

SOUTH AFRICA / JUDGMENT

Billion Group (Pty) Ltd v Gobile (EL759/08, ECD 3059/08) [2013] ZAECELLC 9 (2 October 2013) [2013] ZAECELLC 9

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Hartle

CASE / FILE NUMBER

EL759/08, ECD 3059/08

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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO.: EL759/08

ECD 3059/08

In the matter between

BILLION GROUP (PTY) LTD

Plaintiff

and

SIBONGILE GOBILE

Defendant

JUDGMENT

HARTLE J

1. Both the plaintiff and the defendant claim rectification of a building agreement (and the plaintiff payment consequent thereon)[1], but for present purposes I need concern myself only with the parties' competing claims for rectification of the original agreement.
2. Pursuant to the parties' agreement I issued an order in terms of Rule 33(4) at the commencement of the hearing that the following issues be determined separately:

“1.1 Whether the building agreement, attached as annexure “A’ to the particulars of claim, constitutes a valid and binding contract between the parties, ALTERNATIVELY whether the Defendant is estopped from denying that there was consensus between the parties in respect of the building agreement. [2]

1.2 Whether the said building agreement stands to be rectified as alleged in the particulars of claim, alternatively as alleged in the plea.

1.3 What is the legal effect, if any, of the measurement of 150 m² as reflected in clause 1 of the building agreement?”

3. The relevant provisions of the agreement (annexure “A”) which have a bearing on the narrow issues in dispute and in terms of which the parties purported to agree with each other are the following:

“1. The builder will erect for the Owner a building in accordance with the plans and specifications attached hereto marked Plan No. 8 and in the construction of the building situate at Erf 5752 (No. 16) (measuring 150 metres...), will comply with the said detailed plans and the specifications contained thereon.

2. The total consideration payable by the Owner to the Builder for the construction of the building specified in paragraph 1 hereof shall be the sum of R900 000-00 (VAT inclusive)...

3-16 ...

17. CONDITION – SUBJECT TO PC SUM SCHEDULE OF FINISHES ATTACHED.”

4. The plaintiff pleads as follows concerning the putative agreement in support of its claim for rectification:

“4. During or about November 2006 and at or about East London the Plaintiff, duly represented by Mr Sisa Michael Ngebulana, and the

Defendant, duly representing himself, entered into a written contract. A copy of the said building contract is attached hereto as Annexure “A”.

5. The written building contract provides that :

5.1 The Plaintiff will build a 150 m² house for the Defendant on Erf 5752 Gonubie (hereafter referred to as “the property”)

in accordance with the plans and specifications marked Plan no. 8.

5.2 The Defendant will pay the amount of R900 000.00 to the Plaintiff as remuneration for building the said house (hereafter the “Building price”); and

5.3 ...

5.4 ...

6. Due to a common error in good faith by the parties, clause 1 of the said written contract (quoted above in paragraph 5.1) does not correctly reflect the common intention of the parties in that it was the common intention of the parties that the house would be built in accordance with the plan attached hereto as Annexure “B” (titled “Option [5 ?????? m²]”).
7. In the premises the Plaintiff seeks a rectification of clause 1 of the written agreement as prayed for below.”
5. It subsequently prays for an order in respect of the rectification claim in the following terms:

“(1) The written agreement attached as Annexure “A” to the particulars of claim is rectified to read as follows: “The Builder will erect for the Owner a building in accordance with the plan marked “Option [5 ?????? m²]” and in the construction of the building situated at Erf 5752 (nr 16) (measuring 150 m²).

6. The defendant pleads as follows to the averments set out in paragraph 4 above:

“5. AD PARAGRAPHS 4 and 5

5.1 The Defendant admits only that he signed the document, annexure “A”;

5.2 The Defendant denies that a binding Agreement came into existence upon the Plaintiff and the Defendant signing Annexure “A”, more particularly as Annexure “A” records, in clause 1 thereof, that the Plaintiff would erect for the Defendant a building in accordance with plans and specifications purportedly annexed to the Agreement (Annexure “A”) and identified as Plan No. 8;

5.3 No Plan No 8 was ever attached (nor did such plan ever exist) to the Agreement and accordingly there was no consensus between the parties as to the subject matter of the building contract: [3]

5.4 In the event of the above Honourable Court finding that a valid contract was concluded between the Plaintiff and the Defendant in accordance with Annexure “A”, the Defendant pleads as follows:

5.4.1 At all material times it was the common intention of the parties that the Plaintiff would build a house in accordance with the plan prepared by the Plaintiff’s Architects, a copy whereof is annexed hereto, marked “DEF1”;

5.4.2 Due to an error common to the parties, Annexure “A” to the Particulars of Claim incorrectly refers to Plan No 8, whereas it should have referred to Plan Option No 5:

5.4.2.1 Plan Option No 5 is the plan annexed as Annexure “DEF1” hereto;

5.4.2.2 In addition, Annexure “A”, due to an error common to the parties, records that the building to be constructed on Erf 5752 measures 150 square metres, whereas in reality it should have recorded the size as being 191.86 square metres;

5.4.2.3 The measurement of 150 square metres in “DEF1” is a reference to the internal measurement. The external measurement is 191.96 square metres;

5.4.2.4 In order to give effect to the common intention of the parties, clause 1 of Annexure “A” should read:

“The Builder will erect for the owner of a building in accordance with the Plans and specifications attached hereto, marked plan option no 5 and in the construction of the building situated on Erf 5752 (internally measuring 150 square metres and externally measuring 191.86 square metres), will comply with the said detailed plans and the specifications contained therein.”

6. AD PARAGRAPH 6

The Defendant admits that at the time of conclusion of the written Agreement, it was the common intention of the parties that the house would be built in accordance with the Plan marked Annexure DEF 1 (Annexure B not being complete).[4]

7. AD PARAGRAPH 7

The Defendant notes the claim for rectification, pleading that rectification should be granted in accordance with paragraph 5.4.2

above.”

7. The plaintiff pleads further that flowing from the correct plan (annexure “B”), the appointed architect (Ikamva Architects CC) submitted building plans to the local municipality for approval to build a 207m² house on the property, which building plans contained “a phase one” – corresponding with annexure “B”, and a “phase two” which reflected future contemplated construction of the house, namely an additional area on top of the garage comprising

the master bedroom with an en suite bathroom. This plan was ultimately approved. (Later, as it turned out, the additional

area - the size of which is in dispute, was built all at once rather than in two phases as was the arrangement and this is both the source and area of contention between the parties in the main trial.)

8. To all of this the defendant pleads that he agreed orally with the architect representing the plaintiff, subsequent to the conclusion of the building agreement (sans annexure “B”),[5] that the architect would prepare plans for submission to the municipality in “an amended form”, such amendments to exclude the bedroom and en suite area on the ground floor and the bedroom “11 square metres” on the first floor and to “substitute therefor a master bedroom on top of the garage.” It was expressly agreed, so pleads the defendant, that the variations to the “initial contemplated Building Plan”[6] would not affect the construction price of R900 000.00. He admits that the plans were approved and represent the “as built” plans of the house. However he does not admit that the size is 207m² (or that the plaintiff

ultimately built a 207 m² house).

9. Concerning paragraph 1.3 of the order in terms of Rule 33(4) the defendant alleges in his plea that the measurement of 150m²

in the building agreement refers to the internal measurement of the house, which allegation the plaintiff disputes in its replication.

The plaintiff contends, contrariwise, that the reference in the building agreement to square meterage is a reference to the gross

building area.

10. The plaintiff called four witnesses in respect of the separated issues whereas the defendant, rather surprisingly, closed his case without leading any evidence.[7]
11. Anne Marie Coetzee, a real estate agent in the employ of Homenet testified that her agency was exclusively mandated by the plaintiff to market and sell plots in a development styled Estuary View in Gonubie on the basis of so called “plot and plan” package deals. A prospective purchaser had to purchase an erf (which came standard at a cost of R420 000.00) and conclude a separate agreement to build on the property at a fixed rate of R6 000, 00 per m². She met with the defendant to negotiate such a deal once he had shown an interest in acquiring site no. 16 in the development. He was well aware of the costing which she explained to him. She at first offered him plan no 8, which was affordable to him. This entailed a 130m² - single story house, but he preferred a double storey unit. She showed him a standard plan no 4 depicting a 150m² unit including a ground and first floor, but which only had 2 bedrooms. This was affordable at a cost of R900 000.00 but the defendant wanted even bigger, four rooms in fact. A plan 5 appealed to him but the square meterage was 207m² which was beyond his affordability at the quoted rate.
12. At this point Ms Coetzee consulted Gerhard Scheepers, a registered architect and employee of Ikamva Architects, which firm had been appointed by the plaintiff to prepare the site development plan, to draw up construction plans, to engage with purchasers if they required adjustments to the standard plans and to attend ultimately to the registration of the municipal plan. Being eager to meet the defendant’s needs Mr Scheepers proposed a two phase building, the first phase of which would not exceed 150m² at a cost of R900 000.00 (which was within the defendant’s budget), and a so called “ghost plan” for future development. The defendant was happy to go along with this. The plan ultimately settled upon was styled on option 5 but with certain changes which were coarsely endorsed on the concept plan. Bedroom 4 and the en suite bathroom on the ground floor were crossed out and on the first floor the second bedroom was scratched through and changes made to the sizes of the remaining bedrooms. The addition of a main bedroom with an en suite bathroom was also marked out above the garage. The main bedroom and the crossed out bits were intended to be pursued in the future development (phase 2).

13. It is this plan marked “Option 5 [????? m²]” which the plaintiff’s witnesses say was agreed upon and ought to have been substituted as the plan referred to in paragraph 1 in Annexure “A”. The standard plan 5 before the changes (and which was used by Mr Scheepers as a basis to prepare the plan marked “Option 5 [????? m²]”) is the plan which the defendant however refers to in his pleadings as annexure “DEF 1” and which he pleads should have been annexed to the building agreement as representing the basis upon which agreement was reached. It is common cause that this plan on the face of it reads “option 5 [150m²] ERF 5752”. (Emphasis added.) Mr Scheepers testified that this was wrong and should have depicted the true size of the completed house as 207m² but that his office unfortunately failed to change the reference to the size when plan 4 – which depicts a 150m² house, was used as a template to prepare the later plan 5.
14. Approval for the departure from the standard plan 5 on the basis indicated by Mr Scheepers on “option 5 [?????m²]” and permission to implement the building over two phases was obtained telephonically from Mr Sisa Ngebulana, the executive chairmain of the plaintiff. (Ms Coetzee called him on the telephone in the presence of both the defendant and Mr Scheepers for these purposes.) He agreed that Mr Scheepers could prepare a municipal building plan reflecting the entire house with its future developments, but that the plaintiff would only build that portion of the house at that stage which the defendant could afford, namely a 150m² house.
15. The plaintiff had signed annexure “A” on 26 November 2006 on the basis of a plan 8, but Mr Ngebulana had endorsed changes to it to accommodate the defendant’s subsequent request regarding the two phase development. When he received the document (annexure “A”) in Johannesburg he made the changes to reflect the agreed upon size of 150m² at a contract price of R 900 000.00 and changed Clause 17 to read that the agreement was subject to the PC sum schedule of finishes. He testified that at the time he was not focused on a plan as such but on the “direct relationship” between the agreed upon size of the house at 150 m² and the R900 000.00, which price he had been informed by Mr Coetzee the defendant could afford. The detail in the plan he left to the architect.
16. As for the specifications (the schedule of finishes), he was aware that a signed copy could not be found, but submitted that it was unlikely that such a document was not attached to annexure “A” when he signed off on it. (Ms Coetzee testified that it was attached to the agreement.) He adverted to the printed copy in the plaintiff’s bundle dated 13 March 2006 which he identified as the applicable schedule.
17. When the document was returned to her Ms Coetzee said that the defendant countersigned annexure “A” to reflect that he was happy with these changes and thus the building agreement (on the basis of the accepted counter offer of the plaintiff in effect) was birthed. The final date of the agreement (when the defendant signed the counter offer of Mr Ngebulana) is 5 December 2006.

18. Both Ms Coetzee and Mr Scheepers were adamant that the defendant knew what he would be getting for R900 000.00 (phase 1 in extent 150m²) with future development

prospects when he could afford it and could not have been mistaken in this regard neither concerning the fact that the square meterage

related to the gross building area from the outside.

19. Importantly, Ms Coetzee made contemporaneous notes of her and Mr Scheepers' meeting with the defendant which is consistent with the changes reflected on "Option 5 [????? m²]". In it she refers to, inter alia, a quote for a slab on the garage "for further rooms" and notes the plaintiff's agreement to incorporate the phase 2 development into the present plan but on a future build. In addition, after their meeting the defendant wrote a letter to her dated 6 December 2006 to confirm what had been discussed in the following terms:

"Thank you for the effort you are putting in assisting me in the process of acquiring a house ... I also acknowledge the stage in which we have reached so far.

This is also confirmation of the offer to purchase which we have signed yesterday for an amount of R1.320 mil. This is in relation to the plan as we have discussed which will include "Ghost Plan". The Ghost plan will reflect future plans on development outlined below:

- Room on top of the garage
- Another room downstairs at the back of the garage with en suite.

I hope I am capturing our discussion and understanding correctly

Ann."

20. Ms Coetzee agreed that this letter correctly recorded the future developments, but she lamented the fact that no one picked up on the incorrect

reference in paragraph 1 of Annexure "A" to a "Plan 8". It is this mistake, she explained, which the plaintiff seeks to have rectified.

21. Concerning the agreed upon sketch plan itself she could not recall if, when annexure "A" went to Mr Ngebulana to sign it, an attached plan was included but she was in any event adamant that the plan upon which the defendant settled existed and that he would have received a copy as well as the bank and the attorneys. In response to the suggestion under cross examination that she never ever attached a plan (any plan) she asserted: "No we did because you can't, the bank won't approve a bond without a plan and all the necessary documents attached".

22. Therafter Mr Scheepers prepared the municipal building plan which evolved from plan "option 5 [????? m²]" and submitted it for approval to the municipality. It was passed on 20 July

2007. He noted however that for a reason he could not explain the bottom bedroom 4 and en suite bathroom had been left off the construction plan even though it was supposed to have been included in the second phase of development.

23. Mr Scheepers denied most emphatically the defendant's version put to him that after DEF1 (on his version) was agreed upon, he subsequently

told him that it was impossible to do the building in two phases and that as a consequence he (Mr Scheepers) fiddled with the plans and compromised here and there so that the defendant could still get the main bedroom and en suite bathroom plus the slab above the garage built at the same price of R900 000.00.

24. No doubt on the back of paragraph 5.6 of the defendant's rejoinder (filed of record on 3 February 2011),[8] Mr Friedman who appeared for the defendant in argument made much of the provisions of section 13(1) of the Housing Consumers Protection Measures Act, No. 95 of 1998 ("the act") in support of his claim to the invalidity of the building agreement, whereas in his

plea the defendant had, quite belatedly, only alleged a lack of consensus due to the fact that the parties had not agreed on the

subject matter of the building to be constructed – or at least could not have because the wrong plan was referenced. His secondary argument is that there is no agreement therefore that is capable of being rectified on either party's version. As such, so it was suggested to me, rectification does not come into play.

25. The general principle is that an agreement, invalid for want of compliance with formalities prescribed by statute cannot be validated

by rectification.[9] However vagueness in an agreement between the parties (not voided per se by the failure to comply with a statutory prescript) is not a bar to rectification. The question which arises therefore is whether the failure to meet the statutory requirements of form applicable to building contracts in terms of the act renders annexure "A" void. If it does, then the agreement cannot be rectified.

26. In *Hubbard v Cool Ideas* 1186 CC[10] the Supreme Court of Appeal was confronted with the question what consequence follows upon a home builder failing to register in terms of the act, required by the provisions of section 10(1) and (2),[11] but who nonetheless undertakes a building project. In considering the contractual illegality posed by that homebuilder's

failure to have so registered to carry on business Ponnar JA, writing the majority judgment, adverted to the correct approach to be adopted in that regard as follows:

"[10] One of the earliest cases that had to consider the consequence for the validity of an act that has taken place in conflict with a statutory prohibition was Schierhout v Minister of Justice 1926 AD 99 at 109 in which Innes CJ said:

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect."

But as Nugent JA pointed out in *Lupacchini NO v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at paragraph [8]:

". . . [T]hat will not always be the case. Later cases have made it clear that whether that is so will depend upon the proper construction of the particular legislation. What has emerged from those cases was articulated by Corbett AJA in *Swart v Smuts* [1971 (1) SA 819 (A) at 829C–G].

'Die regsbeginsels wat van toepassing is by beoordeling van die geldigheid of nietigheid van 'n transaksie wat aangegaan is, of 'n handeling wat verrig is, in stryd met 'n statutêre bepaling of met verontagsaming van 'n statutêre vereiste, is welbekend en is alreeds dikwels deur hierdie Hof gekonstateer (sien *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Sutter v Scheepers* 1932 AD 165; *Leibbrandt v South African Railways* 1941 AD 9; *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (AD); *Pottie v Kotze* 1954 (3) SA 719 (AD), *Jefferies v Komgha Divisional Council* 1958 (1) SA 233 (AD); *Maharaj and Others v Rampersad* 1964 (4) SA 638 (AD)).

Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige

transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang. In die algemeen word 'n handeling wat in stryd met 'n statutêre bepaling verrig is, as 'n nietigheid beskou, maar

hierdie is nie 'n vaste of onbuigsame reël nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die Wetgewer geen nietigheidsbedoeling gehad het nie."

27. He held, with regard to the construction of the relevant sections of the act, that the home builder's failure to have registered in that instance did not invalidate the agreement in question between the home builder and the housing consumer. On the contrary, so he held, a failure to comply with these provisions simply disentitles home builders who are not registered from receiving any consideration. Any such claims for payment "without exception" are hit by the prohibition.
28. Section 13(1) of the act, which applies by virtue of the fact that the plaintiff is a home builder and was concerned in this instance with the building of a new home,[12] provides that:

"(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 consumer; and

- (c) shall have attached to the written agreement as annexures, the specifications pertaining to materials to be used in construction of the home and the plans reflecting the dimensions and measurements of the home, as approved by the local government body: Provided that provision may be made for amendments to the plans as required by the local government body.
29. The provisions of subsection 2 are also relevant to the point which I make below:
- (2) The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that—
- (a) the home, depending on whether it has been constructed or is to be constructed ... is or shall be constructed in accordance with -
- (i) ...
- (ii) ...
- (iii) ...
- (bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1)."[13]
30. Although not pleaded with any specificity (section 13(1) of the act was not directly relied upon by the defendant in his rejoinder), Mr Friedman submitted that it was "common cause" that in all respects subsection
- (c) has not been complied with since there are no specifications pertaining to the materials, or plans reflecting the dimensions and measurements of the home. He added that there were no approved plans by the municipality but I cannot see how that can be contended. Not only did the defendant admit as much on the pleadings, but the evidence established that a plan (even on the defendant's version) was approved.
31. That being the case, so he argued, the agreement was invalidated.
32. Section 18(3) provides that "(t)he failure to comply with a provision of subsection
- (1) (a) and (c) shall not render an agreement referred to in that subsection invalid". Mr Friedman submitted however that the "escape provision" provided by this subsection does not afford protection to a home builder where he has failed to comply with the entire subsection, rather than just "a provision thereof". The failure "in all respects" to comply with section 13(1)(c) renders the agreement hopelessly invalid.
33. He added further (yet another string to the defence which did not form part of the defendant's pleaded case) that having regard to the provisions of the Code of Conduct promulgated under the act, albeit that this was published some four months after the agreement was concluded, the parties' own agreement fell short from the perspective of

what the material terms are referred to therein.[14] If I understood his argument correctly this deficiency cannot be saved by the provisions of subsection (3) which deliberately omits any reference to a failure to comply with subsection (1)(b).

34. I am not persuaded, having regard to the unchallenged evidence, that the sketch plan agreed upon (“option 5 [????? m²]”) did not form part of annexure “A”. Once the parties had put their minds to it on 5 December 2006 the defendant confirmed by way of his email to Ms Coetzee that “a plan”, which was to include a ghost plan, was bespoke when he signed the agreement. Even if some criticism can be levelled at the witness’ clear lack of recall in this regard it is in my view improbable that the agreement embodied in Annexure A (after acceptance on 5 December 2006) was unaccompanied by any drawing whatsoever as this was a necessary document to generate the finances and to move the construction forward. The bank would have sought it as well as the conveyancer attending to registration of transfer of the land to the defendant. Indeed, the land sale agreement stipulates that the house plan is deemed to form “an integral part” of the deed of alienation. The situation was not helped by the long lapse of time which passed between the agreement being finally concluded and the defendant’s belated plea (on 4 May 2009) as to the invalidity thereof. Reliance in the plaintiff’s pleadings was understandably placed on “a copy” of annexure “A”.
35. Further, upon a clear reading of the provisions of section 13(1)(c) of the act, what is required to be attached - no doubt for purposes of the warranty envisaged by subsection 2[15] is the plan “as approved by the local governing body”. Evidently this is not a reference to a provisional drawing but the final approved plan which is unlikely in my view to exist at the earliest stages of offer and acceptance of a building agreement. In this instance a plan exists and was approved by the municipality (with revisions). The approved final plan constitutes the “annexure” which conforms to the statutory requirement specified in subsection 1(c) even if it may not physically have been attached to the agreement. Indeed in my view it would not have existed at the time of the conclusion of the agreement in order to be “attached”. The value lies in my view not in the physical attachment of the plan as an annexure, but the assurance that the home build will conform to the plan as approved which is the blue print for the building. As Mr Scheepers testified the value of the plan in the early stages is only to give a person an idea as to the size of the rooms and the building as a whole, but it is merely a sketch plan. It has no measurements or dimensions and one cannot build according to it. It is not a construction plan.
36. Regarding the specifications pertaining to the materials to be used in the construction of the house Ms Coetzee and Mr Ngebulana were more clearer in this regard that this was an attachment to annexure “A” and that the defendant had probably signed this.
37. Regarding the provisions of section 13(1)(b) which require the material terms to be set out in the parties’ agreement, the essentialia of a fixed cost building contract are to my mind the work to be performed (i.e. the construction of a particular home) and the

remuneration therefor. In this instance the plaintiff agreed to construct a 150 m² house for the defendant for a fixed contract price of R900 000.00. These constitute the only necessary terms in my view in compliance with subsection 1(b) even absent a sketch plan. This is not a vague summary of the conditions but contain the crux of such a building contract. The “financial obligations” of the housing consumer referred to in this subsection can further be nothing other than to pay the fixed contract price agreed upon. If more detail is supposed to be reflected than that then the legislature should have said so more clearly. In any event however clause 2 of the agreement in this instance refers in some detail to the manner of payment and it is not understood in what regard the agreement lacks for want of compliance as was suggested by Mr Friedman. Again this was not an issue raised by the defendant on his pleadings.

38. If I am mistaken in my view that the plaintiff has substantively complied with the provisions of section 13(1)(c) of the act, I return to the approach to be adopted as set out in *Hubbard v Cool Ideas* 1186 CC, supra. By parity of the reasoning a failure to comply strictly with the provisions of section 13(1)(a) and (c) (whether by failing to physically attach the specifications or the plan or both) do not in my view invalidate the agreement. This is because not only do the provisions of subsection 3 says so in clear terms, but also because the home consumer will otherwise be without the protection afforded by subsection (2) to enforce the warranties deemed to be included and without the remedy afforded by section 13(2)(b), as will the succeeding housing consumer who is the beneficiary of the provisions of section 13(4), all of which is against the express purpose of the act, namely to afford protection to housing consumers. Ostensibly the only offence against a building contract which is to be visited with nullity is a provision in it “that excludes or waives any provision (of section 13)”.^[16] It is counter intuitive for the defendant to argue against the validity of annexure “A” when, based on these bulwarks in the act, he relies for his defences and counterclaim on its force.
39. Further and in any event the prohibition is not directed at the validity of the agreement but at the home builder who will in the event of an agreement not being concluded in terms of subsections (1) and (2) not be entitled to “demand or receive from (the) housing consumer any deposit for the construction” or to “receive any other consideration unless the provisions of section 14(1) or (2), as the case may be, have been complied with”.^[17] Section 14 deals with the enrolment of a building project. Subsection 1 of that section precludes the home builder from commencing the construction of certain categories of homes before the council has issued a certificate of enrolment in respect of it.
40. In this instance both stages, deposit and enrolment, have long since passed and in a sense serve to confirm that the council had no problem with the form or substance of the agreement.

41. Consequently I find that the agreement is not invalid for want of compliance with any of the provisions of section 13(1). On the contrary the complained of failure (even assuming there to be any) is saved by the provisions of section 13(3). Nothing therefore stands in the way of rectifying the agreement which the plaintiff needs to do in order to enforce its claim against the defendant.
42. In respect of the plaintiff's claim for rectification it bears the onus to prove in essence that the written agreement (annexure "A") does not correctly express what the parties had intended to set out therein.[18] In this regard there is no dispute that annexure "A" mistakenly referred to plan 8 which did not reflect the common intention of the parties on 5 December 2006 when the defendant accepted the plaintiff's counter offer per Mr Ngebulana.
43. The unchallenged evidence is that the parties settled upon plan "option 5 [????? m²]." with the coarse deviations and or additions indicated thereon which proposed a two phase build to assist the defendant who could not afford a 207m² house at the fixed building rate at the time.
44. Regarding the final issue I was called upon to decide, the evidence also establishes in the plaintiff's favour that a reference to the square meterage is a reference to the finished building so to speak, from external wall to external wall. This is the standard basis of referral in the industry and was also the basis explained to the defendant in the negotiations leading up to the conclusion of the building agreement.
45. Accordingly the plaintiff succeeds in respect of the three separated issues.
46. Concerning the costs of the hearing Mr Ebersohn who appeared for the plaintiff argued that these should follow the result. The courts have, in appropriate cases, issued a costs order in favour of a plaintiff who succeeds on the merits, but this is not an inflexible rule and the facts of each case must be taken into account to consider whether such an order should follow at this stage.[19] Whilst the declarator which I intend to issue resolves at least the aspect of the validity of annexure "A" (i.e. the common intention of the parties at least as at 5 December 2006) and the basis upon which the reference to the size of the house is to be considered, there yet appears to be a number of issues which remain for determination upon trial, for example, how the additional area came to be built (upon what basis or whose authority); the size of the additional area; whether the defendant is liable on one or other of the numerous basis pleaded by the plaintiff to remunerate it and, ultimately quantum, if any. Allied to the latter aspect is the question whether the work was incomplete or sub-standard. The answer to these remaining issues will not flow naturally from the declaratory which deals with the least of these. As an aside I venture the suggestion that the issue of the validity of the agreement was just a storm in a teacup when regard is had to the evidence which Mr Friedman suggested the defendant would adduce and his pleaded case that whatever agreement was reached in the first instance was later varied. It appears in my view therefore to be prudent to reserve the issue of costs.

47. At the close of the plaintiff's case the defendant withdrew its counterclaim (in essence a claim for damages consequent upon the plaintiff's alleged failure to build without delay) which was conditional upon the court finding that a valid building agreement had been entered into. Mr Friedman recorded at the hearing that what the defendant meant is that he was no longer confident concerning this claim. Mr Ebersohn submitted that in the result the plaintiff was entitled to absolution from the instance in this respect together with an order for costs in the plaintiff's favour. I made no decision in this regard at the time, but upon reflection this request concerns a development having no bearing on the separated issues. Therefore I decline to make any order thereanent.
48. In the result I issue the following order:
- (1) It is declared that annexure "A" to the plaintiff's particulars of claim constitutes a valid and binding agreement capable of being rectified;
 - (2) Paragraph 1 of annexure "A" is rectified to read as follows: "The builder will erect for the Owner a building in accordance with the plans and specifications hereto marked plan "Option 5 [????? m²]" and in the construction of the building situated on Erf 5727 (No. 16) (measuring 150m²), will comply with the said detailed plans and the specifications contained thereon."
 - (3) The effect of the measurement of 150m², stated in paragraph 1 of annexure "A" to the plaintiff's particulars of claim, is that the house which the plaintiff will construct for the defendant will have a gross building area of 150m².
 - (4) The costs are reserved.

B C HARTLE

JUDGE OF THE HIGH COURT

Date of hearing : 3 & 4 December 2012 (last heads of argument filed on 4 April 2013)

Date of Judgment : 2 October 2013

APPEARANCES:

FOR THE PLAINTIFF : Mr Ebersohn of Ebersohn Attorneys care of Bate Chubb & Dickson Inc., Suite 3, Norvia House, 34 Western Avenue, Vincent, East London, ref. Jason Chambers/B127/W6887.

FOR THE DEFENDANT : Mr Friedman of Friedman Scheckter Attorneys care of Don Maree Attorneys, 19 Tecoma Road, Berea, East London, ref. Don Maree.

- [1] The plaintiff claims that the defendant got more than he bargained for when a building of 207m² was constructed instead of a building measuring 150 m² which was contracted for. The defendant says however that he got exactly what he agreed to pay R900 000.00 for.

- [2] Evidently the chief dispute between the parties, which I was informed from the bar would curtail the other issues on the pleadings, was whether a valid agreement exists (because it was not the common intention of the parties that the house would be built in accordance with Plan 8 referred to in paragraph 1 of Annexure “A”) and whether that agreement stood to be rectified on either of the parties’ versions. I was informed that both agreed that there was a need to rectify the agreement; the question was just which plan represented their common intention or, to put it differently, what building was the defendant supposed to have received for the R900 000. 00 lump sum. Although the plaintiff pleaded estoppel in its replication to the defendant’s plea it is unnecessary by virtue of the decision which I make herein for me to determine whether the defendant is estopped in law from denying that there was consensus on the specific basis as pleaded by it. The estoppel plea was intended to be conditional upon the claim for rectification not succeeding.
- [3] In the defendant’s original plea delivered on 4 May 2009 he admitted that a valid and binding agreement had been concluded.

An absence of consensus in respect of the agreement was not relied upon until much later.

- [4] Perhaps the defendant meant to refer to annexure “A” in this respect but it could also be a reference to the plan the plaintiff purports to rely on.
- [5] This could be a reference to the original agreement (annexure “A”), or to the plan the plaintiff relies on (which it also refers to as annexure “B” in its pleadings).
- [6] The manner in which the defendant has pleaded is confusing. He could mean the putative agreement in annexure “A” (which lacks because it refers to a plan 8 which does not represent the common intention of the parties) or the plan DEF1. He appears to mean that the agreement which should have come into effect, on his version, is the one which was subsequently varied. This might be an attempt to explain why on his version the plan approved by the municipality differs from DEF1.
- [7] He bears the onus after all in respect of his competing claim for rectification. See Laws, Second Edition, Vol 5(1), par 147 (p 233 – 234).
- [8] This paragraph reads as follows: “In addition, the defendant repeats the contention that in any event the agreement, besides lack of consensus, is null and void as a result of there being no terms, plans and specifications as contemplated in terms of section 113(2)(a)(iii) (bb) (of the Housing Consumers Protection Measures Act, No. 95 of 1998”. (sic).
- [8] This paragraph reads as follows:

“In addition, the defendant repeats the contention that in any event the agreement, besides lack of consensus, is null and void as a result of there being no terms, plans and specifications as contemplated in terms of section 113(2)(a)(iii)(bb) (of the Housing Consumers Protection Measures Act, No. 95 of 1998”. (sic).

[9] Magwaza v Heenan 1979 (2) SA 1019 (A); Headermans (Vryburg) (Pty) Ltd v Ping Bai

[1997] ZASCA 33; [1997] 2 All SA 371 (SCA); 1997 (3) SA 1004 (SCA); Intercontinental Exports (Pty) Ltd v Fowles

[1999] 2 All SA 304 (A); 1999 (2) SA 1045 (SCA); Greathead v SA Commercial Catering & Allied Workers Union

[2000] ZASCA 142; 2001 (3) SA 464 (SCA).

[10]

[2013] JOL 30478 (SCA).

[11] "10 Registration of home builders (1) 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 that person is a registered home builder. (2) No home builder shall construct a home unless that home builder is a registered home builder."

[11] "10

Registration of home builders

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(b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home, unless that person is a registered home builder.

(2) No home builder shall construct a home unless that home builder is a registered home builder."

[12] See Maurice Leas t/a Build 4 You and Van Kerckhoven & Another

[2008] JOL 21875 (W) in which the court remarked that the liabilities of home builders are restricted to the construction of a new home only.

[13] See also section 13(2)(b) regarding the home builder's obligations and subsection (4) regarding the housing consumer's rights which it cedes to a subsequent housing consumer if the house built is in turn sold or disposed of.

[14] See in this regard the old Code of Conduct published in Government Gazette 29689, dated 16 March 2007 and in particular the provisions

of section 16.8. Mr Friedman also referred to the provisions of section 17.1, but these relate to “additional costs”, defined in section 1 as meaning “... any costs not included in the contract price and which are or may be payable under a fixed cost building contract or sale agreement, such as costs for: Soil testing Engineer’s service Plan drawing Plan approval Transfer (including transfer duty and bond registration) Inspections Electrical cable connection Sewerage connection and other service connections.” These are clearly not in contention in casu.

[15] As well as the direct, the home builder’s liability referred to in section 13(2)(b).

[16] Section 13(6).

[17] Section 13(7)(a) and (b).

[18] Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd

[2004] JOL 12593 (SCA) at para [21].

[19] See Van Der Spuy v Minister of Correctional Services 2004 (2) SA 463, at pages 477 F – 478 C and the cases cited therein.

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