

Short notes on:

CONSUMER PROTECTION IN RESPECT OF CONSTRUCTION CONTRACTS

Introduction

The Consumer Protection Act No. 68 of 2008 (the “CPA”) has been in effect since 2011, however, long before this Act, there have been other legislation around to protect consumers in the building industry. One of these pieces of legislation is known as the Housing Consumers Protection Measures Act No. 95 of 1998 (hereinafter the “Act”), and prescribes, amongst other things, that no person shall construct a home or receive any consideration in terms of any agreement with a housing consumer for doing so, unless that person is a registered home builder.

Furthermore, the home builder may not demand a deposit for the construction unless the home builder and housing consumer have entered into an agreement, nor may the builder receive any other consideration unless the home builder has enrolled the home with the National Home Builder Registration Council (hereinafter the “NHBRC”) in accordance with section 14 of the Act. The builder may only commence with building works if the NHBRC has issued a certificate of enrolment to the home builder.

Constitutional Court to provide clarity to legislative requirements

In the 2014 Constitutional Court decision of *Cool Ideas 1186 CC v Hubbard and Another*¹, it was clarified that both the property developer and the builder subcontracted by it to construct a home, must be registered as home builders in terms of the Act before construction begins. If only the sub-contractor is registered, the property developer will be barred from receiving consideration in terms of the building contract.

¹ 2014 (4) SA 474 (CC)

Background of Cool Ideas-case

In February 2006, Cool Ideas and Hubbard entered into a building contract. Cool Ideas undertook to construct a residence for consideration of R 2 695 600. Cool Ideas then enlisted the services of Velvori Construction CC (Velvori) to execute the building project. At the time that it entered into the building contract, Cool Ideas was not registered as a home builder in terms of section 10 of the Act. However, Velvori was duly registered as a home builder with the capacity to undertake the construction of a home. The building project was also enrolled by Velvori as required by section 14 of the Act.

The project commenced, payments were made and received, and the building works achieved practical completion in October 2008. Hubbard then raised certain issues regarding the quality of the building works, subsequently refused to make the final payment due on the building project and claimed payment of R 1 200 000 as the cost of remedial work. Hubbard invoked the arbitration clause contained in the building contract and initiated arbitration proceedings to seek payment for contractual damages from Cool Ideas.

During February 2010, Hubbard claimed compensation on the basis of defective workmanship, relocation costs, penalties and certain compliance-type certificates. Cool Ideas counterclaimed for the portion of the contract sum which remained outstanding, namely an amount of approximately R 550 000.

Arbitration and the subsequent appeals

The arbitration proceedings culminated on 15 April 2010 in an award in favour of Cool Ideas. The relevant part of the award reads that Hubbard is to pay the Respondent [Cool Ideas] the sum of R 550 211 inclusive of VAT.

Hubbard failed to satisfy the arbitration award, contending that Cool Ideas was not entitled to claim remuneration under the building contract because it was not registered as a home builder

in terms of the Act. She contended that Cool Ideas was not entitled to apply to have the award of the arbitrator made an order of court, since it would receive remuneration in direct conflict with the provisions of the Act.

Cool Ideas was however of the view that it was not necessary to register as a home builder in terms of the Act, because that Act required both the enrolment of a building project that was subject to its provisions and the registration of a home builder. Cool Ideas contended that, in doing so, it distinguishes between two categories of home builders. The first is where the home builder has the capacity to undertake the physical construction of the home, as did Velvori. The second is where the home builder does not have this capacity and has to appoint a subcontractor. Cool Ideas argued that it falls into this latter category. It also averred that, upon enquiry to the NHBRC, Cool Ideas was informed that it was not necessary for it to register as a home builder before commencing construction.

Subsequently, Cool Ideas applied to the High Court to make the arbitral award an order of court. The High Court held that late registration is permissible after the building has commenced and the provisions of section 10 are to be read with those in section 14A of the Act.

Hubbard appealed to the Supreme Court of Appeal (“SCA”), who held that the purpose of section 10 was to protect consumers. It further held that section 10(7) required that both Cool Ideas and the subcontractor had to be registered as home builders in terms of the Act. The SCA emphasised that it was seized with the question whether it is legally tenable to make an arbitration award an order of court where to do so would amount to sanctioning the breach of a clear statutory prohibition.

The Constitutional Court dismissed Cool Ideas’ appeal with costs saying that the significance of section 10(1)(b) of the Act is that, regardless of how much work has been done by the unregistered home builder, no consideration is payable by the housing consumer. It further went on to say that Cool Ideas’ access to courts was not infringed merely because of the refusal to

make the arbitral award an order of court and that it never declared the building contract null and void.

Conclusion

Irrespective of whether you are a home builder or housing consumer, it is important to be aware of the provisions of the Housing Consumers Protection Measures Act to avoid severe cost implications. It is further important to list the obligations of the builder and the consumer respectively in the agreement. This is important because in the majority of cases, the consumers are not aware of these provisions, and should the builder not comply, it may cause disputes even if the building has been done to practical completion. Contact a professional at SchoemanLaw for assistance.

