OF THE HIGH COURT

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ADV HB MARAIS SC

MCCARTHY CRUYWAGEN

DATE OF HEARING
DATE OF JUDGMENT

25 MAY 2016
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