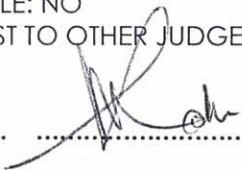


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2019/35086

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
10/6/2019	
DATE	MOKOSE SNI

In the matter between:

UNIQON WONINGS (PTY) LTD

Applicant

and

THE NATIONAL HOME BUILDERS
REGISTRATION COUNCIL

Respondent

JUDGMENT

MOKOSE J

- [1] The applicant seeks a mandamus ordering the respondent to provide it with 'correct and accurate enrolment certificates' in respect of units forming part of three developments.

- [2] The salient facts are briefly that during February 2018 the applicant launched an urgent application against the respondent seeking delivery of certificates of proof of enrolment of certain properties situate in Centurion, Gauteng Province. Fourie J ordered the respondent to provide certificates within two (2) days. Despite such order, the respondent immediately launched an application for leave to appeal. The applicants then launched an application in terms of Section 18(3) of the Superior Courts' Act 10 of 2013 that the order of Fourie J not be suspended pending the appeal. The respondent subsequently opted to withdraw its appeal and was ordered to pay the costs of the appeal and the Section 18(3) application.
- [3] After these applications and counter-applications, the respondent continuously failed to furnish the applicant timeously with the certificates despite applications having been made in respect thereof. These delays in the furnishing of enrolment certificates for units forming part of various developments now culminate in the application before this court today.
- [4] The applicant was of the view that the matter was urgent and as such, its non-compliance with the rules relating to the service of documents and time frames should be condoned as no substantial redress in course would be available to it as consumers would cancel the purchase agreements.
- [5] Although the respondent disagreed and was of the view that there was no justification for the applicant to have 'leaped out of the starting blocks as it has', I am of the view that the applicant has provided evidence and justified the application on an urgent basis. Accordingly, the applicant's non-compliance with the Rules is condoned and the application is heard in accordance with Rule 6(12)(b) of the Superior Courts Act.

[6] The applicant, a property developer, is a duly registered builder in terms of Section 10 of the Housing Consumer Measures Act 95 of 1998 ("the Act"). In terms of Section 14(1) of the Act a home builder shall not commence construction of a home falling within any category of home that may be prescribed by the Minister for purposes of this section unless-

- (a) he has submitted the prescribed documents, information and fee to the Council in the prescribed manner;
- (b) the Council has accepted the submissions contemplated in (a) above and had entered it into its records; and
- (c) the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder.

[7] In terms of the Rules of the respondent a home builder must submit a home for enrolment fifteen (15) days prior to the commencement of construction together with all supporting documents. The home builder has to determine what it believes the estimated selling price of the unit to be enrolled. In support thereof. It must provide proof of the estimated price in the form of a feasibility study. The respondent will then issue an invoice to the home builder for the payment of enrolment fees calculated on the estimated selling price which fee will be paid either in full directly to the respondent or in the case of a sectional development, a phased payment. The respondent would then consider the application and if in order, will issue an enrolment certificate.

[8] Once the construction of the home has been completed, the developer or home builder will sell the house to a consumer. On conclusion of the sale agreement and the determination of an actual selling price by means of a signed offer to purchase, the

home builder has a statutory duty in terms of Rule 12(4) to declare the actual selling price to the respondent and if it differs from the estimated selling price, the difference must be paid by the home builder to the respondent upon the issue of an invoice by the respondent.

- [9] The applicant would furnish the respondent with a spread sheet of the properties being registered but in December 2018, the respondent insisted on copies of the purchase agreements as proof of the actual selling prices. However, during April 2019 the respondent refused to issue invoices for the difference between the estimated enrolment fee and the enrolment fee calculated on the actual selling price despite the spread sheets having been furnished to it.

- [10] Section 18 of the Act states the following:

- "(1) No financial institution shall lend money to a housing consumer against its security of a mortgage bond registered in respect of a home with a view to enabling the housing consumer to purchase the home from a home builder, unless that institution is satisfied that the home builder is registered in terms of the Act and that the home is or shall be enrolled with the Council and that the prescribed fees have been or shall be paid.*
- (2) any conveyancer attending to the registration of a mortgage bond in favour of an institution contemplated in sub-section (1) shall ensure that the home builder is registered in terms of the Act, has enrolled the home with the Council and has paid the prescribed fees in respect of that enrolment."*

- [11] Section 21 of the Act provides as follows:

- "(1) Any person who-*

(a)

(b) *Contravenes section 10(1) or (2), 13(7), 14(1) or (2), 18(1) or (2) or 19(5),.....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."*

[12] Rule 12(4) (GN R1408) states the following:

"In the case of a sectional title development or phased sectional title development the home builder must comply with Rule 8(b) and return the sectional title phased payment form with payment of the outstanding amount by bank guaranteed cheque, cash, or evidence of cash or bank guaranteed cheque bank transfer declaring the difference between the actual selling prices compared with the expected selling prices and make payment of the difference."

[13] Regulation 2(5) (GN1407) states the following:

"If a deed of sale does not exist at the time of enrolment for sectional title homes or homes built in speculation of sale-

(a) The enrolment fee must be determined with reference to the expected selling price;

(b) The home builder must submit marketing brochures reflecting selling prices or extracts from the feasibility studies reflecting details relating to selling prices, in order to enable the Council to compare proposed selling prices with actual selling prices."

[14] Regulation 2(6) (GN 1407) states the following:

"Where an under-declaration of the selling price in respect of homes has occurred, the home builder must, on demand of the Council, pay the difference in enrolment fees."

[15] The respondent's case is that that Rule 12(4) in particular does not apply to the matter in *casu*. It is of the view that this rule applies to phased development payment mechanisms for sectional title development schemes in that it allows payment of twenty per cent (20%) of the total enrolment fee in cash and eight percent (80%) by bank guarantee based on the estimated selling price of the homes. The applicant did not make use of this mechanism and paid the enrolment fee upfront. As such, this rule is inapplicable.

[16] Secondly, the respondent is of the view that Rule 2(6) only applies where 'under-declaration' of the selling price has occurred. As such, the Council is entitled, in its discretion, to demand payment of the difference between the under-declared price at the time of enrolment and the actual selling price. The respondent interprets this rule to apply where the home builder has incorrectly declared the actual or estimated selling price at the time of enrolment. It is of the view that it does not apply where for other reasons, a false or inaccurate declaration, declared at the time of enrolment, is not the same as the actual price such as where the home builder underestimates the selling price in order to reduce the enrolment fee payable or where the estimated selling price has changed due to factors outside the home builder's control such as an improvement in the housing market.

[17] The applicant disagrees with this interpretation and likens the matter in *casu* with that of *Renico Construction (Pty) Ltd v The National Home Builders Registration Council*¹ where the reason the applicant brought the application was that although the respondent had issued a certificate of proof of enrolment based on an expected price, since the certificate had been issued it had concluded a sale in respect of two units at

¹ Case No. 4540/2019 dated 8 March 2019

a selling price that was higher than the price that the applicant had anticipated. The relief sought in this matter was an amended enrolment certificate which the respondent contended was *ultra vires* the Act. The notice of motion was amended in the alternative to an amended enrolment certificate, a letter from the respondent confirming the applicant's compliance with the Act, alternatively a compliance certificate.

[18] The respondents were ordered to issue certificates of compliance in respect of the two units where the applicant had already paid the difference in the enrolment fee. The court was of the view that such matters must be approached on a pragmatic basis and on a basis, as regulator, of assisting those who are regulated to achieve legitimate objects that are required in terms of the Act.

[19] In the matter in *casu*, the respondent accepted a duty to assist and offered the applicant what was suggested by the court in the Renico matter (*supra*) – a certified document or some other form of confirmation as it alleged that it was unable to furnish a new certificate of compliance as the under-declaration caused by market fluctuations does not fall within the scope of the Act. Accordingly, it is unwarranted to suggest *mala fides* on its part.

[20] Submissions were made by counsel for the applicant that such confirmation or certification would not suffice as it was not acceptable to the Banking Association of South Africa. Furthermore, the offer which had been made by the respondent differed to that in the Renico matter in that it was a tender of issuing the certificate in respect of the lower amount and not the higher amount.

[21] The respondent had acknowledged that it has an obligation to provide confirmation of compliance which is an incident of its powers and duties under the Act. A thorough reading of the Act, the Rules and Regulations indicates the said obligation on the part of the respondent to issue such certificate. It does not restrict the issue of enrolment certificates to under-declarations made due to factors other than market fluctuations.

[22] The case before this court is one in which the applicant sought an order directing the respondent to issue certificates of enrolment in respect of certain units. It was resisted by the respondent on the basis that it is not obliged or permitted in terms of the Act, Regulations or Rules to re-issue an enrolment certificate and levy an additional fee where there is a difference due to market fluctuations. I am of the view that this is a case where the award of attorney and client costs are warranted due to the attitude of the respondent despite the decision in the Renico case (supra). The court has taken note of the fact that the respondent is an official body and that the use of public resources for litigation in this form is not exemplary.

[23] Accordingly, the following order is granted:

The order is granted as per the draft order attached hereto.


MOKOSE J
Judge of the High Court
of South Africa
Gauteng Division,
Pretoria

For the Applicant:

Adv L Van Gass instructed by

Van der Merwe & Associates

For the First Respondent:

Adv I Currie instructed by

Kunene Ramapala Inc

Date of Hearing: 5 June 2019

Date of judgement: 10 June 2019

IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

Handwritten signature and date: 10/6/2019

Case No: 35086/2019

IN FRONT OF HONOURABLE JUSTICE MADAM MOKOSE
ON 5 JUNE 2019

10

In the matter between:

UNIQON WONINGS (PTY) LTD
REGISTRATION NO.: 1999/001441/07

APPLICANT

and

THE NATIONAL HOME BUILDERS REGISTRATION COUNCIL RESPONDENT

DRAFT COURT ORDER

AFTER HAVING READ THE PAPERS FILED OF RECORD, AFTER HEARING ARGUMENT ON BEHALF OF THE PARTIES AND AFTER CONSIDERING THE MATTER, THE FOLLOWING ORDER IS GRANTED:

1. THAT the Applicant's non-compliance with the rules of Court relating to service of documents and time frames is condoned and that this application is heard as an urgent application in accordance with Rule 6(12)(b);
2. Directing the Respondent to issue the Applicant with correct and accurate enrolment certificates in relation to the units listed in Annexure "B" to the

founding affidavit relating to the developments known as IQ Waitikiri, IQ Brooklyn, IQ Whistling Thorn upon:

- 2.1) The Applicant declaring to the Respondent, in terms of Rule 12(4) published under Regulations GNR 1408, the actual selling price of each unit supported with the offer to purchase of such unit;
- 2.2) The Respondent issuing a demand/ invoice within 2 (two) days from declaration, in terms of Regulation 2(6) of GNR 1407, for the difference between the enrolment fee paid and calculated in terms of the estimates selling price and the enrolment fee based upon the actual selling price for such unit;
- 2.3) The Applicant paying such demand/ invoice in respect of the such unit;
3. The Respondent is afforded 5 (five) days from date of payment in terms of 2.3 to issue the Applicant with correct and accurate enrolment certificates;
4. **THAT** the Respondent is ordered to pay the costs of this application on an attorneys and client scale.

BY ORDER – REGISTRAR