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**CONSTRUCTION LAW BULLETIN**

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**UNREGISTERED HOME BUILDERS**

A decision of the Johannesburg High Court last year<sup>1</sup> has affirmed the precarious position of contractors who build homes without being registered in terms of the Housing Consumers Protection Measures Act, 95 of 1998 (“the Act”).

The Act stipulates<sup>2</sup>:

*“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.”*

In the abovementioned case, the contractor built a house for the defendant, and for one or other reason which is not clear the defendant declined to pay the contractor.

The contractor instituted legal action against the defendant for payment. The defendant defended the claim on the basis that the contractor was not registered as a home builder in accordance with the Act and hence had no claim.

The contractor argued that the Act merely made receiving payment of the contract price an offence but should not be construed so as to preclude it from receiving payment at all.

The court disagreed with this approach and held that the Act unequivocally prohibited an unregistered contractor from receiving any consideration and that the court would not make an order contrary to an express prohibition contained in legislation. The court cannot be asked to order the performance of a prohibited or criminal act.

In the result, the contractor was held not to be entitled to receive payment as claimed.

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<sup>1</sup> IS & GM Construction CC v Tunmer 2003(5) SA 218 W.

<sup>2</sup> Section 10(1).

Although the case did not deal with the issue, it is likely that the contractor would be entitled to make a claim based on the principles of unjust enrichment.

Such a claim would not however ordinarily put the contractor back into the same position as he would have been as the amount recoverable in an enrichment claim is usually less than the contract price.

An enrichment claim only allows compensation for actual expenses incurred or the amount by which the value of the property concerned has been enhanced, whichever is the lesser. No compensation is allowed in the case of luxurious improvements save in limited circumstances.<sup>3</sup> In contradistinction, the price payable in terms of the contract would cover the contractor's costs and expenses as well as profit mark-up, and the fact that the improvements might be luxurious would be irrelevant.

### **DAMAGES FOR LOST TENDER**

On 1 April 2004 the Supreme Court of Appeal ordered Transnet Ltd to pay damages of R57m to an unsuccessful tenderer arising out of a fraudulent tender award.<sup>4</sup>

The relevant facts were:

- Transnet Ltd, a parastatal corporation, called for public tenders for the purchase of one of its divisions, Transnet Production House, which operated a printing business.
- Sechaba Photoscan (Pty) Ltd ("Sechaba") and Skotaville Press (Pty) Ltd ("Skotaville Press") submitted tenders.
- Transnet gave strong indications to Sechaba that its tender would be successful. However, unexpectedly, Skotaville Press was awarded the purchase contract.

- Sechaba sued for damages on the basis that it had been deprived of the award by virtue of a fraudulent tender process.
- Transnet conceded the allegations of fraud and in the end result the only issue in the case was the quantum of Sechaba's damages.

Sechaba had calculated its claim on the basis of the net profit which it would have earned over a three year period had it been awarded the business.

Transnet argued that an award of damages on this basis was not permissible outside the law of contract and that all that Sechaba was entitled to was its out of pocket expenses incurred in preparing and making its bid.

Sechaba's claim was perforce based on the law of delict as there was no contractual connection between it and Transnet.

Fraudulent conduct, such as Transnet's, causing loss does give rise to delictual liability.

Our courts have explained the difference between contractual damages and delictual damages as follows:

*"A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him."*<sup>5</sup>

Transnet placed great reliance on a fairly recent Appeal Court decision<sup>6</sup> in which a loss of profits claim arising out of an unsuccessful tender was not allowed.

<sup>3</sup> LAWSA Vol 9 para 97.

<sup>4</sup> Transnet Ltd v Sechaba Photoscan (Pty) Ltd Case No 98/03 SCA.

<sup>5</sup> Trotman v Edwick 1951(1) SA 443 A at 449 B-C.

<sup>6</sup> Olitzki Property Holdings v State Tender Board and Another 2001(3) SA 1247 SCA at 1261.

The Appeal Court distinguished the present case from that one by pointing out that:

- Here the tenderer had been dishonestly deprived of a contract which it would otherwise have been awarded.
- The tenderer in the Olitzki case had not been defrauded in this fashion.
- The Olitzki tenderer had complained of an irregular, unreasonable and arbitrary tender process and had sought to evoke a delictual remedy “from the interstices of the interim Constitution” on the ground of unlawful administrative action.
- The Olitzki tenderer could not and did not prove that it would have been awarded the contract but for the alleged wrongful conduct whereas in the Sechaba case the point had been conceded by Transnet.
- The Olitzki case did not concern itself with whether loss of profits was claimable in delict but whether in that case there was a delictual claim at all.

After analysing the principles relating to the computation of damages going back to Roman law times, the court held that there was no reason why loss of profits could not be awarded in respect of a delictual claim. The court stated that an award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict.

In the case in question the court held that Sechaba was entitled to be placed in the position it would have been in but for it having been fraudulently deprived of the purchase that it was destined to be awarded.

It is unlikely that there will be a flood of successful damages claims by disgruntled tenderers as a consequence of this decision. A major hurdle that must be overcome in each case will be proving that there has been some fraud and that, but for the

skulduggery, you would have been the successful tenderer.

The case does however sound a note of warning to those State organisations which have been prone to dubious tender practices.

ALASTAIR HAY  
COX YEATS  
12<sup>th</sup> Floor, Victoria Maine  
71 Victoria Embankment  
P O Box 3032  
DURBAN  
Tel: (031) 304 2851  
Fax: (031) 301 3540  
[ahay@coxyeats.co.za](mailto:ahay@coxyeats.co.za)