

SOUTH AFRICA / JUDGMENT

Marde (Pty) Limited v J Con Construction (Pty) Limited In Re J Con Construction (Pty) Limited v Marde (Pty) Limited (947/2020) [2020] ZAFSHC 263 (20 August 2020)

[2020] ZAFSHC 263

COURT

Free State High Court, Bloemfontein

BEFORE

S Grobler

CASE / FILE NUMBER

947/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(FREE

STATE DIVISION, BLOEMFONTEIN)

Case

Number: 947/2020

In

the matter between:

MARDé
(PTY)
LIMITED
Excipient
and
J
CON CONSTRUCTION (PTY)
LIMITED
Respondent
IN

RE: J
CON CONSTRUCTION (PTY)
LIMITED
Plaintiff
MARDé
(PTY)
LIMITED
Defendant
HEARD
ON: 14 AUGUST 2020

JUDGMENT

BY: GROBLER, AJ

DELIVERED ON: 20 AUGUST 2020

INTRODUCTION:

- [1] This exception concerns the Defendant's complaint on the lack of what it contends is a necessary averment. That is to say, the Excipient (Defendant) contends that the Respondent's(Plaintiff) summons does not disclose a cause of action.
- [2] The Plaintiff sues on a verbal agreement, in terms of which it was to perform for the Defendant certain services. Notably this includes what the Plaintiff has called simply "construction work". What exactly this construction work entailed is at this stage a mystery! except to say that the Respondent's reply to a Rule 35 notice the Excipient had served upon it indicates that "alterations" were done. I mention this in passing, because I am not all together sure that I should look - for purposes of this proceeding - at anything extraneous to the summons itself.
- [3] The exception is at its heart a simple one. The Excipient contends that the Respondent should have averred that it is registered with the National Home Building Regulatory Council. This requirement flows from the provisions of the Housing Consumer Protection Measures Act, 95 of 1998. As the Plaintiff has not, so the argument goes, the summons does not disclose a cause of action.
- [4] Delineated further, section 10 of this Act provides:

"Registration of Homebuilders-

- (1) No person shall -
- carry on the business of a homebuilder; or
 - receive any consideration in terms of any agreement with the housing consumer in respect of the sale or construction of a home,

unless that person is a registered homebuilder."

[5] Mr Zietsman, for the Excipient, correctly submits that this should be read with the definition clauses of "business of a homebuilder" and "home" in section 1 of this act. These say:

"Business of a homebuilder means-

- (a) to construct or to undertake to construct a home or to cause a home to be constructed for any person;
- (b) to construct a home for the purposes of sale, leasing, renting out or otherwise disposing of such a home."

And

"'Home' means any dwelling unit constructed or to be constructed by a homebuilder, after the commencement of this act, for residential purposes or partially for residential purposes, including any structure described by the Minister for the purposes of this definition or for the purposes of any specific provision of this act, but does not include any category of dwelling unit described by the Minister."

[6] For Mr Zietsman further the first question is whether the construction works executed by the Plaintiff was in respect of a home. This submission he makes in para 6.1 of his heads of argument.

[7] To my mind the first- and determinative question is somewhat different. Based upon what I say below, the question truly is whether

the claim is based upon the Respondent constructing a home, because the commandment in section 10 of the Act appears to deal with exactly that (i.e. the construction of a home). But what does

this phrase mean?

[8] The Supreme Court of Appeal has recently dealt with the purpose and objects of the Act. In *National Homebuilders Registration Council v Adendorff and Others* (2019) JOL 41550 (SCA), Salduker JA wrote for a unanimous court at para 6 et seq.:

"I turn to consider the purpose and objectives of the Act. The Act is consumer protection legislation, having as its object the protection of consumers against homebuilders who construct homes with structural defects, to provide consumers with information about competent builders and to give effect to the rights of consumers. Thus the Act requires registration of homebuilders and the enrolment of houses being built to ensure that the aims and objects of the Act are optimally achieved."

[9] Instructive also is section 1A of the Act which prescribes that the Act applies to any homebuilder. Section 3 furthermore indicates that the objects of the council shall inter alia be to represent the interests of housing consumers by providing warranty protection

against defects in new homes.

[10] Section 3 ties in with Regulation 14(d) of the General Regulations Regarding Housing Consumer Protection Measures (GNR1406 of 1 December 1999). I return to its import infra.

[11] Notably absent in the Act is any definition of what exactly the intention of the legislature is with regard to the word "construct" or "construct a home". As is the case with many disputes, the Apex lawmaker could very easily have solved this linguistic/interpretive dispute by speaking its mind clearly and concisely. But, alas, it is left to counsel and this court to determine the intention and apply commensurate meaning to the words used.

[12] The process of interpretation of a statutory instrument or any document for that matter is now a unitary one. It involves as the starting point to the words used. A court is required to consider them in light of the relevant context, and the former distinction

between background and surrounding circumstances is no longer to be made. Importantly, the legislation must be considered as a whole.

[13] Every word must be given a meaning. Impractical or unbusinesslike, oppressive consequences or consequences that will stultify the broader operation of the legislation or contract under consideration is not to be allowed. See in this regard Bothma-Batho Transport (Edms) Beperk v S Bothma & Seun Transport (Edms) Beperk, 2014 (2) SA 429 (SCA). See also Firststrand Bank Limited v Clear Creek Trading 12 (Pty) Ltd and Another, 2018 (5) SA 300 (SCA) at para 16. See furthermore Natal Joint Municipal Pension Fund v Endumeni Municipality, 2012 (4) SA 593 (SCA) at para 25 and 26.

[14] The consideration of context is paramount even where the words to be construed are clear and unambiguous. See Department of Land Affairs v Goedgelegen Tropical Fruits, [2007] ZACC 12; 2007 (6) SA 199 (CC).

[15] In dealing with what exactly the word "parent" in the context of the South African Schools Act meant, Ponnar JA wrote for a unanimous court in the Fish Hoek case:

"When the legislature chose to use the word 'parent' in section 1(a), in my view, it intended to use it a sense conforming at least with its literal meaning, as opposed to some other unspecified narrower sense. For, as it was put by Schutz JA, 'The literal meaning of an act (in the sense of strict literalism) is not always the true one, but escaping its operation is usually not easy, most often impossible.' That, to again borrow from Schutz JA, makes it all the more difficult to push out a plain word in favour of its ill-bordered shade. After all, if the legislature wanted to restrict liability for school fees solely to the custodian parent, he could simply have done so by stating that in clear and unambiguous language."

See Fish Hoek Primary School v GB, 2010 (2) SA 141 (SCA) at para 12.

[16] At first blush a plain reading of section 1o the Act reveals that the Act does not apply to all work done on a home as defined in section

1. It appears to deal only with homes that are constructed out of the new. That is the literal interpretation.

[17] Mr van der Merwe, for the Respondent, has referred me to the judgment of Leas t/a Maurice trading as Build4you v Van Kerckhoven and Others, 4 June 2008 (Case no. 28811/2007) (WLD). In this case, Claassen J held at para 13 and 14:

"On a conspectus of the provisions referred to above, it is clear that the Act purports to regulate the building industry in such a way that protection is afforded to housing consumers who are in a process of acquiring or have acquired a home. The definition of a housing consumer would appear to be referring to homes build for first time purchasers and/or their successors in title. It is the original homebuilder of that particular home which attracts liability to the first time purchaser and/or successors in title of that particular home. This interpretation is supported by the fact that section 3(a) objectifies the duties of the council to "new homes" only. From this provision it seems plain that the liabilities of homebuilders are restricted to the construction of a new home only. Subsequent additions to or renovation of the original new home by a different building contractor is excluded from the provisions of the Act. This, in my view, is also confirmed by the definition of the 'business' of a homebuilder which refers to the construction of a home and not to the renovation of or addition to a home. If the legislature intended the ambit of the Act to extend to subsequent additions or to renovations of already constructed homes, it could easily have included the words 'addition to' or 'renovation of' to the definitions of the business of a homebuilder, 'home' and 'housing consumer'."

[18] The end of this quoted passage conforms with how the SCA reasoned in Fish Hoek.

[19] Reference was also made to the decision of IS & JM Construction CC v Tanner, 2003 (5) SA 218 (W). Here Goldblatt J held that the plaintiff was obliged to allege that it was a registered homebuilder in terms of the Act before it could claim consideration for the construction of a home. To my mind, the facts of this matter differ. In that case, the plaintiff pleaded that it was to "erect a dwelling house" and had not been paid. There is no similar allegation here.

[20] During argument Mr Zietsman added a further spring to his bow. He criticized the Leas case as having been decided incorrectly, because according to him the Judge had overlooked certain provisions in the Regulations. Regulation 14(d), supra, reads that limitations and exclusions contemplated under section 13(2)(b)(i) of the Act in respect of which a homebuilder is not liable for loss, damage, destruction or threat of collapse are"(d) structural alterations, repairs, modifications or alterations to the home as originally constructed and which affected the original structure of the home."

[21] This Mr Zietsman says is an indication that the legislator's intention was to include such work, thus creating the need for the Regulations to specifically exclude them. What would have been the point otherwise? - so Mr Zietsman argues.

[22] This is an attractive argument but unfortunately flawed. The fundamental problem with this is that it seeks to rely on the

Regulations in order to justify a specific interpretation of the Act. The cannons of interpretation do not allow for that. Alkema J quoted the work of Kellaway in *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality*, 2016 (1) All SA 721 (ELC) with approval thus:

"South African courts have followed the English rule of interpretation and have said that as a statute and a regulation made thereunder shall not be treated as a single piece of legislation, the regulation may not be used as an aid to interpret a provision of the statute. In *Moodley v Minister of Education and Culture*, House of Delegates, the Appeal Court Stated very specifically that even where a statute provides that the regulations made under it are part of the enactment, it must not be treated as a unitary piece of legislation and the regulations shall not be used as an aid to interpreting any of the statutory provisions, nor can the regulations be used to extend the meaning of the enactment. The provision in the statute

must be interpreted before the regulation is considered, and if the regulation purports to vary the provision as to interpret it is ultra vires and void. Also, the regulation cannot be used to cut down or enlarge the meaning of a statutory provision. On the other hand, a regulation clearly stated and needing no interpretation and not ultra vires must be read without reference to the reason why it was drafted and effect must be given to its clear language."

[23] Absent then any provision that seeks to extend the meaning of "construct a home", there is no ready reason to interpret

this phrase more broadly.

[24] Furthermore, Regulation 14(1)(d) is promulgated on the back of the authority conferred upon the state functionary in section 13(2)(b)(i) of the Act. It deals with the obligations of the homebuilder to rectify major structural defects in the home caused by noncompliance with NHBRC technical requirements. It does not at all impact upon the definitions contained in section 1 of this Act.

[25] There is, to my mind further, a very good reason why the Act should not be interpreted so as to mean that construction works such as alterations and repairs to an existing home falls under the provision of especially section 10. The excipient's interpretation will produce

- by means of an extreme example - a person contracted to do paintwork to a house or home may not sue for services rendered because of nonregistration as a homebuilder. This interpretation would lead to an absurd result, which as I have said, should be avoided in the exercise of interpreting statutes.

[26] Furthermore and given that this is an exception, I am required to afford every possible interpretation to the pleading as a whole in order to determine if it discloses an arguable case. Unless the Excipient can show that on every possible interpretation there will be no case to meet, the exception cannot succeed. See: *Lewis v Oneanate (Pty) Ltd and Another*, [1992] ZASCA 174; 1992 (4) SA 811 (A) at 817 F - G. See also: *Southern African National Parks v Ras*, 2002 (2)

SA 537 (C) at 541 E - 542 E.

[27] The exception must for these reasons fail, and costs should follow the event.

I make the following order:

1. The exception is dismissed with costs.

S. GROBLER, AJ

On behalf of the Excipient: Adv P.J.J. Zietsman

On instruction of: Kramer, Weihmann & Joubert Inc.

On behalf of the Respondent: Adv. R van der Merwe

On instruction of: Stander & Green Attorneys

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