

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Handwritten Signature]</i>	
Date <i>30/10/2020</i>	

CASE NO: 2328/2015

In the matter between:

RABE BOUERS CC**APPLICANT**

and

SHAMOON CHAYA**RESPONDENT**

JUDGMENT

MAKGOBA JP

- [1] The Plaintiff as a homebuilder instituted an action against the Defendant as a housing consumer claiming payment of the sum of R 1 105 473.31 being in respect of services rendered.

- [2] The Defendant as a housing consumer raised a defence in the form of a special plea that the Plaintiff as a homebuilder is, following non-compliance with the provisions of the Housing Consumers Protection Measures Act, No 95 of 1998, precluded from receiving any consideration in terms of any agreement with the Defendant as a housing consumer in respect of the construction of homes.
- [3] The Plaintiff presented evidence of two witnesses to support its case and then closed its case. At the end of the Plaintiff's case the Defendant applied for absolution from the instance in terms of Rule 39(6).
- [4] Mr Duan Oosthuizen, the construction manager of the Plaintiff testified that he represented the Plaintiff when an oral building agreement was entered into with the Defendant. The Plaintiff operated as the homebuilder for the construction of 5(five) homes for the Defendant. The Plaintiff was registered as a homebuilder with the National Builders Registration Council ("NHBRC") in terms of section 10 of the Housing Consumers Protection Measures Act 95 of 1998 ("the Act").
- However, the Plaintiff never enrolled the 5 (five) houses constructed for the Defendant with the NHBRC as stipulated and required by Section 14 (1) of the Act.
- The Plaintiff presented to the NHBRC that another entity, TCO Constructions acted as the homebuilder for the particular 5(five) houses for the Defendant and enrolled the 5(five) houses under the name of TCO Construction.

- [5] TCO Construction never built anything in relation to the 5 (five) houses constructed for the Defendant and never acted as homebuilder in relation to the houses constructed for the Defendant.

This false information provided to the NHBRC constitutes a contravention of Section 14(1) of the Act and this is also a statutory offence as stipulated in Section 21 of the Act.

I deal more fully with the relevant provisions of the Act later in this judgment.

- [6] Mr Jakobus Rabe is the member of the Plaintiff. He confirmed that Mr Oosthuizen represented the Plaintiff when an oral building agreement was entered into with the Defendant. That the Plaintiff acted as the home builder for the 5 (five) homes constructed for the Defendant and that all the building construction was conducted by the employees of the Plaintiff, Rabe Bouers CC. Mr Rabe confirmed that the Plaintiff never enrolled the 5 (five) homes constructed for the Defendant with the NHBRC as stipulated by Section 14(1) of the Act, but the enrollment was done under the name of TCO Construction. Mr Rabe testified further that the Plaintiff never enrolled the 5 (five) houses constructed for the Defendant with the NHBRC for reason that the Plaintiff was at that stage involved in a dispute with the NHBRC and therefore arranged for the enrollment under the name of TCO Construction.

- [7] Section 13 of the Act provides that:

“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 ”.

[8] 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. ”*

[9] 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.

(2) Notwithstanding anything to contrary in any other Act, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this Act. "

- [10] Regarding the purpose and objective of the Housing Consumers Protection Measures Act, 1998 ("the Act") it is clear that this Act is consumer protection legislation, having as its object the protection of consumers against home builders who construct home with structural defects, to provide consumers with information about competent builders, and to give effect to the rights of consumers.

Thus the Act requires registration of home builders and enrolment of houses being built ensure that the aims and objects of the Act are optimally achieved.

See **National Home Builders Registration Council v Adendorf and Others 2019 (5) SA 317 at 319 C-D**.

- [11] The Supreme Court of Appeal in **National Home Builders Registration Council v Xantha Properties 18 (Pty) Ltd 2019 (5) SA 424 at 427H** said the following per Leach JA:

"[10] At first blush these provisions, as they currently stand, therefore provide for a person who wishes to construct a home for the purpose of "leasing renting out" and thereby carry on the "business of a home builder" as defined, to first register as a home builder under s 10 – after satisfying the Council that it meets the necessary requirements

– and then, before commencing construction, to enrol the home with the Council, pay the prescribed fee and otherwise fulfil the requirements laid down in s 14(1), which will entail showing that the proposed building specification will not be substandard and will meet the necessary specifications (my underlining)”.

At page 430E the learned Judge of Appeal concluded that

“Without homes being enrolled under s 14, inspectors would be unable to identify them or fulfil their duties or obligations under this section. In itself this is a clear indication that it was intended that all homes were to be enrolled”.

- [12] Section 14 of the Act appertains to the enrolment of the home (the subject of the construction) with the Council. It prohibits a home builder from commencing the construction of that home unless the Council has issued a certificate of enrolment in respect of it. By its very nature the protection afforded to a housing consumer by section 14 is in addition to that afforded by section 10 of the Act which requires that the home builder be registered with the HNBRC – **Hubbard v Coal Ideas 1186 CC [2013] JOL 30478 (SCA)**, confirmed by the Constitutional Court in **Cool Ideas 1186 cc V Hubbard and Another 2014 (4) SA 474 (CC)**.

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.

- [13] In the present case it is common cause that the Plaintiff did not enrol the 5 (five) homes constructed for the Defendant with the NHBRC. The enrolment was with a different entity, namely TCO Construction.

Section 13(7) of the Act prohibits the Plaintiff in the present case from receiving any consideration from the Defendant for the construction of homes unless the Plaintiff complied with the provisions of section 14(1).

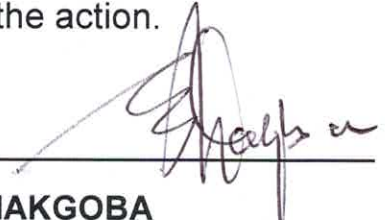
Section 14(1) stipulates that the Plaintiff, Rabe Bouers CC, as the homebuilder that constructed the homes for the Defendant had to enrol the homes before construction may have been proceeded with. This was not done.

- [14] The test applicable to absolution from the instance is connected with the burden of proof resting on the Plaintiff. The burden of proof resting squarely on the Plaintiff in this case is to prove that the Plaintiff complied with the provisions contained in the Act. The Plaintiff has failed to discharge the burden of proof and it is therefore barred from receiving any consideration from a housing consumer (Defendant) in terms of any agreement between the homebuilder and housing consumer in respect of the construction of a home.

The Plaintiff has therefore failed to demonstrate that it has a claim against the Defendant.

[15] I accordingly grant the following order:

1. Absolution from the instance is granted.
2. The Plaintiff shall pay Defendant's costs of the action.



E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

For the Plaintiff	: Adv. I A Van den Ende
Instructed by	: Niland & Pretorius Inc
For the Defendant	: Adv J C Kloppe
Instructed by	: Corrie Nel & Kie Attorneys
Heard on	: 20 & 21 October 2020
Judgment delivered	: 30 October 2020