REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No.: **3862/2005**

In this matter between:
LINDA ANN BEKKER Applicant

And

SCHMIDT BOU ONTWIKKELINGS CC First Respondent

ANDRÉ KLEYNHANS Second Respondent

THE REGISTRAR OF DEED, CAPE TOWN Third Respondent

Coram: YEKISO J
Heard: 1 September 2005
Delivered: 24 August 2006
Summary:
The Housing Consumers Protection Measures Act, 95 of 1998 – section 10 thereof.
Section 10 cannot be interpreted to mean that a deed of sale concluded between the housing consumer and the home builder invalid by reason only of omission on the part of the home builder to enrol with the National Home Builders Registration Council.
- ignorance on the part of the home builder to comply with the provisions of the Housing Consumers Protection Measures Act is no justification to conclude that such deed of sale invalid in circumstances where the home builder ought to have been aware of the laws regulating the building industry.
Deed of sale – cancellation clause – seller needs to strictly comply with the

---

provisions of the cancellation clause for cancellation in terms of the cancellation clause to be valid.

JUDGMENT DELIVERED ON 24 AUGUST 2006

YEKISO, J

[1] On 4 May 2005 the applicant, who is described in the founding affidavit as an adult female estate agent, residing at 9c Hope Street, Hunter's Home, Knysna, launched an application out of this Court, on urgent basis, for a rule *nisi* interdicting and restraining the first respondent from alienating, transferring or causing to be transferred to any person or entity, the first respondent's right, title, and interest in a certain immovable property situate at and commonly known as Unit 9, Meedingspark Townhouse Complex, Sedgefield, being erf 4088, Sedgefield, in the province of the Western Cape. The rule *nisi* was intended to operate as an interim interdict pending resolution of certain disputes, in the normal course, then existing between the applicant and the first respondent.

[2] The relief sought in the normal course is for a declarator declaring that a deed of sale concluded between the applicant and the first respondent at Knysna on 18 July 2003 relating to the sale of the property described in the preceding paragraph is valid and binding on the parties

and that an amount of R 10,000-00 paid to the second respondent on behalf of the applicant, which has since been appropriated by the second respondent as fees, be re-instated as a deposit in terms of clause 2 of the deed of sale. The further relief sought against the first respondent and/or the second respondent is an order ordering the first and/or the second respondent to make available to the applicant the entire original deed of sale, including the addendum thereto, concluded between the applicant and the first respondent.

[3] The first respondent is a Close Corporation, duly incorporated in terms of the Close Corporations Act, 69 of 1984. It appears on basis of the papers that a Casper Johannes Schmidt is a sole member of the close corporation. The registered office of the first respondent is not apparent on basis of the papers save that the first respondent, in terms of the deed of sale, chose a postal address at Sedgefield Post Office as its *domicilium citandi et executandi.*

[4] The second respondent is described in the founding affidavit as an attorney of this Court, practising as such under the name and style of André Kleynhans at Sedgefield Business Centre, Sedgefield.

THE DISPUTE

[5] The first leg of the dispute between the applicant and the first respondent essentially relates to the enforceability of the deed of sale concluded between the applicant and the first respondent, which deed of sale the first respondent alleges in its opposing papers is not enforceable since same has since been cancelled due to breach by the applicant of the material terms and conditions thereof.

[6] The second leg of the dispute relates to the validity of the deed of sale itself, it being contended on behalf of the first respondent that same is void *ab initio,* and as such unenforceable as its terms and conditions are in conflict with the provisions of the Housing Consumers Protection Measures Act, 95 of 1998 (the Act) and that, in view thereof, the agreement thus concluded is *contra bonos mores,* invalid and incapable of enforcement.

[7] The best approach to deal with these issues, in my view, will be, in the first instance, to determine if the agreement concluded between the applicant and the first respondent has since been cancelled. If it appears

that any purported cancellation of the agreement was not valid in the sense that such purported cancellation was not strictly in accordance with the provisions of the cancellation clause of the agreement, the next issue to determine will be if indeed the agreement is *contra bonos mores,* invalid and unenforceable because of conflict of its terms and conditions with the provisions of the Act as contended on behalf of the first respondent.

[8] On Friday, 13 May 2005 Ndita AJ, as she then was, and by consent between the parties, granted a rule *nisi* restraining the first respondent from alienating its right, title and interest in the property in dispute pending the hearing of the matter on 1 September 2005. On the latter date the matter was argued before me. After hearing argument on behalf of the parties, I reserved judgment. In the paragraphs which follow, is my judgment in the matter.

ALLEGED CANCELLATION OF THE AGREEMENT

[9] For sake of completeness I should point out that the agreed purchase price in respect of the property which is the subject of the dispute between the parties was in an amount of R 365,000-00. The agreement is subject

to payment of a deposit in an amount of R 10,000-00. The balance of the purchase price was to have been paid by way of progressive instalments as set out in clause 3 of the deed of sale. The amount of R 10,000-00, payable as a deposit in terms of clause 2 of the agreement, was paid into the trust account of the second respondent who, at all material times, acted on behalf of the first respondent. The aforementioned payment was made by one S W Van der Merwe who, incidentally, is the former husband of the applicant.

[10] The remedies available to the seller, in the event of breach, are contained in clause 10 of the deed of sale. Clause 10 of the deed of sale provides as follows under the heading "Breach":

> "***10 BREACH***
>
> Should the PURCHASER fail to make any payments provided for herein, or otherwise commit a breach of any of the conditions hereof, and remain in default for 7 (SEVEN) days after dispatch of a written notice by registered post, requiring the PURCHASER to make such payment or to remedy any other breach, the SELLER shall be entitled to, and without prejudice to any other rights available by Law:
>
> 10.1 claim immediate payment of the entire balance outstanding although not otherwise due by the PURCHASER under this Deed of Sale; or

10.2 cancel this Deed of Sale and retain all amounts paid by the PRUCASHER as roukoop or a genuine pre-estimate of damage suffered by the SELLER, and further the PURCHASER shall not be entitled to compensation from the SELLER for any improvements of whatever nature he may have caused on the property, whether with or without the SELLER'S consent; and

10.3 Claim payment of the arrear instalments due under this Deed of Sale, which will be regarded as a portion of the pre-estimated damage;

10.4 Alternative to the above, the SELLER shall be entitled to cancel this Deed of Sale and to recover any damage that the SELLER may have suffered as a result of the breach of the PURCHASER, from the PURCHASER."

[11] The breach clause referred to in the preceding paragraph contemplates placing the purchaser in *mora* in the event of breach. It provides that the seller, in the event of a breach of any material term and condition by the purchaser, shall call on the purchaser to remedy such breach within seven (7) days of despatch of a notice calling on her to remedy the breach. The notice must stipulate the nature of the breach. The notice should be sent to the purchaser per prepaid registered post. It is only in the event of the purchaser failing to remedy the breach within seven (7) days of despatch of the notice that the seller can proceed to

cancel the agreement and invoke any of the remedies available as set out in the breach clause. The seller must rely on the provisions of the cancellation clause to cancel the contract.

[12] Clause 15 of the deed of sale, in turn, provides for the despatch of a written notice by either party in the event of breach, including those breaches contemplated in clause 10 of the deed of sale. This clause provides as follows under the heading “Notices”:

"15 NOTICES

Written Notices dispatched by prepaid registered post and addressed to the Domicilium of the one PARTY to the PARTY shall be deemed to have come to the notice of such PARTY 7(SEVEN) days after the posting thereof. Such notice shall be the correct method of communication notwithstanding the fact that it may not have reached the PARTY to whom it was addressed or be communicated to his mind."

It bears to be noted that the notice contemplated in this clause should be addressed to the party's *domicilium.*

STEPS TAKEN IN THE ALLEGED CANCELLATION

[13] Numerous letters were addressed to the applicant on behalf of the first respondent which were intended either to place the applicant in *mora,* thus requiring the applicant to perform in terms of the contract or purporting to cancel the agreement. The first such communication was by way of a letter dated 29 September 2003. The letter was despatched to the applicant by way of telefax transmission by the second respondent, acting on behalf of the first respondent. The letter seeks to demand that the applicant performs in terms of her obligations arising from the deed of sale.

It does not specify in specifically what respect the applicant is in default of her obligations. The letter does not comply with the provisions of clause 10 and 15 of the deed of sale in that it was not sent to the applicant per prepaid registered post. It calls on the applicant to remedy an unspecified breach within forty eight (48) hours and not within seven (7) days as provided for in the deed of sale. It was despatched to the applicant per telefax transmission to the applicant's then attorney instead of applicant's *domicilium* as provided in clause 15 of the deed of sale.

[14] The second such purported notice of cancellation is by way of a telefax transmission dated 16 October 2003. It calls on the applicant to provide guarantees by not later than Friday, 17 October 2003 failing which notice of cancellation would be given. The letter is not addressed to the applicant's *domicilium* but, instead, is transmitted per telefax both to the applicant and her then attorneys. The deed of sale does not make provision for giving of guarantees so that the applicant cannot be said to be in breach on the ground set out in the letter. A notice calling on the applicant to perform something not required under the contract is not a valid notice and cannot be relied upon to cancel the agreement. Once again the pre-registered post and the seven (7) days requirement has not

been complied with.

[15] A letter of 7 November 2003 dispatched to the applicant per prepaid registered post purports to give the applicant a notice of intention to cancel the agreement in terms of clause 12(4) of the contract. The deed of sale does not have a clause 12(4) so that no valid notice can be given in terms of a clause which is non-existent. A further letter of 27 November 2003 transmitted to the applicant's attorneys per telefax, purports to cancel the agreement on the grounds of applicant's failure to perform in terms of the contract. Similarly, this letter was neither dispatched to the applicant per prepaid registered post nor was it addressed to the applicant's *domicilium* as required in terms of the deed of sale. It would appear that it is on the strength of this purported cancellation that the first respondent saw fit to offer the property for sale to a third party.

[16] The remedies available to the first respondent, in the event of breach, are contained in clause 10 of the deed of sale. Before the clause comes into operation there must be a breach by the applicant. In none of the correspondence addressed to the applicant is it stipulated, in specific terms, the nature of the breach complained of. The seven (7) days notice

required to remedy the breach was not complied with. At no stage was payment demanded from the applicant other than a demand to give guarantee. More so, none of the notices addressed to the applicant requiring her to perform were addressed to her *domicilium* as provided for in the deed of sale. Accordingly, I cannot, under these circumstances, find that the agreement concluded between the applicant and the first respondent was validly cancelled.

[17] The purpose of a notice requiring a purchaser to remedy a default is to inform the recipient of that notice of what is required of him or her in order to avoid the consequences of default. It should be couched in such terms as to leave him or her in no doubt as to what is required, or otherwise the notice will not be such as is contemplated in the contract. (See *Godbold v Tomson* 1970(1) SA 60(D) 65 C-D) In my view, the first respondent clearly failed to strictly comply with the provisions of the cancellation clause so that under no circumstances can it be said that the deed of sale concluded between the applicant and the first respondent was validly cancelled as the first respondent seeks to contend.

THE HOUSING CONSUMERS PROTECTION MEASURES ACT

[18] The initial position adopted by the first respondent was that the provisions of the Act do not apply to the transaction concluded between the applicant and the first respondent. The first respondent, it would appear, adopted this position because the construction on the site on which the applicant's dwelling was to be erected commenced before the Act came into operation. This is confirmed by the applicant who states in her founding affidavit that shortly before she signed the deed of sale, she had visited the site on which the dwelling was to be erected. She had established that the construction on the site had been done up to the floor slab level, but no further building work had been done. She states further in her affidavit that Casper Johannes Schmidt, a member of the first respondent, had met her on site and indicated to her that the slab had been laid some two years earlier.

[19] Shortly after the conclusion of the deed of sale, the applicant applied for a bond with a financial institution. Before the financial institution would approve the bond application, it need proof that the home builder, it being the first respondent in the instance of this matter, was issued with an enrolment certificate by the National Home Builders Registration Council

("the Council"). The first respondent had not applied for enrolment with the Council, and in view thereof, it could not provide the applicant with proof of enrolment as required by the bank. The first respondent held the view that proof of enrolment was not necessary as the construction on the property purchased by the applicant had commenced before the provisions of the Act came into effect. This attitude resulted in the applicant not being able to access a bond to enable her to fulfil her financial obligations in terms of the contract.

[20] The first respondent was, in the course of time, legally advised that the provisions of the Act do indeed apply to the transaction. Once such advice was given, the first respondent adopted the attitude that the deed of sale concluded between it and the applicant is invalid on the ground the terms and conditions of the deed of sale are in conflict with the provisions of section 10 of the Act which prohibit the carrying on of business by a home builder if the requirement relating to the enrolment with the Council in terms of section 14 of the Act have not been complied with. For this reason, the first respondent became of the view that the deed of sale concluded between it and the applicant is *contra bonos mores,* invalid and thus incapable of enforcement.

[21] In adopting the view that the agreement is not enforceable for the reasons stated in the preceding paragraph, the first respondent relies on the provisions of section 10 of the Act which provide as follows:

> ***"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."

[22] Home builder, in turn, is defined in the definition section of the Act to mean a person who carries on the business of a home builder.

[23] In further advancing its defence, the first respondent contends that it is a home builder as defined in the Act except that it is not enrolled as a home builder in terms of section 14 of the Act and thus prohibited from carrying on the business of a home builder. It is because of this omission that it is contended on behalf of the first respondent that it had no capacity

to conclude the deed of sale with the applicant in the manner it did. The Act contains a rather lengthy definition of the term "business of a home builder" but the most pertinent aspects of the definition relative to these proceedings are those contained in paragraphs (a), (b) and (c) of the definition. The Act, in the paragraphs stated, defines the term as follows:

> ***"'Business of a home builder' 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 purposes of sale or otherwise disposing of such home;
>
> (c) to sell or to otherwise dispose of a home contemplated in paragraph (a) or (b) as a principal; …"

[24] The first respondent is not a building contractor but a property developer. In the instance of this matter the first respondent caused a home to be constructed for the applicant using the vehicle of a sister close corporation in the form of Schmidt Boukontrakteure cc. The deed of sale concluded between the applicant and the first respondent thus facilitates the conclusion of a building contract between the first respondent and the building contractor. For this reason the first respondent qualifies and falls

squarely within the definition of a “home builder” except that, at the time of the conclusion of the deed of sale, the first respondent was not enrolled as a home builder with the Council as is required in terms of section 14 of the Act. The question then is whether the first respondent had the capacity to conclude the deed of sale with the applicant as it did by virtue of this omission. This then leads to the merit of the first respondent’s defence based on the invalidity of the agreement.

MERIT OF THE DEFENCE OF INVALIDITY

[25] In my view, the answer to the question posed in the preceding paragraph is whether it was absolutely impossible or relatively impossible for the first respondent to perform in terms of the contract. The first respondent, when it became evident to it that the Act does apply to the transaction concluded between it and the applicant, could simply have enrolled with the Council and be issued with the enrolment certificate. Had the first respondent done so, not only would the first respondent, as a home builder, derive the benefit arising from enrolment as the home builder, as for an example, recognition as an entity in the eyes of the bank, but that such enrolment would facilitate access by the applicant to the necessary funds to enable her to comply with her financial obligations. Had the first

respondent opted for this option, it would have made it possible for the first respondent to perform in terms of the contract. There would thus have been no question of the first respondent being unable to perform in terms of the contract and, similarly, the applicant would have no problem in having her application for a bond approved.

[26] In the second instance, the definition of the term “home builder” is wide enough as not to require the first respondent to physically undertake the construction of the applicant’s dwelling. The first respondent could have caused the dwelling to be constructed in the same fashion it did with the conclusion of the building agreement with Schmidt Boukontrakteure cc. Schmidt Boukontrakteure cc is registered with the Council so that, in terms of the wide definition of “home builder” it cannot be said that, at the time of the conclusion of the deed of sale, the first respondent was not carrying on the business of a home builder as contemplated in section 10 of the Act.

[27] Section 10 of the Act merely imposes an obligation on the builder to enrol with the Council in order to afford the housing consumer the protection of a warranty imposed on the home builder in terms of the Act. The legislature could never have contemplated that failure, or omission by

the home builder, either deliberately or through ignorance, to comply with the provisions of the Act should result in the invalidity of the agreement contemplated in section 13 of the Act to the detriment and the prejudice of the housing consumer. It is thus, my considered view that there is no merit in the defence of the invalidity of the deed of sale which the first respondent seeks to invoke.

[28] Registration with the Council is an internal matter which properly would have been done internally within the first respondent. It purely is an internal matter which the outsiders, such as the applicant, could not be expected to have had actual or constructive knowledge. It would be unfair to the applicant to hold the deed of sale invalid solely by reason of the fact that the first respondent, through ignorance of the practice in the building industry, omitted or failed to enrol with the Council. To hold otherwise would place the applicant at a disadvantage and deprive her of the protection in respect of a commercial decision she made in good faith on the assumption that the first respondent would have no hindrance in discharging its obligations.

[29] Even if the conclusion I have reached in the preceding paragraphs is

wrong, which in my view is not, it nonetheless is indeed so, as submitted by *Mr Seale*, that the contract concluded between the applicant and the first respondent consists of two parts: being the sale of the immovable property on the one hand and the construction of the building on the other hand. These two aspects are severable. The sale of the immovable property aspect may thus stand and the construction aspect may be severed from the whole. That would leave the deed of sale in tact, perfectly legal and legally enforceable.

RE-INSTATEMENT OF DEPOSIT PAID

[30] Much has been said about payment of an amount of R 10,000-00. The applicant claims in both her founding and replying affidavit that payment of the amount of R 10,000-00 was intended as a deposit as required in terms of clause 2 of the deed of sale. The first and second respondent, on the other hand, claim that the amount of R 10,000-00 was intended to cover fees which would be due to the second respondent and that Schalk van der Merwe, who actually paid the amount of behalf of the applicant, was made aware of this arrangement. Van der Merwe denies this arrangement in his affidavit in support of this issue in the applicant's

replying affidavit.

[31] It is common conveyancing practice that conveyancers charge their fees on the passing of transfer once transfer has been effected and payment obligations are discharged by the parties involved. The explanation by the respondents as regards how the amount of R 10,000-00 landed into the second respondent's business account is just not plausible and does not make sense. I am in perfect agreement with *Mr Seale,* in his submissions, that on the preponderance of probabilities, the amount of R 10,000-00 was paid and accepted as a deposit. The second respondent thus had no mandate to transfer the aforementioned amount into his business account.

[32] As to the addendum to the deed of sale, the first respondent does not dispute the fact that same was concluded save that same appears to have been mislaid. It appears that the addendum could not be found despite what appears to have been a diligent effort to do so. In view thereof, I am of the view that no purpose will be served by ordering production thereof.

[33] It therefore follows, in my view, that the applicant has established a

clear right arising from the deed of sale concluded between her and the first respondent; that the deed of sale is valid and binding on the parties and that the applicant has made out a case for the relief as prayed for in the Notice of Motion.

[34] In the result I make the following order:

[34.1] The rule *nisi* granted on 13 May 2005 is confirmed.

[34.2] It is hereby declared that the deed of sale concluded between the applicant and the first respondent at Sedgefield on 18 July 2003, together with the addendum thereto, is valid, of force and effect and binding on the parties.

[34.3] The first respondent is ordered to transfer, or cause to be transferred to the applicant the first respondent's right, title and interest in the property fully described in the deed of sale and in doing so to sign all documentation and to take all steps necessary in order to enable the applicant to take and to receive registration of the property into the applicant's name against performance by the applicant of her counter obligations in terms of the deed of sale.

[34.4] The first respondent is ordered to indicate to the applicant or her attorneys of record within fourteen (14) days of the granting of this order as

to when the first respondent will commence taking steps to transfer or cause the property referred to in the preceding paragraph transferred to the applicant.

[34.5] Should the first respondent fail to give the indication contemplated in the preceding paragraph within fourteen (14) days of the granting of this order, the Sheriff of this Court for the magisterial district of Knysna, is authorised and directed to take steps to have the property referred to in the preceding paragraphs transferred to the applicant and in doing so sign all such documentation necessary to effect transfer and to take all such steps as are required to effect registration of transfer of the property into the name of the applicant.

[34.6] The second respondent is ordered to repay into the trust account of the applicant the amount of R 10,000-00 transferred from the applicant's trust account in lieu of fees, together with interest thereon at the applicable rate reckoned from date of this order.

[34.7] The first respondent is ordered to pay applicant's costs on a party and party scale, duly taxed or as agreed.

……..

NJ Yekiso, J