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CONSTRUCTION LAW BULLETIN

OCCUPANCY CERTIFICATES AND LEASES

INTRODUCTION

The National Building Regulations and Building Standards Act, 103 of 1997, makes provision for the issue of certificates of occupancy in relation to buildings.¹

Once the erection of a building has been completed, the owner must apply to the local authority for the issue of a certificate of occupancy. If the local authority is satisfied that the construction is in accordance with the Act and the approved plans, it issues a certificate of occupancy.

The owner of a building or any person having an interest therein who occupies or uses a building or permits the occupation or use of the building in respect of which plans have been approved without a certificate of occupancy commits an offence² and is liable to a fine not exceeding R4 000,00 or to imprisonment not exceeding 12 months.

Is a lease invalid for want of a certificate of occupancy and can a tenant escape liability for its rental obligations on that account?

The Supreme Court of Appeal deliberated on these issues and issued a helpful judgment on the subject in December 2017.³

¹ Section 14 of the Act.

² Section 14(4)(a) of the Act.

³ Wierda Road West Properties (Pty) Ltd v Sizwe Ntsaluba Gobodo Inc 2018(3) SA 95 SCA.

BACKGROUND

Sizwe Ntsaluba Gobodo Inc (“SNG Inc”), a firm of chartered accountants, failed to pay R7,8m worth of rent to its landlord, Wierda Road West Properties (Pty) Ltd (“Landlord”), in respect of its offices in Houghton, Johannesburg.

When sued by the Landlord, SNG Inc raised as a defence to the claim that the lease was invalid and as such the Landlord’s rental claim could not be enforced.

The basis of this defence was that no certificate of occupancy had been issued in respect of the building.

The case has the hallmark of a family dispute.

SNG Inc was created through a merger between two firms of chartered accountants, namely Gobodo Inc and SizweNtsaluba.

The Landlord comprised a property-owning company, the shareholders in which were the shareholders in the erstwhile Gobodo Inc.

The Landlord had acquired the property to house Gobodo Inc which had outgrown its previous premises.

After Gobodo Inc had taken occupation, it became apparent that no plan approvals had been obtained in respect of a significant part of the buildings on the property and as such no certificate of occupancy in respect thereof had been issued.

After unsuccessfully trying to obtain plans from the original owner, the Landlord commissioned architects to draw the necessary plans and obtain plan approval from the City Council of Johannesburg.

In the meantime Gobodo Inc merged with SizweNtsaluba.

Following the merger, the lease between the Landlord and Gobodo Inc of 12 years was substituted with a new lease agreement between the Landlord and SNG Inc for five years.

SNG Inc occupied the buildings for nearly two years during which time it paid rent and during which time the Landlord beavered away trying to get plan approval and a certificate of occupancy.

After two years SNG Inc abruptly and without notice vacated the premises.

Two years later the Landlord sold the property, having finally extracted a certificate of occupancy out of the City Council.

Its claim against SNG Inc was for the rental payable between the date SNG Inc vacated the property and the date on which the property had been sold.

It emerged that:

- the shareholders of Gobodo Inc were all aware from the outset of the lack of a certificate of occupancy;
- the City Council was also fully aware of that and acquiesced in the property being occupied;

- the property was itself perfectly safe for occupation; and
- only after it had vacated the property did SNG Inc raise the absence of a certificate of occupancy as an issue and a reason to not pay the outstanding rental.

LEGAL ARGUMENT

SNG Inc's defence was founded on:

- the Landlord's non-compliance with section 4(1) of the Act which prohibits any person erecting a building in the absence of an approved plan and renders a person erecting a building in contravention of this requirement guilty of an offence and liable on conviction to a fine not exceeding R100,00 per day; and
- the provisions of section 14(4)(a) of the Act which renders the owner of a building or any person having an interest therein who occupies a building which has been erected with the approval of the local authority, without a certificate of occupancy, guilty of an offence.

Underlying this defence was the trite principle of our law to the effect that what the law prohibits it also renders void. In other words because the Act prohibits the erection of a building without an approved plan and prohibits the occupation and use of a building without a certificate of occupancy, a lease agreement relating to the building must be taken as void and of no effect.

COURT'S DECISION

The court, whilst recognising this principle of our law, pointed out that it is not an inflexible rule. Consideration must be given to the wording in the statute and of its purpose and purview which may lead to the conclusion that the Legislature did not intend invalidity even where there had been non-compliance with the statute.

Unless a statute specifically declares an act or contract invalid for want of compliance with the statute, and if it lays down a penalty for contraventions, a court is justified in deciding that the act or contract is not invalid.

In such cases the contract can be upheld and the contravening parties punished through the mechanism provided in the statute by way of a fine or imprisonment or both.

The Supreme Court of Appeal concluded on the facts of this case that it was not the intention of the Legislature to render lease agreements invalid in the circumstances and that the penalties provided in the Act were sufficient punishment for non-compliance with the applicable provisions of the Act.

Before coming to this conclusion, the court pointed out in any event that it was doubtful whether the provisions of the Act relied on by SNG Inc were applicable in this case because:

- the Landlord had not been the party to erect the buildings; and
- the penalty for occupation without a certificate of occupancy only applied in relation to buildings that had plan approval which was not the case in this matter.

The court concluded that the Act made sufficient provision for penalising non-compliance and that it was not necessary for it to impose the additional penalty and sanction of declaring the lease in question invalid.

The court also overruled a previous decision of the Cape High Court⁴ which had construed section 4(1) of the Act as containing an implied prohibition against use or occupancy in the absence of approved plans.

CONCLUSION

Lease agreements in respect of premises where there are no approved plans nor a certificate of occupancy will not in the ordinary course be treated as invalid and unenforceable.

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⁴ Berg River Municipality v Zelpy 2065 (Pty) Ltd 2013(4) SA 154 (WCC).