IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

Case No. 3853/10
Dates Heard: 30 -31/7/12; 1-2/8/12
Date Delivered: 2/10/12
Date of amended order: 16/10/12
Not Reportable

In the matter between:

DOUKA PANAGIOTIS STERGIANOS **Plaintiff**

and

NATIONAL HOME BUILDERS
REGISTRATION COUNCIL **Defendant**

Housing Consumers Protection Measures Act 95 of 1998 – liability of National Home Builders Registration Council for the rectification of major structural defects to consumer's home, in terms of s 17(1) of Act – whether major structural defects proved.

JUDGMENT

PLASKET J:

[1] The Housing Consumers Protection Measures Act 95 of 1998 is consumer protection legislation that is intended, inter alia, to protect home owners, in certain circumstances, from the effects of poor workmanship on the part of home builders who are registered with the National Home Builders Registration Council – the NHBRC.[1] In this matter, the plaintiff, Mr Douka Panagiotis Stergianos, has issued

[1] The long title of the Act states that its purpose is to 'make provision for the protection of housing consumers; and to provide for the establishment and functions of the National Home Builders Registration Council; and to provide for matters incidental therewith'.

summons against the NHBRC alleging that the defects evident in his house are such that the Act obliges the NHBRC, the defendant, to remedy them.

[2] The NHBRC is established as a juristic person by s 2 of the Act. Its objects are set out in s 3 and include representing 'the interests of housing consumers by providing warranty protection against defects in new homes;[2] regulating the home building industry;[3] providing protection to owners of homes 'in respect of the failure of home builders to comply with their obligations' in terms of the Act;[4] and 'to establish and to promote ethical and technical standards in the home building industry'[5].

[3] Section 10(1) of the Act requires persons who carry on the business of home building or who receive consideration from a home owner in respect of the construction of a home to register with the NHBRC as a home builder and s 10(2) prohibits a home builder from constructing a home unless he, she or it is registered as a home builder with the NHBRC. In terms of s 12, the NHBRC shall publish a Home Building Manual which contains technical standards with which home builders are required to comply. Every home building contract is deemed to contain a number of warranties which are enforceable by the home owner against the home builder. They are that:

'(a) the home, depending on whether it has been constructed or is to be constructed-

(i) is or shall be constructed in a workmanlike manner;

(ii) is or shall be fit for habitation; and

(iii) is or shall be constructed in accordance with-

(aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and

(bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1).'

[4] In terms of s 14(1), a home builder may not begin to build a home before he, she or it has submitted the prescribed documents, information and fee to the

[2] Section 3(a).
[3] Section 3(b).
[4] Section 3(c).
[5] Section 3(d).

NHBRC, the NHBRC has accepted these and has entered this in its records and has issued a certificate of proof of enrolment.

[5] Section 15 deals with the financial affairs of the NHBRC. Section 15(2) provides that it may pay out of its funds 'any amount contemplated by s 17(1)'. In this way, it gives effect, subject to the terms stipulated in s 17, to its object of 'providing warranty protection against defects in new homes'.

[6] Section 17(1) of the Act provides:

'(1) Subject to subsection (2), the Council shall pay out of the fund established for that purpose in terms of section 15 (4), an amount for rectification where-

(a) within-

(i) five years of the date of occupation, a major structural defect has manifested itself in respect of a home as a result of non-compliance with the NHBRC Technical Requirements and the home builder has been notified accordingly within that period;

(ii) 12 months of the date of occupation, a roof leak attributable to workmanship, design or materials has manifested itself in respect of a home and the home builder has been notified accordingly within that period;

(b) the home builder is in breach of the home builder's obligations in terms of section 13 (2) (b) (i) regarding the rectification of such defect;

(c) the relevant home was constructed by a registered home builder, had been enrolled with the Council and, at the occupation date, the home was enrolled with the Council subject to section 14 (4), (5) and (6);

(d) the home builder no longer exists or is unable to meet his or her obligations; and

(e) in the case of a home that has been enrolled with the Council on a project basis in terms of section 14 (2), the application has been made by the MEC pursuant to an agreement in terms of section 5 (4) (c).'

[7] Section 17(2) empowers the NHBRC to either reduce any amount that may be expended in terms of s 17(1), in exceptional circumstances, make a payment to a home owner in full and final settlement instead of rectifying the defect, or refuse any claim.

[8] This action was instituted in terms of s 17(1) of the Act in the circumstances that are set out below.

[9] On or about 10 May 2005, Stergianos entered into a contract with Herrington Construction CC, trading variously as Ring Civils and Menziwa Building, in terms of which Herrington Construction was to build a home for Stergianos on erf 1392, Kleinkrantz, Wilderness for a price of R578 757.49. The home was duly constructed with, it must be said, a number of difficulties along the way, and Stergianos took occupation of it on 20 December 2005.

[10] During the course of the first year of his occupation of the house, cracks began to develop in the concrete floor slab. They got progressively worse with time and efforts to fill them came to naught as the cracks continued to open. Stergianos turned to his attorneys for help and a civil engineer, Mr Retief Kleinhans, was instructed to determine the cause of the cracks. His opinion was that the cause was structural.

[11] Not having been able to obtain satisfaction against the builder, Stergianos issued summons against the NHBRC in terms of s 17 of the Act, claiming orders declaring that the NHBRC was responsible for the rectification of the structural defects in the home, directing it to rectify the defects within 180 days and directing it to pay his costs.[6]

[12] The NHBRC has refused the claim made by Stergianos. All of the elements of the cause of action set out in s 17(1) bar one have either been admitted by the NHBRC or are not in dispute. The only element that is in dispute, and which I have to determine, is the cause of the defect. If I find that the cracks in the floor slab are caused by a major structural defect, Stergianos will be entitled to the relief contemplated by s 17(1) and if I cannot make such a finding or find that they are not so caused, the action must fail.

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[6] Although the contract was entered into, and the home is situated in the Wilderness within the jurisdiction of the Western Cape High Court, Cape Town, the parties were agreed that this court has jurisdiction. The relevant regional office of the NHBRC is situated in Port Elizabeth and the cause of action substantially originated within this court's area of jurisdiction.

[13] The term ‘major structural defect’ is defined in s 1 of the Act to mean ‘a defect which gives rise or which is likely to give rise to damage of such severity that it affects or is likely to affect the structural integrity of a home and which requires complete or partial rebuilding of the home or extensive repair work to it, subject to the limitations, qualifications or exclusions that may be prescribed by the Minister’.

[14] The conclusion reached by the civil engineer who testified as an expert on behalf of Stergianos – Kleinhans, who I have mentioned above – was that the defects in the concrete floor slab of the home were indeed caused by major structural defects in the substructure of the home and consequent settling of the slab. The NHBRC’s expert, Mr Thabo Mathibeli, was of the opinion that the cracks were caused by shrinkage as a result of poor workmanship when the concrete slab was poured and the builder’s failure to place expansion joints in the slab where they should have been placed. In his view, therefore, the defects in the slab were not structural in nature. Both experts were agreed that, whatever the cause of the cracking, the standard of workmanship of the builder left a lot to be desired.

[15] Before turning to the evidence of the experts called by the plaintiff and the defendant, it is necessary to say something of the nature and purpose of expert evidence and the correct judicial approach to dealing with it. I commence with Addleson J’s judgment in *Menday v Protea Assurance Co Ltd*[7] in which he stated:

‘In essence the function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable.’

[16] In *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung Mbh*[8] Wessels JA said of the use of expert evidence:

‘As I see it, an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald

[7] *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E), 569B-C.
[8] *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung Mbh* 1976 (3) SA 352 (A), 371G.

statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'

[17] And in *R v Nksatlala*[9] Schreiner JA, in dealing with the evidence of a finger print expert about a fingerprint which to the untrained eye was not particularly clear in respect of all of the points of resemblance that the expert had identified, stated that while a court should not accept the evidence of an expert blindly, once it has satisfied itself that the evidence can safely be accepted, it should give 'effect to that conclusion even if its own observation does not positively confirm it'.

[18] Finally, before turning to the evidence of the expert witnesses, it is necessary to consider the role that an expert plays when he or she testifies. This role, and the consequent responsibilities of an expert witness, was set out as follows by Davis J in *Schneider NO & others v AA & another*:[10]

'In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.'

[19] When the problems in the home became evident and after the NHBRC had denied liability, Kleinhans was commissioned to investigate the cause of the problems. In the letter instructing him, Mr E Brand, Stergianos' attorney, stated that while one Muller had advised on the project, he was too closely connected to it to be able to be called as an independent witness. Brand said in the letter that his client's case 'is dat sy woning strukturele gebreke het vanweë gebrekkige bouwerk, en die NHBRC daaroor moet instaan' but his instructions to Kleinhans were the following:

'Ons benodig derhalwe u dienste om die woning te evalueer, en te adviseer ten opsigte van

[9] *R v Nksatlala* 1960 (3) SA 543 (A), 546D. See too *Ruto Flour Mills Ltd v Adelson (1)* 1958 (4) SA 235 (T), 237A-G.

[10] *Schneider NO & others v AA & another* 2010 (5) SA 203 (WCC), 211J-212B. See too *Stock v Stock* 1981 (3) SA 1280 (A), E-G.

die beweerde strukturele gebreke.'

[20] Kleinhans proceeded to inspect the home. He was perturbed by extent of the cracks that he had observed in both the substructure and the superstructure of the home. This, to him, was a visual indication of what he termed obvious distress of the substructure – that part of the building from ground level to the top of the floor.

[21] According to Kleinhans, the home was built 'on a primary dune adjacent to the Indian Ocean, previously covered with indigenous vegetation as well as invasive alien vegetation'. It is north facing and built on a 'long oblong' erf. The erf 'has a substantial slope with a drop in height of 2.45 metres along the south-north axis of the house itself'. These characteristics, he said, signalled extreme caution to anyone who was going to build on that site. A builder would need to take special precautions when building on a dune because it is mobile. All in all, he said, this being 'a special animal', an engineer involved in the project would have to know his stuff to 'get something functional'. The characteristics of the site signalled that it had to be handled with care.

[22] Given the technical challenges that the site presented, Kleinhans felt that the documentation that should have been kept concerning compliance with technical requirements and prescribed standards would be important. He stated that even if the home had been built according to 'normal structural engineering practices' rather than the National Home Building Regulations, 'there should have been at least a paper trail of tests, approaches, strategies, in situ tests on the ground, in situ tests on the strip footings, concrete tests' and so on. He was, however, able to find very little documentation. He did find a record of three Dynamic Cone Penetrometer (DCP) tests conducted, it would appear, before building commenced (and hence before any in-filling had taken place) which were probably conducted in order to classify the soil type for purposes of designating a class to the site in terms of the Home Building Manual. These results indicated cause for concern and the consequent need to take remedial measures. In his view, the site classification had probably been wrong.

[23] He then proceeded to examine what he termed the 'health of the structure'. To do this he first took a large number of photographs of the cracks, recorded them

on a plan and looked for a pattern. This involved measuring the length of the cracks as well as their maximum widths and depths. (This information was usefully collated in a document that was headed ‘All Crack Summary’.) The total linear length of the cracks was given at first by Kleinhans as 159 metres. Later in his evidence, he spoke of 104 metres. He explained this discrepancy by saying that while the total length was indeed 159 metres, he had disregarded the most insignificant cracks from consideration and the remainder of cracks, which are logged on the All Cracks Summary totalled 104 metres in linear length.

[24] The longest cracks that he found were two of five metres, the deepest cracks that he found were two of 140 mm deep and the widest crack was 30 mm wide as its widest. (I leave out of consideration a hole, rather than a crack, that was 60 mm wide and 60 mm long, the cause of which was speculated upon and debated at length but which takes the matter no further.) Of the 57 cracks that he recorded in the All Cracks Summary, 33 were longer than a metre. Most were in the floor slab while some were in the walls and ceiling and one was in a pillar. There were cracks in every room including the garage and scullery. An example of one of the most severe cracks was one in the main bedroom. It was 4,8 metres long. This was the entire width of the room. It was 6 mm wide and 140 mm deep. If this was not the full depth of the slab, it was fairly close to that.

[25] Having concluded from his observations that the problem was probably substructure failure, Kleinhans then conducted DCP tests in order to determine the density of the fill below the slab. To this end, he commissioned Outeniqua Lab (Pty) Ltd to supply the instrument and the technician to operate it but he supervised the tests and recorded the results for himself. It was argued that the evidence of Kleinhans in respect of the results of the DCP tests was inadmissible hearsay as the technician who compiled the test reports was not called as a witness. In my view, this argument has no merit. Kleinhans conducted the tests even if someone else did the physical work and even though someone else plotted the results onto paper. These tests, conducted in seven places chosen by Kleinhans, confirmed his visual analysis of the cause of the problem. They showed that the fill beneath the slab was not sufficiently compacted to bear the weight of the slab.

[26] From his visual observations, his photographing and recording of the lengths, depths and widths of the cracks, his plotting of their positions in the home, his consideration of DCP tests conducted before building began and his own DCP tests on the fill beneath the slab, Kleinhans concluded that the cracks were caused by a serious failure of the substructure of the home. The fact that there was no record of what was done to safeguard against the dangers inherent in building on a fundamentally unstable site, and no evidence that he could observe of any special precautions having been taken, strengthened his opinion that the heart of the problem was structural: in essence, bad workmanship had resulted in structural failure.

[27] In justifying this conclusion, Kleinhans explained that in order for the slab to carry its intended load, and bearing in mind that a certain amount of shrinkage is bound to occur, the material that supports the slab must have integrity and must not be able to subside, it should not be able to draw moisture from the concrete thereby reducing the strength of the concrete and the concrete slab must be 'poured with care, with good quality material, with good specification and supervision and with good aging so that it does not collapse under own weight, imposed weight and dynamic weight'. He concluded this explanation by saying the following of the cause of the problem:

'So what caused it in this case? A combination of all these factors. A sick support, bad concrete material placing, bad design and an absence of plastic preventing cement water to be sucked away. The slab did not have a chance from the beginning.'

[28] As far as the remedial work needed was concerned, Kleinhans said that there were two possibilities. In both instances, the walls would remain standing while the slab would have to be removed. The first solution, which he favoured, is to 'acknowledge that the soil is not worth anything' and pour a slab with re-enforcement, as one would in a multi-storey building. He concluded on this option that 'with clever placing of those suspended slabs, well planned expansion joints, good engineering, it will be better not to try and remedy the soil compaction below'. The second option is, once the slab has been removed, to remove the soil below it, re-compact it and pour the slab again. This option presented problems, not least of them being the prohibitive costs.

[29] Mr Thabo Mathibeli who, like Kleinhans, is a structural engineer, was called as an expert witness by the defendant. He inspected the home on two occasions and came to a conclusion contrary to that of Kleinhans. He inspected the walls, both inside and outside, in order to look for any separation of the walls from the slab and cracks running into the foundations, both of which would, he said, indicate subsidence of the substructure. He found neither and concluded that the problem was caused simply by bad workmanship. The builder had not poured the concrete properly and had not placed joints to allow for shrinkage. The resultant stress in the concrete had caused the cracks. In other words, in the view of Mathibeli, the problem was not structural at all. That being so, and as the cracks were, he said, merely surface cracks, all that was required was for the cracks to be ground and filled properly with the appropriate material and for joints to be created where appropriate.

[30] The outcome of this case turns entirely on the expert evidence. I am faced with opinions as to the cause of the cracking expressed by two experienced and qualified structural engineers that are at odds with each other. In circumstances such as this, I am required to analyse the essential reasoning of the expert witnesses and to consider how logical the opinions of each are, viewed in the light of the probabilities.[11] I am required, as in any civil dispute, to decide on the evidence placed before me whether it is more probable that the cracking was caused by poor workmanship that led to structural failure or was simply the product of poor workmanship that had no structural implications.[12]

[31] Before turning to that analysis, I shall say something of the performance of both experts in the witness box. Both gave evidence in a clear manner, often explaining complex engineering concepts in terms that were, for a lay person, easily understood. Both may be criticised, to an extent, for an unwillingness at times to make concessions that had to be made. That said, however, in the case of both of them, this was not a criticism that applied to their evidence as a whole, and nor is it a

[11] *Michael & another v Linksfield Park Clinic (Pty) Ltd & another* 2001 (3) SA 1188 (SCA), paras 34-40.
[12] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E), 440D-G; *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA), para 5; *Dreyer & another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA), para 30.

criticism that adversely affects their credibility or independence as experts to any significant degree.

[32] Kleinhans was criticised for exaggerating the total length of the cracks, as he first said that this was 159 metres, and that this represented nearly two rugby fields. He gave an explanation for this evidence. He said that while he had measured cracks with a total length of 159 metres, for purposes of his report he had left out of consideration a number of cracks that were not cause for concern. That left a total length of 104 metres. It was clear, however, that he was at all times concerned with a total crack length of 104 metres: that appears from his report and from the rest of his evidence. If he can be criticised, it is for not knowing the length of a rugby field, rather than for attempting to mislead the court! He was also criticised for regarding the plaintiff as his 'client'. While it is true that he referred to the plaintiff in these terms, he was expressing, it seemed to me, the idea of a professional relationship between them, rather than expressing partisanship. From his evidence and his demeanour in the witness box, I never gained the impression that he was championing the cause of his 'client' come what may. I do not consider this criticism to have merit.

[33] Mathibeli's opinion that the cracks were caused by bad workmanship alone and not by structural failure was based on his observations of the home on two occasions. He conducted no tests and he did not measure, catalogue and classify the cracks as Kleinhans did. His opinion is based on one central observation: if the problem was caused by sub-structural failure, there would have been evidence of the slab pulling away from the walls. As there was no such evidence, the cracking could not, in his opinion, have been caused by the subsidence of the fill.

[34] Kleinhans had testified, however, that subsidence of the fill would not necessarily have led to the slab and the walls pulling away from each other. While it could have such a result, there were other possibilities. One was dealing with what he termed a 'complex mechanism'. How the slab reacted was dependant on the geology below the in situ material. There were, in any event in his view, indications of the type of problem that Mathibeli spoke of. Cracks in the scullery and garage, for instance, ran diagonally from wall to wall.

[35] In my view, the opinion of Kleinhans as to the cause of the cracks is to be preferred over that of Mathibeli. Kleinhans engaged in a meticulous mapping and measuring of the cracks, and once he had formed the view that the problem lay, in all probability, in the fill below the slab, he conducted tests in order to either confirm his view or disprove it. The DCP tests indicated that his initial view was in fact correct. It was suggested that the DCP tests were of little consequence because they were only indicative and not definitive of the cause of the problem. As I understood the evidence of Kleinhans, however, a DCP test could give a false result in favour of soil being more compacted than it was – as where, for instance, the plunger struck a piece of rock that happened to be in the way – and it was in that sense seen as merely indicative. In this case, it showed that the soil was not sufficiently compacted. What is more, seven DCP tests were conducted at different sites in the house and the results, taken together, indicated a compaction problem in the material below the slab. It should be borne in mind too that the home was built on a site that held its own challenges and Kleinhans was not able to find any records to indicate that special measures had been taken to avoid the risks inherent in building on such a site. The DCP tests confirm that, in all probability, no special precautions were taken.

[36] Kleinhans was criticised for not conducting further tests but once he had the results of the DCP tests there was really no need to conduct further tests: he had, as far as he was concerned, determined the cause of the problem. In any event, the further tests that could have been conducted would have been invasive, and he wished to avoid that.

[37] The DCP tests conducted by Kleinhans swing the probabilities in favour of his opinion. The fact that the density of the fill below the slab was shown to be wanting also lends credence to his explanation that cracking in the walls is not the only sign of substructural subsidence.

[38] I therefore find that it is more probable than not that the cracking in the plaintiff's home was caused by a failure of the substructure of the house. That, in turn, means that the plaintiff has discharged the onus resting on him to establish a structural defect and there can be no doubt that the structural defect is a major

defect: the defect, to apply the definition of a major structural defect, has been proved to be one that has given rise to damage of such severity that it has affected the structural integrity of the home, which now requires extensive repair work to it.

[39] In the result, I make the following order.

(a) The defendant is ordered, in terms of s 17 of the Housing Consumer Protection Measures Act 95 of 1998, to rectify the structural defects in the plaintiff's home, situate at erf 1392, Kleinkrantz, Wilderness, subject to the maximum amount prescribed by regulation 13(1), read with regulation 13(2), of the regulations promulgated in terms of the Housing Consumer Protection Measures Act.

(b) The defendant is ordered to pay the plaintiff's costs.

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C Plasket

Judge of the High Court

APPEARANCES:

For the plaintiff: Mr L Joubert SC, instructed by Cilliers Odendaal, George and Kaplan Blumberg Attorneys, Port Elizabeth

For the defendant: Mr L Schubart SC, instructed by V P Maluleke Attorneys and Lexicon Attorrneys, Port Elizabeth