

SOUTH AFRICA / JUDGMENT

HT De Jager Properties CC v National Home Builders Registration Council (30954/2006) [2008] ZAGPHC 315 (1 February 2008)

[2008] ZAGPHC 315**COURT**

High Courts - Gauteng

BEFORE

Hartzenberg

CASE / FILE NUMBER

30954/2006

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Source record**IN THE HIGH****COURT OF SOUTH AFRICA****(TRANSVAAL PROVINCIAL DIVISION)****Date:** 01/02/2008**Case No:** 30954/2006**UNREPORTABLE****In the matter between:**

HT DE JAGER

PROPERTIES CC Applicant

And

NATIONAL HOME BUILDERS REGISTRATION

COUNCIL Respondent

JUDGMENT**HARTZENBERG J:**

- [1] At this stage the applicant applies for an order reviewing and setting aside two decisions of the respondent alternatively of its provincial manager, Limpopo, Nurse L Chavalala, taken on 15 September 2006 and 18 July 2006 respectively. The decisions entailed that the applicant is to provide guarantees of respectively R974 400,00 and R2 305 200 in terms of the Rules promulgated under section 7 of the Housing Consumers Protection Measures Act, No. 95 of 1998 ("the Act") as a precondition to the late enrolment of the development of Erf 368, Penina Park, Polokwane, in terms of section 14 of the Act. The guarantees required are in respect of phase 1 and phases 2-5 of the aforesaid development. Initially the applicant applied for urgent interim relief. It was refused but the applicant arranged for guarantees

and now proceeds with the second leg of the initial application.

- [2] The applicant, a Close Corporation, is a registered home builder in terms of section 10 of the Act. The respondent is the National Home Builders Registration Council ("the NHBRC"), established in terms of chapter 1 of the Act. The application concerns the interpretation of the Act in respect of what reasonable measures are, that may be required by the respondent, for the late registration of a building project.
- [3] The object of the Act is "to make provision for the protection of housing consumers". Experience has shown that with the great emphasis on the provision of housing for previously homeless people, builders have on many occasions ruthlessly exploited the situation by delivering sub-standard houses. Some of the more common malpractices are the failure to provide a foundation for the building fit for the site on which it is erected, the use of inferior materials, the failure to employ acceptable building standards and the failure to build with the necessary reinforcement materials, whilst pretending that it has been done.
- [4] Section 13 of the Act gives protection to home owners in the sense that the home builder has to ensure that no house is built or sold otherwise than in terms of a written contract, which indicates the specifications in respect of materials to be used in the building of a home and a plan reflecting the dimensions and measurements of the home. The agreement is deemed to contain warranties that the home has been constructed in a workmanlike manner, fit for habitation and constructed in accordance with the NHBRC technical requirements and with the relevant plan and specifications. Moreover section 13 (1)(b) enjoins the home builder to rectify major structural defects for an agreed period, not less than five years, after first occupation of the home, to rectify non-compliance with or deviations from the plan and specifications within an agreed period, not less than three months after occupation of the home and to repair roof leaks within an agreed period, not less than twelve months, from occupation. These rights of home owners are automatically transferred to subsequent owners. A home builder may not receive a deposit from the housing consumer unless a written agreement has been concluded and may not receive any other consideration unless the project has been properly enrolled with the respondent in terms of section 14 of the Act.
- [5] Apart from the rights conferred on home owners against builders in terms of section 13 of the Act there is further protection for home owners in terms of section 17(1) of the Act. The respondent is to pay to the home builder out of the fund established for that purpose in terms of section 15(4) of the Act an amount for rectification where a major structural defect has manifested itself within five years of occupation. That obligation of the respondent will only arise if the builder is in breach of his obligations [section 17(1)(b)], the home was constructed by a registered home builder, enrolled as such with the respondent, and the home was enrolled with the respondent in terms of section 14 of the Act [section 17 (1)(c)] and the builder no longer exists or is unable to meet his or her obligations [section 17 (1)(d)].

[6] Section 10 of the Act provides that only registered home builders may construct homes and provides for registration as home builders. An applicant for registration must pay the necessary fees, must satisfy the respondent it will comply with its obligations and that it has appropriate financial, technical, construction and management capacity not to expose housing consumers to unnecessary risks. The respondent is to publish a Home Building Manual in terms of section 12 of the Act with which home builders have to comply. A home builder may not commence with the construction of a home unless it has been enrolled in terms of section 14 of the Act. The application must be submitted at least 15 days before commencement of the construction and must indicate that inspectors will be able to do inspections during the construction process. The home builder must confirm that he has complied with the requirements of the Home Building Manual and must attach a soil analysis certificate confirmed by a competent person indicating that the correct foundation will be laid. The home builder must pay the prescribed fees, which fees are calculated with reference to the selling price of the house.

[7] It is the applicant's case that the Rules make provision for the late enrolment of a project and for the payment of additional fees in such a case. Rule 14 provides for late registration. The applicant must submit enrolment forms, proof of the estimated selling price, a certificate by a competent person dealing with the soil classification, the design of the foundation and of a rational design and indicating that the structural work has been completed satisfactorily. Enrolment fees must be paid. Of particular

importance is rule 14(4). It reads:

(4) Should any defects be detected during the course of inspection that may influence the structural integrity of the home or if it is established that there is a substantial non compliance with the NHBRC technical requirements, the Council must, prior to the acceptance of the enrolment, request rectification of such defects or such non-compliance to be undertaken as may be necessary at the home builder's cost and under the supervision of the competent person appointed by the home builder."

[8] Rule 14(5) provides that where an inspector is unable to determine compliance with the NHBRC technical requirements for whatever reason, the respondent may require the home builder to appoint a competent person to inspect the home and to complete a report that confirms compliance with the technical requirements. If any work is to be exposed to enable the competent person to certify compliance with the requirements, it must be done at the cost of the home builder [Rule 14(6)].

[9] Of crucial importance is the interpretation of Rule 14(7):

"(7) The Council may request any surety, guarantee, indemnity or other security considered reasonable by the Council to satisfy its obligations under section 16(1) of the Act".

It is evident that it has to be established what the respondent's obligations are under section 16 of the Act.

- [10] Section 16 deals with "Management of funds". It requires of the respondent to take prudent measures to manage the risks pertaining to its business, including any funds. In particular it has to secure that the fees or charges payable by home builders and provincial housing development boards to it, are prescribed at levels which will be sufficient, in aggregate, to meet expected demands on its funds. To do so it has to appoint an expert fund manager and a funds advisory committee. The advisory committee has to advise on how the fund is to be managed. The respondent has to pay its operational costs and claims by housing consumers due to rectification of major structural defects out of the fund [section 15(2)(a) and (b)]. If at any time the funds appear to be insufficient to meet the demands the advisory committee may recommend an increase in the fees payable by home builders to the respondent [section 15(6)]
- [11] It is the applicant's case that late registrations were readily accepted by the respondent as it is not always possible for home builders to delay construction until after registration of a project. The applicant only learned about a notice issued by the respondent's Limpopo office on 19 July 2006. The notice informs home builders that in line with Rule 14(7) a financial guarantee will be payable to the respondent with any application for late enrolment of properties, and that the notification applies with immediate effect.
- [12] The applicant contracted with the owner of erf 368, Penina Park to build 100 residential units on the property, during April 2006. It was a term of the contract that the whole construction had to be done under supervision of an engineer. At that time erf numbers had not yet been allocated to the different erven, by the Surveyor General. The respondent does not enroll a project unless the erf number is available. It was accordingly impossible for the applicant to enroll the project. The applicant alleges to have taken up the problem with Messrs. Thansa and Makgathi who promised to talk to the project manager but failed to do so. The owner of the erf insisted that building must commence. The applicant has 350 employees whose salaries had to be paid. The building of phase 1, commenced on 18 April 2006. Only on 24 May 2006 the erf numbers became available. According to the respondent's requirements the applicant had to submit 100 reports, one for each unit, by the competent person, the engineer, before the project could be enrolled. The reports were given by one A J Smith who represented Avon Engineers (Pty) Ltd. He is a competent person in terms of the definition of "Competent Person" in section 1 of the Act and duly registered as a competent person. He is insured against professional negligence to an amount of R2 000 000,00. He confirmed that the site and surrounding area complied with the requirements of the Home Building Manual and that both the substructure and the superstructure complied with it. The applicant enrolled all the phases before 5 June 2006 and paid enrolment fees of R90 480,00, R2 340,00, R96 720,00, R96 720,00 and R31 980,00 for the different phases.
- [13] On 14 June 2006 the applicant received a "Late Enrolment Inspection" report from the respondent. Initially the applicant

was to furnish a guarantee of R16 738,00 in respect of phase 1, but on 18 July 2006 the applicant received a revised report indicating

that the applicant was to furnish a guarantee of R974 400,00 in respect of phase 1. On that date it also received a "Late

Enrolment Report" in respect of phases 2-5. A guarantee of R2 365 200,00 was required for these phases. In respect of both amounts the enrolment of the property was recommended subject to an "Upfront payment of guarantee fee". In both cases the document states that "The quality of construction elements used does not comply with NHBRC Home Building manuals and therefore poses a very high risk on NHBRC security fund". Apart from the guarantee a late enrolment fee was required based upon the distance traveled to the project the time spent by the inspector and the standard fee per unit. There is no dispute that the two amounts of R3 681,52 and R5 981,52 respectively, levied on that basis, were payable. The applicant maintains that it has complied with all the requirements for late registration.

[14] The aforesaid A J Smith was requested to negotiate with the respondent about the furnishing of the guarantee. He invited an inspector of the respondent to attend at the premises and to do an inspection of the foundation after it and the floors had been opened to satisfy himself that there was no defect in the substructure of the building. He also took samples for analysis by the TPT Lab/Civil Engineering Services. The analysis report is to the effect that there is no additional risk. The competent person has also confirmed professionally that there is no additional risk and that the structural integrity of the building has not been compromised. The applicant alleges that Mr. Ramala of the respondent indicated that the condition of the foundations will not have any influence on the insistence upon a guarantee or the amount thereof as the enrolment was late. Thereafter the applicant lodged a formal objection against the decision of the person in the Limpopo office in terms of section 22(3) of the Act with the Chief Executive Officer of the respondent. The Chief Executive Officer replied on 15 September 2006 that he agrees with the findings of Ms. N L Chavalala and that the guarantees have to be furnished.

[15] The respondent alleges that it became aware of building activity on the relevant premises and ascertained from the local authority that erf numbers had not been allocated in respect of the property. It contacted the applicant around 19 May 2006 to inform it about the necessity for enrolment. It is accepted that the applications for enrolment were received and that inspections were done by Mr. Ramalla. It is explained that the initial amount of the guarantee, given on 18 June, was wrongly calculated as 15% of an enrolment value of the properties of R90 480,00 whilst the correct value was R6 960 000,00. When the mistake was detected the correct requirement was conveyed to the applicant. It is confirmed that there were negotiations about a possible reduction of the amount of the guarantee. The respondent contends that the only reason advanced by the applicant for the reduction of the guarantee was that it could not afford to raise the amount and that that is not a good reason. The respondent contends that in terms of the Act and the Rules it is entitled to insist upon the guarantee. The deponent for the respondent states in paragraph 42 of the answering

affidavit that the only request by the applicant to the Chief Executive Officer was that the amount was not affordable and that as that was not an answer to the fact that the applicant had not enrolled the project timeously it was entitled to insist upon a guarantee calculated as a percentage of the estimated value of the properties. That allegation is factually not correct because in paragraphs 23.2 (3) and 22.4 of their letter the attorneys for the applicant complains about the respondent's failure to do a further visual inspection and the failure to do a proper risk assessment.

- [16] It is evident that the Act requires of the respondent to be involved in and to supervise the construction of all homes to protect consumers against malpractices. For that reason a project is to be registered before construction commences. Arrangements must be made that inspectors of the respondent can inspect the project regularly so as to ensure that the standards of the respondent's manuals are complied with. If a project is enrolled after construction has commenced, the respondent did not have the opportunity to ensure compliance with its requirements. The rules recognize that late registration is permissible. It is evident though that in such cases the respondent must ensure that it is in the same position than what it would have been if it had the opportunity to inspect the progress from the very start. For that reason an additional prescribed late enrolment fee is payable. That is a fee that refunds the respondent for having to send an inspector to go and do an inspection. That fee is based upon time spent by the inspector to do the inspection, on traveling costs and a prescribed fee per unit inspected. The two amounts of R3 681,52 and

R5 981,52 respectively referred to in paragraph 13 above, levied by the respondent, were quite correctly calculated on that basis.

- [17] If upon inspection the inspector is satisfied that what has already been done complies with NHBRC requirements and upon payment of the special fee for the inspection and of course the normal enrolment fee, the respondent is obliged to enroll the project. If however defects are detected, during the inspection, the provisions of sub rules 14(4), 14(5) and 14(6) become relevant. The respondent must insist upon rectification of the defects at the builder's costs under supervision of the competent person appointed by the builder. It means that, in terms of rule 14(4), before enrolment, the defects are to be rectified at the cost of the builder under the supervision of the competent person. If the respondent's inspector is unable to determine whether there was compliance with the NHBRC requirements the respondent may require of a builder, in terms of rule 14(5), to appoint a competent person to inspect the home and to confirm compliance. If it is necessary for the competent person to be able to do so, to have work exposed, rule 14(6) provides that what has to be done to enable him, must be paid for by the builder. The way I read rule 14(6) it provides that if the competent person detects non-compliance with the requirements of the NHBRC, after the works had been opened up, the defects will have to be rectified to enable him to confirm compliance, which is a prerequisite for enrolment.

[18] It seems to be clear that the competent person has to certify compliance with the requirements. In order to be able to do so, he must be satisfied that there was compliance. If he is so satisfied and he positively certifies compliance he attracts liability for professional negligence. The competent person has certified that the integrity of the buildings has not been compromised, after he had the works exposed and had invited the respondent's inspector to inspect the works. It means that he has certified compliance. Moreover the respondent knows that apart from the engineer's own means he is professionally covered by insurance to an amount of R2 million against professional negligence. The applicant itself is of course also liable for damages due to structural defects. It is a registered builder which has satisfied the respondent about its competence and means.

[20] Where it is a prerequisite that the respondent must be satisfied about compliance before it can effect a late enrolment of a project it is difficult to see under what circumstances the provisions of rule 14(7) are to be invoked, in the event of a late enrolment. Section 16(1) of the Act does not deal with late enrolments as such. It provides:

"(1) The Council shall take prudent measures to manage the risks pertaining to the business of the Council, including any fund, and to secure that the fees or charges payable by home builders and provincial housing development boards to the Council are prescribed at levels that are sufficient, in aggregate, to meet expected demands on the funds of the Council."

[21] In this connection it, the provisions of sections 16(2),16(4),16(5) and 16(6) are informative of the scheme of the Act. An expert fund manager is to be appointed as fund manager. An expert advisory committee is to advise in respect of financial and risk management

[16(2) and 16(4)]. The advisory committee is to report quarterly to the Council [16(5)]. If it appears at any time that the funds of the Council may be insufficient to meet the demands thereon the Council, on the recommendation of the advisory committee, may increase the fees. It must just obtain the approval of the Minister.

[22] The respondent was created to oversee building projects and to protect housing consumers. The funds to do so are to be generated by it through registration fees. The respondent's first obligation is to ensure that houses are properly built. If, nevertheless, there are structural defects in a house supervised by the respondent, and the builder no longer exists or is unable to rectify the defects or compensate the consumer the respondent is to do so in terms of section 17 of the Act. It is in my view implicit in the Act that the creation of the respondent and its management will not unduly increase building costs. The whole idea clearly is that the housing consumer gets a properly built house as cheaply as possible.

[23] The real dispute in this case is that the respondent refuses to accept the certification by the competent person. The applicant has done what the rules require of it to do. It has paid the enrolment fee and the special fee for a late enrolment. The project was always done under the supervision of a competent person. The competent person has exposed the foundations and floors and has invited the respondent to come and inspect the works. The respondent refuses to do so maintaining that because of failure to enrol timeously the respondent is

obliged to furnish security for an amount which is calculated as a percentage of the eventual value of the property. It refuses to indulge in a risk assessment. The circular of 19 July 2006 in so many words indicate that the respondent will require guarantees with every late enrolment. Rules 14(4), (5) and (6) provide for late enrolment without the necessity of furnishing a guarantee. The respondent's case was that it is entitled to insist upon guarantees. That view cannot be correct in that there will be no risk on the respondent to pay in terms of section 17 of the Act if its building requirements had been adhered to. Belatedly the respondent changed its stance. The respondent now challenges the competent person's certification and wishes the court to take cognizance of foreign statistics.

[24] I accept that the respondent's insistence upon security being furnished does not entail that the applicant has to pay the two relevant

amounts into the respondent's fund. What it has to do is to obtain a guarantee from a reputable financial institution, operative for five years after occupation of the houses, that in the event of claims by the consumers the institution will accept liability for proven claims to the aggregate of the two amounts guaranteed. To obtain such guarantees will not be without cost implications. I accept that the better the collateral security that can be provided by the applicant the smaller the charge by the financial institution for furnishing the guarantee will be. I accept that it will be a long term financial burden on the applicant. For that reason alone, and although security has been furnished, this application is not academic.

[25] The result is that in my view the respondent misconceived its powers and obligations in terms of the Act and of the rules. It was wrong to require guarantees from the applicant as it had complied with the requirements of rule 14. Moreover it failed to take a reasonable decision by refusing to get involved in a risk assessment. It follows that the application must succeed and that the decisions of the respondent and its provincial manager are to be reviewed and set aside and that the respondent is to consider the applications afresh in accordance with what has been stated in this judgment. The respondent is to pay the applicant's costs. Both parties were represented by two counsel. The parties were prudent in engaging the services of two counsel and the applicant is accordingly entitled to the fees of two counsel.

Order.

1. The decisions of the respondent's provincial manager, Nurse L Chavalala, taken on 18 July 2006 and endorsed by the Chief Executive Officer of the respondent on 15 September 2006, namely that the applicant should furnish guarantees in the amount of R974 400,00 and R2 305 200,00 respectively in terms of rule 14(7) of the National Home Builders Regulations Council Rules (1999) as a precondition to the enrolment in terms of section 14 of Act 95 of 1998 in respect of Phase 1 and Phases 2-5 of the construction development Kwena Plains on Erf 368, Penina Park, Polokwane are hereby reviewed and set aside and referred back to the respondent to be considered afresh in accordance with what has been said in this judgment.

2. Save for existing orders for costs the respondent is ordered to pay the applicant's costs of the application, including the costs of two counsel.

W J HARTZENBERG

JUDGE OF THE HIGH COURT

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