

SOUTH AFRICA / JUDGMENT

De Kock v Olivier (21144/2022) [2024] ZAWCHC 351 (6 November 2024)

[2024] ZAWCHC 351

COURT

Western Cape High Court, Cape Town

BEFORE

M W Janisch

CASE / FILE NUMBER

21144/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN

Case

Number: 21144/2022

In

the matter between:

WILLEM
CHRISTOFFEL DE KOCK
Plaintiff/Applicant
and
MARCO
JOACHEMO OLIVIER
Defendant/Respondent

JUDGMENT

JANISCH AJ:

Introduction

1. The Applicant and the Respondent are respectively the plaintiff and the defendant in an action in which the Applicant (a builder) claims payment of amounts pertaining to a building contract with the Respondent.
2. The Applicant gave notice under Uniform Rule 28(1) of his intention to amend his particulars of claim in various respects. The Respondent having objected to the amendments, the Applicant applies in terms of Rule 28(4) for leave to amend.
3. This was not the first notice of amendment. The Applicant had filed a previous notice to which the Respondent had objected. The Applicant had not proceeded to apply for leave, and the period to do so had lapsed. Thereafter the notice to which the present application relates was filed.
4. I am required to determine the following:
 - 4.1. Whether and/or to what extent the Applicant is entitled to amend his particulars of claim pursuant to the operative Rule 28(1) notice, and the costs implications thereof; and
 - 4.2. The costs implications of the original Rule 28(1) notice which was not persisted with.

The History of the Dispute

5. It is common cause that in April 2021, the Applicant entered into an agreement with the Respondent in relation to the carrying out of what I might neutrally describe as building works on a property in Jongsfontein, Western Cape. The nature and ambit of the agreed building work is central to the current amendment dispute.
6. It is also common cause that the Applicant conducted building works in the period between April 2021 and early December 2021, when disputes arose and the agreement was cancelled.
7. In June 2022, summons was issued out of this court in the name of “CJ Konstruksie” as plaintiff. This was pleaded to be the trading name of a close corporation called “Bold ‘n New Investments 47 CC.” The Respondent was cited as defendant.
8. The particulars of claim alleged the conclusion of an oral building

contract between the CC and the Respondent in terms of which the CC “agreed to construct a house for Defendant at Erf 1[...] Jongensfontein”. The oral agreement was pleaded to be “based on” a two-page quote which was annexed. This was on the letterhead of CJ Konstruksie and entitled “kwotasie vir bou van nuwe woonhuis te Strandstraat, erf nommer 1[...], Jongensfontein, Stilbaai.” It listed various included materials, various excluded items, and a total quoted sum of R3,387,911.38.

9. The CC averred that certain additional work was agreed upon later; that the CC commenced the building work; and that the Respondent repudiated the contract by instructing the CC to cease building. The CC claimed damages for the repudiation in the sum of R576,022.00, as well as R15,932.01 in respect of building materials delivered to the site and not paid for. The damages claim was supported by a report from a quantity surveyor, Mr N Monk, which purported to identify the value of work completed but not paid for.
10. The Respondent excepted to the CC’s particulars of claim. In overview, he took the point that the building contract was subject to the terms of the Housing Consumers Protection Measures Act 95 of 1998

(“the Act”), that the plaintiff was therefore obliged to allege that it was a registered home builder as defined by the Act, and that having failed to do so, the particulars of claim disclosed no cause of action. There was a second ground of exception that the alleged oral agreement did not comply with section 13 or section 14 of the Act and therefore that no cause of action was disclosed.

11. The plaintiff (the CC) withdrew the action and tendered costs.
12. A new summons was then issued in the matter now before me. The main differences are as follows:

12.1. Although the cause of action is based on precisely the same building project as addressed in the original summons, the plaintiff is the Applicant in his personal capacity, trading under the name of “CJ Konstruksie”.

12.2. There is an averment that the Applicant was, at all relevant times, a registered home builder as envisaged in the Act.

12.3. The same written quote is pleaded as the basis for the agreement, which is now described as being partly oral and partly in writing (the quote being the written portion).

12.4. The claims for work completed and not paid for (R576,000.00) and material delivered to site (R15,932.01) are repeated, but the quantity surveyor report is not mentioned or annexed.

12.5. There is also a new claim for damages arising from alleged loss of profit on the building work as a whole (had the contract not been cancelled) in the amount of R134,121.80.

13. The Respondent filed an exception to the particulars of claim. Contending that the written quote refers to the building of a “woonhuis,” he averred first that the agreement as alleged does not comply with the formalities required in section 13 of the Act and is invalid or

unenforceable. A second ground of exception was that there is no averment that the Applicant complied with the enrolment requirement of section 14(1) of the Act before commencing construction, with the result that he is not entitled to any consideration by virtue of section 13(7)(b) of the Act.

14. In response to the notice of exception, the Applicant filed his first Rule 28(1) notice. Various amendments were proposed, all of which aimed to distance the building project from the Act. These included:

- 14.1. averments that the provisions of the Act do not apply to the contract or the construction work, because a dwelling unit was already in existence when the contract was concluded and that “alterations and renovations” did not constitute the construction of the dwelling unit as contemplated in the definition of “home” in section 1 of the Act;

- 14.2. the deletion of references to the contract being for “the construction of a dwelling” and the insertion of references to “alterations and renovations to an already existing dwelling; and

- 14.3. the inclusion of averments that the claims for materials and damages were not for “consideration” for purposes of the Act, and that the claim for building work done was not for construction of a home, since there was a dwelling already in existence.

15. The Respondent filed an objection to the proposed amendments. He raised 10 grounds of objection in all. I shall not tabulate them all here. Central themes were that the proposed amendment of the nature of the contract was inconsistent with the written quote, and there was no claim of rectification; that the proposed amendment was mala fide and in fraudem legis; that he still failed to plead compliance with the enrolment requirements of section 14(1); and that the amounts claimed constituted “consideration” which could not be claimed under the Act.

16. The Applicant did not bring an application for leave to amend as envisaged in Rule 28(4). Instead, after the 10-day period in Rule 28(4) expired, he filed a fresh Rule 28 notice.

17. The amendments which are proposed under this notice, and which are now the subject of the application before me, were largely the same as what was contained in the prior notice. The main differences were as follows:

- 17.1. It was now proposed to plead for the rectification of the alleged written portion of the agreement to reflect “veranderinge en restorasie” instead of “bou van nuwe woonhuis”;

- 17.2. A specific averment was proposed to be added that because the provisions of the Act do not apply to the contract, it was not necessary to enrol the project under sections 14(1) and 14(2) of the Act;

17.3. It was proposed to plead two new substantive paragraphs in the alternative and on the assumption that the Court were to find that sections 13 and 14 of the Act need to be complied with. The first is that the Respondent is estopped from relying on non-compliance by virtue of a representation that he did not require such compliance, on which the Applicant relied in not enrolling the project. The second is that the Respondent waived his right to rely on section 13(7), despite having knowledge of his rights in this regard.

18. Predictably, the Respondent filed a notice of objection to the new Rule 28 notice. This time, there were 11 grounds of objection. I will refer to them where necessary below. Central to them was however an averment, in relation to the revised description of the agreed work, that “no admissible evidence exists which could possibly prove the allegations which the [Applicant] seeks to introduce regarding the nature of the agreement, or the work performed.”
19. This time, the Applicant persisted with his amendments by bringing an application in terms of Rule 28(4), thereby seeking leave to amend his particulars of claim in respect of all of the proposed amendments.

Legal principles: Amendment of Pleadings

20. The general principle in relation to amendments to pleadings was stated as follows in *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC) in paragraph [9]:

“The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in Commercial Union Assurance Co Ltd v Waymark NO. [1995

- (2) SA 73 (Tk) at 76D - 76I]. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'. ... The question in each case, therefore, is, what do the interests of justice demand?”*
21. With reference to the above authority, it has been stated that the court’s power to allow material amendments is limited only by considerations of prejudice or injustice to the opponent (*Media 24 (Pty) Ltd v Nhleko* [2023] ZASCA 77 in paragraph [16].
22. In the passage from *Commercial Union v Waymark* endorsed in *Affordable Medicines Trust* (*supra*), the following further guidance is provided in relation to when an amendment will be permitted:

“In Rosenberg v Bitcom 1935 WLD 115 at 117 Greenberg J, as he then was, stated:

'Although it has been stated that the granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the Courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties.'

(My emphasis.) In *Zarug v Parvathie* NO 1962

(3) SA 872 (D) at 876C Henochsberg J held:

'An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay.'

Caney J stated in *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967

(3) SA 632 (D) at 641A:

'Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.' ”

23. Further support for these requirements is found in the full bench judgment of this Court in *Vinpro NPC v President of the Republic of South Africa* [2021] ZAWCHC 261 in paragraph [25]:

“On this score, it is trite law: that a court is vested with a discretion as to whether to grant or refuse an amendment: that an amendment cannot be granted for the mere asking thereof: that some explanation must be offered therefor: that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously, some reason must be given for the delay: that that party seeking the amendment must show prima facie that the amendment has something deserving of consideration: that the party seeking the amendment must not be mala fide: that the amendment must not be the cause an injustice to the other side which cannot be compensated by costs: that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is no reason, in itself, for refusing the application.”

24. One of the circumstances where the other party would necessarily be prejudiced is where an amendment would render a pleading excipiable. Such an amendment ought not to be allowed, save in exceptional cases,

where the balance of convenience or some other reason might render another course desirable. See e.g. *Cross v Ferreira* 1950 (3) SA 443 (C) at 450 E-G.

The Main Application

25. As stated, the Respondent raised 11 grounds of objection to the various amendments. Some of them overlap and one of them is not persisted with.
26. It however seems to me that the central issue in this application is that which flows from the fourth to sixth grounds of objection. For reasons which will become apparent, it is convenient first to address these objections and the proposed amendments to which they pertain.

The Fourth to Sixth Grounds of Objection: The Nature of the Contract

27. The fourth ground of objection is to the proposed amendment to the description of the contract from “the construction of a dwelling” to “alterations and renovations to an already existing dwelling.” The fifth ground objects to the associated rectification of the written quote to reflect a similar description of the project. The sixth ground objects to the proposed averment that the “alterations and renovations” did not constitute the construction of a dwelling unit for purposes of the Act.
28. Both the fourth and fifth objections make the express averment that “no admissible evidence exists which could possibly prove the allegations which the plaintiff seeks to introduce regarding the nature of the agreement, or the work performed”. In other words, it is expressly stated that the Applicant cannot put up evidence that would support the contention that what was agreed upon and what occurred, was not the construction of a new dwelling but the alteration or renovation of an existing dwelling.
29. Accordingly, the Respondent objects to an attempt to change the already pleaded cause of action by pleading facts (and legal conclusions based on those facts) which would, on the face of it, place the building project outside the ambit of the Act.
30. The Act, which is consumer protection legislation, regulates “home builders” by requiring them to be registered with the National Home Builders Registration Council (“the Council”). The “business of a home builder” is defined to mean, inter alia, “to construct or to undertake to construct a home or to cause a home to be constructed for any person”. A “home”, in turn, is defined to the extent relevant as “any dwelling unit constructed or to be constructed by a homebuilder ... for residential purposes or partially for residential purposes ...”
31. A person who undertakes the construction of a home is not entitled to any consideration in respect thereof unless they are a registered home builder (section 10(1)(b)). Moreover, in terms of section 13(7)(b), a home builder may not receive “any other consideration” unless the requirements of sections 14(1) or 14(2) have been complied with. These pertain to the enrolment of the project with the Council.

32. It follows from this that where one is dealing with claim for consideration arising from an agreement for the “construction” of a “home” as defined, unless one can demonstrate both registration as a home builder and the enrolment of the project, such a claim cannot succeed (cf. *Hubbard v Cool Ideas* 1186 CC 2013 (5) SA 112 (SCA) in paragraph [14]).
33. As stated, the Applicant seeks to plead facts which differentiate the subject of the agreement from the “construction” of a “home.” The thesis is that the mere alteration or renovation of an existing dwelling falls outside that ambit.
34. Counsel for the parties could not refer me to any authority addressing the limits of the Act with reference to entirely new buildings, on the one hand, and renovations of existing buildings on the other. I am prepared to accept for present purposes, but without deciding the point, that not every item of work done by a builder or artisan or tradesperson in relation to a dwelling unit will necessarily constitute the construction of a home for purposes of the Act. Examples given in argument as to what would probably fall outside the Act involved the ad hoc replacement of windows or painting works. On the other hand, clearly where a person constructs an entirely new home from the foundations up, that would fall squarely within the ambit of the construction of a home. Between these extremes may be a range of factual circumstances which could fall on one or the other side of the dividing line. The extent of any pre-existing structure, and the nature of the work to be done in relation to it (e.g. structural as opposed to cosmetic) will be instructive and each case will turn on its own facts. Given the consumer protection flavour of the Act, however, I would venture to suggest that a court will not be quick to accept that a project involving significant building work, including laying foundations and installing structural elements, may be freed from the strictures of the Act merely because elements of an existing dwelling are retained.
35. It is however not necessary for me to say anything more about this. Assuming that the point is in principle arguable, the key question is whether the Applicant should in the present case be given leave to

plead the facts on the basis of which he would make that argument.

36. The first point to make in this regard is that the proposed amendment is material. The nature of the contract that is proposed to be pleaded (changing from the express construction of a new dwelling to mere “alterations and renovations” of an existing dwelling) is fundamentally different from what is currently on the pleadings.
37. Apart from the fact that the written quote itself (drawn up by the Applicant) refers to “bou van nuwe woonhuis”, I am entitled to have regard to the quantity surveyor’s report annexed to the original particulars of claim, which referred in the cover page to a “new dwelling”. And of course the current particulars of claim refer unashamedly to the agreement being for the construction of a dwelling – which reflects the language of the Act – with no reference to an existing dwelling.

38. It is also significant that in the objection, the Respondent averred that there was no evidence that could justify the contention that what was agreed involved a renovation of an existing dwelling.
39. Against these factors, it was in my view incumbent upon the Applicant, in his application, to provide some proper basis for being permitted to make this substantial change in approach. To borrow from the above authorities, he had to offer an “explanation ... as to why the amendment is required” (*Zarug v Parthavie* (supra)); having already made his case in his pleading, if he wished to change or add to this, he had to “explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required” (*Trans-Drakensberg Bank Limited* (supra)); and he had to provide his explanation “in the founding affidavit filed in support of the amendment application (*Vinpro NPC v President of the Republic of South Africa* (supra)).
40. Tested against these standards, the Applicant’s case put up in his founding papers in support of the core amendments is woefully inadequate. The high-water mark of factual averments explaining what gave rise to the change, and on what it is proposed to be based, is a paragraph which reads as follows:

“The question whether the alterations and renovations constituted the construction of a dwelling or not is a question of fact and not one capable of resolution on the basis of notices, as the Respondent wishes the court to do.”

“The same argument applies to the allegation that the NHBRC does not require alterations and renovations of this nature to be registered.”

41. In his founding papers, the Applicant has therefore failed to explain on what factual basis he now contends that the work contracted for amounted only to “renovations and alterations” to an “existing dwelling.” One would have thought that, particularly in the face of an averment that there is no evidence to support this proposed pleading, he would put up some facts to demonstrate that he has a triable case in this regard, or merely that he has “something worthy of consideration”. For example, he could have described the site of which he took possession, explained what the existing dwelling looked like, and given some sense of how it was altered and renovated. Nothing of the type was done. He has also not explained why he originally pleaded a different positive case of construction of a dwelling. His statement in a replying affidavit that “there was, in fact, an existing dwelling on Erf 1[...], Jongensfontein, at the time when I contracted with the Respondent,” apart from coming too late, is also too bland to give any comfort that one is really dealing with a renovation, since the Court is left in the dark as to what part (if any) that existing dwelling played in the construction that followed.

42. Moreover, in the founding papers, no factual basis is provided for the pleaded rectification. A rectification involves proving a mutual error by both parties to a written agreement (*Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 294). To establish some basis for this new claim, it is therefore necessary to provide a factual basis for a finding that both the Applicant and the Respondent were subject to the same error and that both intended the quote to read as is now averred. The application does not deal with this aspect at all.
43. This is not to say that to be entitled to amend, the Applicant had to prove his case in the application. But to establish that the amendment was in good faith and raised an issue worthy of consideration, he had to do more than he did. He seems to have laboured under the misapprehension that an amendment is there for the asking. As the abovementioned authorities show, that is not the case.
44. It is true that the Respondent also did not put up facts in his answering affidavit that refuted the proposed new formulation of the contract and project. However, given the absence of any real case to meet in the founding papers, I cannot criticise him for this.
45. In the circumstances, the Applicant has not in my view overcome the burden of demonstrating that he has a triable case, as a matter of fact, in the terms proposed. That is not to say that he would never be able to do so. I have no basis to conclude that the necessary facts to establish such a pleading are not present. But on what was placed before me, I cannot draw such a conclusion.

46. It was suggested in oral argument by counsel for the Applicant that refusing an amendment of this type is pointless because the Applicant could withdraw the action and start again, without having to meet the

requirements for amending his pleadings. That is of course his right, as long as prescription does not preclude such a claim. He could also, if time permitted, launch a fresh and better-motivated application. But the mere fact that the Applicant may otherwise be able to produce a set of pleadings based on a type of contract that does not fall within the scope of the Act cannot warrant allowing an amendment for which the requirements have not been met.

47. It follows that I am not prepared to grant the Applicant leave to make the amendments in paragraphs 2, 3, 4, 5 and 6 of the Rule 28(1) notice. The same applies to the proposed new paragraph 23 forming part of paragraph 7 of the Rule 28(1) notice.

Impact of the findings on the other proposed amendments

48. As I understand the Applicant's approach, as debated in oral argument, the core amendments dealt with above are crucial for the ongoing pursuit of his claims. Essentially, counsel conceded that the claim had to be located outside the Act since if the Act does apply, it cannot be demonstrated that the building project was enrolled, and that would mean that any claim for "consideration" would not be competent.

49. The practical result of the conclusion I have reached on the fourth to sixth grounds of appeal is therefore probably that if the Applicant is minded to continue with his claim, he will either bring a fresh application for all the amendments, or start from scratch with a new summons.
50. Be that as it may, the remaining proposed amendments are before me. I therefore propose to address them briefly, on the assumption that the Applicant would still wish to pursue them without the core amendments

being made, i.e. on the basis of a contract for the construction of a new dwelling – which presupposes that the Act applies.

Paragraph 1 of the Rule 28(1) notice

51. The first amendment involves replacing the averment that the Applicant was registered as a home builder with one that avers that the Act does not apply to the contract, but in any event that he was so registered for the whole period of the contract, alternatively until September 2021 whereafter the Council made his further registration “impossible” despite his efforts to obtain a registration certificate.
52. On the face of it, in the absence of the core amendments, the averment that the Act does not apply to the pleaded contract for the construction of a dwelling is unsustainable. I would therefore not be inclined to grant leave to make that averment.
53. On the assumption that the Act is applicable, I see no reason why the Applicant should not be permitted to plead the alternatives regarding the period of his registration. The Respondent’s sole objection

to this is that this amounts to a pleading of mutually inconsistent versions which prejudice the Respondent in pleading thereto.

54. There is no prejudice in having to plead to such alternative averments, if necessary with denials that will compel the Applicant to prove his registration status in evidence. I note further that the two versions are not entirely inconsistent with one another, at least in relation to the period up to September 2021.

Paragraph 7 of the Rule 28(1) notice

55. The seventh ground of objection addresses the proposed inclusion of paragraphs 21 to 23.
56. I have already concluded that leave should not be granted to include paragraph 23, that being premised on the averment of a renovation rather than the construction of a dwelling.
57. As regards paragraphs 21 and 22, however, the Applicant may well persist with these contentions which are, effectively, that even if the Act applies to the contract, the amounts there claimed do not constitute “consideration” as envisaged in the Act.

58. As regards the merits of such claims, without making any finding in this regard, I can see that there may be an argument for why a claim for payment for goods merely delivered to site is not consideration for building work. And while I have significant doubt as to whether a damages claim based on projected loss of profit can fall outside the notion of “consideration,” because a profit share would be drawn from contract payments made, I have not been provided with detailed argument on the point and do not wish to pre-judge it in this context.
59. I would therefore be inclined to grant leave to include paragraphs 21 and 22.

Paragraph 8 of the Rule 28(1) notice: estoppel and waiver

60. The Applicant seeks leave to introduce a new paragraph 24 in which he would plead, pre-emptively, an estoppel which proceeds from the premise that the Act is held to apply to the building contract. The contention is in essence that the Respondent represented that he did not require compliance with the Act in the form of enrolment of the project, so as to avoid having to pay the registration fee, and that the Applicant relied on this to his detriment by not enrolling the project.
61. In support of pleading in particulars of claim what would usually be found in a replication (on the basis that estoppel typically operates as a shield rather than a sword), the Applicant relied upon the approach of Wallis AJ in *Makate v Vodacom Limited* 2016
- (4) SA 121 (CC), in which, albeit in a minority judgment, he held that there could be no criticism of pre-emptively pleading that estoppel applies where one knows that a defence of, in that case, lack of authority would be pleaded (see paragraphs [121] and [122]).
62. That might well be so as a point of pleading. However, on the present facts, I have considerable doubt as to whether the averments which are sought to be pleaded would competently establish an estoppel. This is so because it has consistently been held that one cannot, through an estoppel, render lawful conduct that is otherwise unlawful

under a statute in the public interest.

63. The principle was expressed as follows in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Limited* 2008 (3) SA 1 (SCA) in paragraph [16]:

“It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel (Trust Bank van Afrika Bpk v Eksteen 1964

- (3) SA 402 (A) at 411H - 412B), for to do so would be to compel the defendant to do something that the statute does not allow it to do. In effect

therefore it would be compelled to commit an illegality (*Hoisain v Town Clerk, Wynberg* 1916 AD 236).”

64. Section 13(7)(b) of the Act prohibits a home builder from receiving consideration where the requirements of section 14(1) have not been met. As stated, this is consumer protection legislation and it clearly operates in the public interest. It appears to me that there are strong arguments to the effect that an estoppel cannot permit the Applicant to receive payment of an amount to which he is not entitled by operation of statute.
65. It is however unnecessary for me to make a final decision in this regard, because, similarly to the case with the core amendments, the Applicant has not sought to make out any case in his founding papers regarding the factual averments proposed to be pleaded under estoppel. I am therefore unable to conclude that he has a triable factual case to raise in this regard. As with the other refused amendments, this does not mean that he will be unable to plead or sustain such a defence in due course, but on the papers before me, I am not satisfied that he has met the standard required for obtaining leave to amend.
66. The Applicant also seeks leave to introduce a new paragraph 25 in which he would plead, again pre-emptively, that the Respondent waived his right to rely on section 13(7) of the Act. The waiver is pleaded to have been expressed through conduct on the basis that despite having knowledge of sections 13 and 14 of the Act, the Respondent did not insist on compliance, did not prevent the commencement of construction, and accepted and took possession of the construction

work.

67. I harbour similar doubts about the legal viability of reliance on a waiver in these circumstances as I do about the proposed estoppel. It has been held that waiver cannot properly operate to renounce a right

contrary to law, or to effect something expressly forbidden by statute (see *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719 at 734-735). The effect of the waiver as pleaded would be to permit the Applicant to receive consideration in respect of the carrying out of unenrolled construction work where the Act specifically forbids this.

68. Once again, however, I need not decide this point finally, given the paucity of the factual case put up in the founding affidavit as to why the waiver argument raises something worthy of consideration. Once again I do not say that the Applicant may not be able successfully to plead and rely on this point, but not on the papers before me.

Costs of the Main Application

69. In the ordinary course, an applicant for an amendment seeks an indulgence and will be required to pay the costs, including those of reasonable opposition (see *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W) at 347C-E).
70. In the present case, although I would grant leave to make some of the proposed amendments, the application has largely been unsuccessful. I see no reason why the ordinary approach as to costs should not

follow.

71. It was suggested by the Respondent that the costs should be paid on a punitive scale. I am not prepared to make such an order. While I have held that the Applicant has not done enough to establish his entitlement to all the amendments prayed for, I cannot in my discretion conclude that his behaviour has been such as to warrant a costs order on a higher scale.
72. Since the present proceedings commenced before the introduction of the scale of tariffs in Uniform Rule 69(7) read with Rule 67A(3), it is not necessary to fix a scale for counsel's fees. If I had had to do that, however, I would have had no reason to award such costs on anything more than scale A, since this is not a matter of

particular complexity.

Costs of the Aborted Rule 28(1) Notice

73. Finally, as stated, I am requested to make an order as to the costs of the original Rule 28(1) notice which was not persisted with, and which was allowed to lapse.
74. Given the fact that the Respondent's objection succeeded (since no application flowed from it), I am of the view that the Respondent should likewise, on ordinary principles, have its costs in relation to its notice of objection.
75. Here, too, I see no reason to award costs on a punitive or enhanced scale. There was no request to include the costs of counsel.

Order

76. In the premises, I make the following order:

76.1. The Applicant is granted leave to make the amendments prayed for in the following paragraphs of its Rule 28(1) notice:

76.1.1. Paragraph 1 (save for the words "Although the provisions of the Housing Consumers Protection Measures Act, No 95 of 1998 (hereinafter 'the Act') do not apply to the contract pleaded below"); and

76.1.2. Paragraph 7 (proposed new paragraphs 21 and 22).

76.2. Save as aforesaid, the application is dismissed with costs on a scale as between party and party, including the costs of counsel.

76.3. The Applicant is also ordered to pay the Respondent's costs of drawing the notice of objection dated 4 May 2023 on a scale as between party and party.

M W JANISCH

Acting Judge of the High Court

Western Cape Division

APPEARANCES:

For the Applicant: D J Coetsee (Instructed by Malan Lourens Viljoen Inc) For the Second and Third Respondents: F A Ferreira (Instructed by Christi Olivier Attorney) Date of hearing: 29 October 2024 Date of judgment: 6 November 2024 (electronically)

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/de-kock-v-olivier-unknown-topic-awchc-2024>

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