REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON EXCEPTION

Case No. I 3622/2014

In the matter between:

KONDJENI NKANDI ARCHITECTS **FIRST PLAINTIFF**

KONDJENI NKANDI **SECOND PLAINTIFF**

And

THE NAMIBIAN AIRPORTS COMPANY LIMITED **DEFENDANT**

*Neutral citation: Kondjeni Nkandi Architects v The Namibian Airports Company Limited (*I 3622-2014*) [2015] NAHCMD 223 (11 September 2015)*

CORAM: MASUKU, AJ.

Heard: 1 July 2015

Delivered: 11 September 2015

Flynote: **PRACTICE –** Rules of the High Court – compliance with rule 32 (9) and (10); Exception – law applicable to exceptions; CONTRACT – validity of contracts

entered into in violation of statutory enactments – whether courts can give effect to such contracts.

Summary: The plaintiffs sued the defendant for architectural work done apparently in violation of a statutory enactment. PRACTICE – Rules of Court – held the provisions of rule 32 (9) and (10) are mandatory and parties should comply therewith and may not choose or agree whether to comply with same or not; Exception – a thin line at times exists between a bad cause of action or defence and one that is excipiable. For an exception to apply, the question is whether any evidence may be led on the averrals in the particulars of claim or plea. CONTRACT – held that payment claimed under contracts entered into in violation of statutory provisions may not be sanctioned by the court. Defendant's exception upheld with costs.

RULING ON EXCEPTION

MASUKU, AJ.

[1] Presently serving before court for determination is the excipiability or otherwise of a claim instituted by the plaintiffs against the defendant company.

[2] The history of the matter may be summarized briefly as follows, the factual matrix of which is largely common cause: The defendant, a company duly registered in terms of the Company laws of Namibia, advertised a tender for the design and overall project management of its head offices at Eros Airport, Windhoek. The first plaintiff responded to the tender and was awarded same in terms of a letter dated 18 April 2012 signed by the defendant's Chief Executive Officer (C.E.O.) and the second plaintiff. The said letter contained a declaration by the second plaintiff to the effect that the first plaintiff accepts the offer coupled with the terms and conditions contained in a written agreement which

is attached to the particulars of claim. The terms thereof bear no particular relevance for present purposes.

[3] By letter dated 10 September 2012, the defendant's C.E.O. informed the plaintiffs that the appointment referred to above was being terminated with immediate effect and requested the plaintiffs to submit their invoices for the work undertaken up to that time. No reasons were advanced for the termination in the letter.

[4] The plaintiffs accordingly filed their invoice for the work done, in an amount of N$ 4,110,224.75. The matter, however, took a strange twist when the defendant's lawyers Ellis Shilengudwa wrote a letter dated 12 April 2013 in which they indicated their instructions from their client to deny liability for the claim. It was pointed out that the agreement entered into *inter partes* was null and void *ab initio.* It was pointed out in particular that the said agreement was entered into in contravention of the provisions of the Architects and Quantity Surveyors Act[1] (the 'Act'). This denial of liability culminated in the issuance of a combined summons which is the subject of this ruling.

[5] In the combined summons, the first plaintiff alleges the existence of a main and an alternative claim. In the main claim, it alleges that the parties entered into a written agreement as stated above and that the first plaintiff complied with all its obligations in terms of the said agreement and that while the works were in progress, the defendant terminated its appointment, which appointment it duly accepted and rendered its invoice as requested by the defendant. It claims payment of the amount stated in the invoice and which is captured in the immediately preceding paragraph.

[6] In the alternative claim, the first plaintiff avers that should the court find that the agreement in question is in contravention of the Act as alleged, for the reason that the first plaintiff is not a natural person and is not registered as an architect in terms of the Act, then the second plaintiff, who is qualified and duly registered as an architect, rendered the services in question to the defendant on the *bona fide* but erroneous belief

[1] Act 13 of 1979.

that the agreement is valid. It therefore claims payment of the aforesaid sum on the basis of unjust enrichment.

[7] By notice dated 12 February 2015, the defendant filed an exception to the plaintiff's particulars of claim on the basis that same did not contain averments necessary to sustain an action against the defendant and/or failed to disclose a cause of action against the defendant and should be dismissed therefor. The principal grounds upon which the said pleading was impugned, briefly captured, in relation to the main claim, are in essence the following:

(a) that the agreement entered into by and between the parties was in contravention of the Act, particularly section 13 (1) (b) thereof and moreover, is regarded by the Act as an offence in that only natural person may engage in the type of work that the first plaintiff accepted. it is common cause that the first plaintiff is a juristic person;

(b) the first plaintiff makes no allegation to the effect that it is exempted from complying with the provisions of the Act quoted above;

(c) there is no allegation made that the first plaintiff is a registered architect by the Council in terms of the Act.

It is accordingly claimed that the plaintiff's claim, contravening the provisions of the Act mentioned above as alleged, is therefore illegal and unenforceable.

[8] In relation, however, to the alternative claim, the basis for the exception is that the second plaintiff does not allege that she has been exempted to carry out the works in terms of the Act for the reason that the Act prohibits such work to be done by any person other than an architect and that there is no allegation that the second plaintiff is registered by the Council as an architect. It is contended therefore that the alternative claim is, for those reasons also illegal and hence unenforceable. Needless to say, the

plaintiff has taken a position contrary to that of the excipient and I shall deal with the respective arguments presented by the protagonists in due course.

Compliance with Rule 32 (9) and (10)

[9] Before the matter could be argued, the court, *mero motu* taxed both parties regarding whether they had complied with the provisions of rule 32 (9) and (10) of the rules of this court. Mr. Totemeyer argued that the parties had agreed not to go the route of rule 32 (9) and (10) since the matter was not capable of being resolved by the parties amicably. In alternative argument, he submitted that the parties had substantially complied with the said provisions and in this regard referred to a letter dated 12 April 2013 written by the excipient's attorneys denying liability for the claim.

[10] In pursuance of this argument, Mr. Totemeyer also referred to a status report filed in terms of rule 27 received by this court and bears a court stamp dated 20 January 2015. Particular reference was made to paragraph 3 thereof, headed 'Possible exception to be raised in case I 3622/2014'. In the said paragraph, it is stated that the defendant intends raising an exception to the plaintiff's particulars of claim.

[11] The question for determination is whether these documents referred to, whether considered individually or collectively, do comply fully or substantially with the requirements of the said sub-rules. The said provisions bear repeating. They provide the following:

'(9) In relation to any proceeding referred to in this rule, a party wishing to bring such proceeding must, before launching it, seek an amicable resolution thereof with the other party or parties and only after the parties have failed to resolve their dispute may such proceeding be delivered for adjudication by the court.
(10) The party bringing any proceeding contemplated in this rule must, before instituting the proceeding, file with the registrar details of the steps taken to have the matter amicably resolved as contemplated in subrule (9) without disclosing privileged information'.

[12] There is no argument that the proceeding in question, being an exception is interlocutory in nature and therefore is governed by the provisions of this subrule. What should also not sink into oblivion, is that from the nomenclature employed by the rule-giver, it is clear that the provisions of these subrules are peremptory in nature and this cannot be gainsaid. That this is the case can be deduced from the language, for instance as found in the use of the words "must before launching it" in subrule (9) and 'must, before instituting the proceeding' occurring in subrule (10). See *Irvine Mukata v Lukas Appolus.*[2]

[13] In *Chantal Visagie v Josias Alexander Visagie*[3] I had occasion to comment on the above subrules as follows:[4]

'The import is that a party, who seeks to raise an application for an irregular step must before launching the said proceeding do two things: (a) seek an amicable solution to the dispute and (b) file with the registrar details of the steps taken to attempt to resolve the matter amicably.
It is plain, in my view that failure to comply with either or both requirements in rule 32 (9) and (10), is fatal. The court cannot proceed to hear and determine the interlocutory application. The entry into the portals of the court to argue an interlocutory application must go via the route of rule 32 (9) and (10) and any party who attempts to access the court without having gone through the route of the said subrules can be regarded as improperly before court and the court may not entertain that proceeding. In colloquial terms, that party can be said to have 'gatecrashed' his or her way into court. Gatecrashers are certainly unwelcome if regard is had to the provisions of the said subrules.
A proper reading of the above rule suggests unequivocally that once an application is interlocutory in nature, then the provisions of the subrule are peremptory and a party cannot wiggle its way out of compliance therewith . . . For that reason, I am of the considered view that a party may not circumvent compliance with the said subrules, whatever the circumstance and the one at hand, namely, that the case involves minors, is not, in my view one that brooks an exception.'

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[2] (I 3396/2014) NAHCMD 54 (12 March 2015).
[3] (I 1956/2014) [2015] NAHCMD 117 (26 May 2015).
[4] *Ibid* at paragraphs 10 and 11.

[14] Reverting to the matter at hand, it is clear that the letter referred to as compliance with subrule (9) was written at demand stage i.e. even before the combined summons was issued. Compliance with the said subrule demands that having drafted the pleading containing the interlocutory application but 'before launching it seek an amicable resolution thereof . . .' In this case, it means that having drafted the exception, but before launching it, the excipient should have sought an amicable resolution of the dispute and this evidently did not happen. It would appear to me that the onus to ensure compliance with the subrules rests on the party initiating the interlocutory application, namely the excipient in the instant case.

[15] I am of the firm view that the excepient did not comply with the said provisions at all. The letter written before the issue of summons can hardly be said to answer to the clear and unambiguous requirements of the said subrule (9). There was simply no attempt to comply with same. The fact that the issue of an exception was mooted in the status report referred to earlier as 'possible' also does not meet muster. It is also my view that there was no attempt to comply with the provisions of subrule (10). The court order dated 21 January 2015 adopting the proposed case plan does nothing to advance the case of compliance with the said subrules.

[16] I must also consider the argument that if there was no full compliance with the subrules in question, then there was substantial compliance. I recently had occasion to deal with this very issue in *Old Mutual Life Assurance Company (Namibia) v Risto Hasheela and Another*[5]. In that case the plaintiff (excipient) had written a letter to the defendant pointing out the issues in need of attention in their plea in the spirit of rule 32 (9) and called upon the defendants to amend their counterclaim, failing which they would then deliver the exception for determination.

[17] The amended counterclaim was still excipiable in the excipient's view and it accordingly delivered the exception for determination. The plaintiff however neglected to file the letters exchanged by the parties in an effort to resolve the matter amicably with

[5] (I 2359/2014) [2015] NAHCMD 152 (26 June 2015).

the registrar in terms of subrule (10). Relying on cases such as *Kanguatjivi v Shovoro Business and Estate Consultancy*[6], *Kessl v Minsitry of Lands Resettlement and Two Others*[7] and *Rally for Democracy v Electoral Commission*[8] I found and held that in those circumstances, there was substantial compliance. In the instant case, there was simply no attempt whatsoever, to comply with any of the two requirements by the excipient. I accordingly find that a case of substantial compliance has not been made out and it is not at all borne out by the cold facts of the matter.

[18] I understood Mr. Totemeyer to suggest in the alternative that as the parties representing the litigants, they took the position that there was, on account of the disputed nature of the issues, no prospect of settling the matter amicably and hence no need to comply with the said provisions. My reading of the subrule does not leave it to the parties to agree or disagree to comply with what are clearly mandatory provisions. Parties cannot be allowed to opt out and to choose which rules to comply with and which ones not to comply with. Such an election would be perilous and result in anarchy and a complete breakdown in the orderly conduct of litigation.

[19] Having said the above, and considering that all the parties were before court, with instructing and instructed counsel ready to fire on all cylinders, and amply prepared to argue the exception, I grudgingly condone the non-compliance but hasten to point out very sternly that this must not be taken as a precedent that parties who choose not to comply with this subrule can be allowed to gatecrash the court's portals and be allowed to access the fountains of justice with the freshness of the non-compliance very evident. Far from it. Other overriding principles, including the saving of time and costs and the need to speedily dispatch the application have impelled me from strictly following the strictures of the said subrules and in the peculiar circumstances of this matter, subordinating the overriding principle of seeking amicable resolution of disputes to the others I have just mentioned. I accordingly, on that note turn to consider the exception proper.

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[6] 2013 (1) (NR) 271.
[7] 2008 (1) R 212-213.
[8] 2010 (2) NR 487 at 515 D-E.

The exception

The alternative claim

[20] In dealing with the exception, I choose to first consider the exception to the alternative claim for it appears there is a possibly easy answer. In response to the exception, the plaintiff filed an application to amend same, which at the time of the hearing of the exception the time limits for considering same were still running.

[21] It will be recalled that the principal basis for the exception, as foreshadowed and captured in paragraph [8] above is that whereas the plaintiff's alternative claim is based on work specially reserved for architects and performed for gain, the second plaintiff does not make any averral to the effect that she was exempted to carry out the work in terms of the provisions of section 13 (1) of the Act. It was also averred that section 11 of the Act requires registration by the Namibia Council for Architects and Quantity Surveyors ('the Council') established in terms of section 2 of the Act. The contention is that the second plaintiff, in so far as the alternative claim is concerned, has not made the allegation that she is registered as an architect by the said Council.

[22] In addressing the cause of the complaint as borne out in the exception in relation to the alternative claim, the second plaintiff filed a notice of intention to amend paragraphs 1 and 2 of the particulars of claim by deleting the words 'Namibia Institute of Architects' and substituting same with 'Namibia Council for Architects and Quantity Surveyors'. This amendment would appear to address the complaint that the second plaintiff makes no allegation that she has been registered as an architect by the Council as required.

[23] I am not properly placed to consider whether the amendment does actually meet muster and appropriately answers the cause of the complaint. This will be the prerogative of the excipient once the *dies* has expired. All I can do at this juncture is to record that the second plaintiff by conduct admitted that its particulars of claim lacked

certain averrals rendering it excipiable by filing the proposed amendment. It can only be after the excipient has responded to the proposed amendment that the court can properly pronounce itself and only if the excipient still maintains the view that in the amended form, the second claim still does not found a cause of action or is vague and embarrassing.

[24] I can only mention *en passant* that the fact that the second plaintiff has conceded the correctness of the exception on the alternative claim is a clear pointer that had the provisions of rule 32 (9) and (10) been complied with to the letter, a portion of the exception may well have been disposed of without a need to launch the application for determination by the court.

The principal claim

[25] I now turn to address the exception relating to the principal claim. The main bases on which the said claim is sought to be impugned are set out briefly in paragraph [7] above. Before I can fully determine the question whether the exception to this claim is meritorious or not, there is one issue that I find myself in duty bound to make and it is this - there is a difference between what may ultimately, after evidence has been led, be a bad claim or defence, as the case may be and a claim or defence that is excipiable. The fact that a claim or defence appears at first blush to be unsustainable in the long run, does not *per se* entitle the opposite party to except thereto. At the end of the day, if some evidence may be led to prove the claim or the defence, as the case may be, that serves to point to the fact that an exception is not the appropriate means of dealing with what may appear, on first principles, to be a weak, limping or unsustainable and therefor unmeritorious claim or defence.

[26] In *Mkhangezi Gule v The Commissioner of Correctional Services and Others*[9] I had occasion to comment as follows:

[9] Civ. Case 2419 of 2011 (High Court of Swaziland)

'There is, in my view, a fine line, fine as it may be, between a bad defence and one in which the allegations made do not have the material averrals to found a defence. An exception is applicable in the latter case. If a defence is bad, it is not excipiable but must be allowed to be dismissed at the end of the trial, with evidence being led or relevant facts agreed.'

[27] For the foregoing proposition, I found solace in the works of the learned author Harms[10]

'An exception is a valuable part of the system of procedure: its principal use is to raise and obtain a speedy and economical decision on questions of law which are apparent on the face of the pleadings. It also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing. Unless an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling a dispute between the parties, an excipient should make out a very clear case before he is allowed to succeed. If evidence can be led which can disclose a cause of action or defence alleged in a pleading, that pleading is not excepiable. A pleading is only excepiable on the basis that no possible evidence led on the pleading can disclose a cause of action or defence'.

[28] It will be seen that in the instant case, although the exception is not directed at pleadings which are not sufficiently detailed or not drafted with lucidity, the point raised in the exception is one directed at a substantive question of law, which if upheld, may have the effect of settling the dispute. From the quotation immediately above, it is clear that the present exception falls within the matrix of the delineation by the learned author and therefore perfectly in order.

[29] Having regard to the exception on the main claim, it would seem to me that the main, if not the decisive question to ask is this: what is the effect of the Act declaring the conduct of architectural work illegal for an entity other than a natural being? The defendant submits that the effect of the prohibition is to render any contract entered into in contravention of the Act unenforceable, unless there has been an exemption obtained by the said entity in terms of the Act. The plaintiffs argue to the contrary and state that

[10] Civil Procedure in the Supreme Court, Butterworths, 1998 at p 285, para J26.

the Act does not expressly invalidate the said contract if not entered into by a natural person and further, does not specifically render the agreement unenforceable.

The Statutory Regime

[30] In order to place the questions in need of determination in proper perspective, it is prudent, first of all, to have regard to the legislative regime on which the question craving an answer oscillates. The starting point, in this regard, are the provisions of section 11 of the Act. The relevant provisions of section 11 (1) of the Act provides as follows:

> '(1) Any person who desires to be registered as an architect or quantity surveyor or architect in training shall lodge with the Council in the manner prescribed by it, an application in writing for such registration, and such application shall be accompanied by the prescribed registration fee, and such information as may be required by the Council.
> (2) If after consideration of any such application the council is satisfied that the applicant –
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> (a) Is not less than twenty-one years of age; and
> (b) has passed the examination prescribed by any regulation or any examination recognized by the Council for the purpose of this paragraph; and
> (c) has for a period determined from time to time by the Council and commencing before or after the date of passing of any examination referred to in paragraph (b), performed architectural or quantity surveying work which in the opinion of the Council is of sufficient variety and of a satisfactory nature and standard, and has performed such work;
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> (i) in Namibia, under the direction and control of an architect or quantity surveyor;
> (ii) elsewhere than in Namibia, under the direction or control of any other person who has passed an examination recognized by the Council for the purposes of this subparagraph, if such person is engaged primarily in the performance of the kinds of work prescribed under section 7 (3) (b); and

(iii) is a member of the Namibia Institute of Architects or the Institute of Quantity Surveyors, as the case may be, of such a class of members as the Council may approve;

The Council shall, subject to the provisions of subsection (7), register the applicant as an architect or a quantity surveyor, as the case may be, and issue to him a certificate of registration.'

[31] Section 13 (1) (a) of the Act, on which large store is placed by the excipient, provides the following:

'Subject to any exemption granted under this Act –

(a) any person other than an architect or a quantity surveyor who –

(i) for gain performs any kind of work reserved for architects or quantity surveyors under section 7 (3) (b); or

(ii) pretends to be or by any means whatsoever holds himself out as an architect or quantity surveyor or uses the name of architect or quantity surveyor or any name, title, description or symbol indicating or calculated to lead persons to infer that he is registered as an architect or quantity surveyor in terms of this Act.'

[32] On the other hand, section 11 (1) (b) provides the following:

'Any person other than a natural person which:

(i) for gain performs any kind of work reserved for architects or quantity surveyors under section 7 (3) (b) or in any way makes known that it is prepared to perform any such work; or

(ii) uses any name, title, description or symbol or calculated to lead persons to infer that it performs any kind of work reserved for architects or quantity surveyors shall be guilty of an offence and liable on conviction to a fine not exceeding R1,000'.

[33] In this regard, the excipient claims that the reading of the provisions together, indicate inexorably that persons who may carry out architectural or quantity surveying work must be natural persons unless an exemption in terms of the Act has been granted by the Council. It is contended on the excipient's behalf that there are no averrals to the effect that the first plaintiff has been registered by the Council as an architect in terms of section 11 or has been exempted by the Council from compliance with the requirements of section 13 (1) as read with section 23 of the Act.

[34] It is the excipient's further case that if any person who is not a natural person but which performs such work or holds itself out as qualified to do so but is not a natural person and has not been granted an exemption in terms of the Act commits an offence and the result is that any contract entered into in contravention of the above prescripts is null and void and therefore unenforceable.

[35] The argument by the plaintiffs is a horse of a different colour. Whilst admitting the conclusion that a person who carries out the stipulated categories of work contrary to the provisions of the Act commits an offence in terms of the Act, the legislature did not in any terms, whether direct or by implication seek or serve to render any agreement reached by contractants in violation of the said section null and void or unenforceable. It is the plaintiff's contention that a proper and close reading of section 11 together with Regulation 4 (kk) of the Regulation made under section 18 of the Act lead inexorably to the conclusion that a company may perform such work provided certain circumstances and conditions are met.

[36] The plaintiffs contend and quite forcefully too, that juristic persons always act through natural persons, who in a sense become the hands, feet and ears of the juristic person. In the instant case, it is argued, that the work was actually being performed, not by a juristic person but by a natural person in the name of the second plaintiff, who was properly registered as an architect by the Council in terms of the Act. It is contended therefor that there was no intention on the part of the plaintiffs and the defendant to contravene the provisions of the Act. I shall return to deal with the various arguments in

respect of these very vexing issues and in respect of which this Court is expected and in duty bound to untie the Gordian Knot as it were.

The Law

[37] By virtue of the maxim *ex turpi causa non oritur actio* (from a dishonourable cause no action [11]arises) agreements in violation of the law are rendered unenforceable. It is common cause that this maxim admits of no exception. In the instant case, it is clear that the agreement in which the contractants entered was in violation of the Act as aforesaid. In *IS & GM v Construction Tunmer*[12] the following is recorded:

'The plaintiff further submitted that the Act merely made the receiving of consideration by an unregistered homebuilder an offence but did not preclude such person from receiving consideration. In my view, this submission is without substance and flies in the face of the clear and unambiguous wording of the Act, which unequivocally prohibits such a person from receiving any consideration. The court will not make an order contrary to an express prohibition imposed by the Legislature. The Court cannot be asked to order the performance of a prohibited or criminal act. I am satisfied that the particulars of claim do not disclose a cause of action in that the plaintiff, in view of the facts pleaded, is obliged to allege that it is a registered home builder as defined in the Act before it can receive any consideration.'

[38] On the other hand, the learned author Christie[13], states the following:

'An act that is made unlawful by statute is, it need hardly be said, unlawful, so whether or not on a proper interpretation of the statute a contract is in itself the unlawful act is void as well as being criminally punishable, a contract to commit the unlawful act must be void, and so is a contract that facilitates or encourages the commission of the unlawful act, even if only indirectly, provided the connection is sufficiently close.'

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[11]The Law of Contract in South Africa, 6th Ed at 371.
[12] 2003 (5) SA 218 (W) at 220.
[13]The Law of Contract in South Africa (*supra*) at 371

In the case of *Pottie v Kotze*[14] the Appellate Division expressed itself in the following terms on the issue under consideration:

> 'The usual reason for holding a prohibited act to be invalid (is) . . . the fact that recognition of the act by the Court will bring about, or give sanction to, the very situation which the legislature wishes to prevent'.

[39] Having regard to the foregoing authorities, it would appear that where the legislature criminalises certain behavior or conduct, any contract entered into in violation of the statute becomes unlawful and for that reason, it will not normally behove the court to countenance that conduct by giving it any degree of legitimacy by sanctioning and giving effect to same. Put in the particular facts of the case, the defendant's case is that the legislature prohibited the carrying out of architectural or surveying work for gain by entities other than natural persons, unless an exemption was granted. There can be no doubt that the work carried out by the plaintiffs in this instance, was for gain and therefore, in violation of the provisions of the section in relation to the first plaintiff.

[40] If the court were to give effect to a contract concluded in violation of this piece of legislation, then the court would be seeking to facilitate or encourage the very act or conduct that parliament, in its wisdom, saw it fit to proscribe and render a criminal offence.

[41] The plaintiffs argue that not every criminalization of an act or conduct visits the agreement arising therefrom with invalidity and that where the law-giver does not expressly invalidate a contract performed in contravention thereof, the court must determine, on a proper interpretation whether the legislature can be said to have intended to visit the said agreement with invalidity. In support of this contention, the court was referred to *City of Tshwane v Marius Blom And GC Germihuizen Inc & Another*[15] where the court reasoned as follows:

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[14] 1954 (3) SA 719 (A) at 727 A.
[15] 2014 (1) SA 341.

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose for which it is directed and the material known to those responsible for its production.'

[42] It is the plaintiffs' further contention therefore that the mischief sought to be arrested by the promulgation of the prohibition, was to protect the public by ensuring that architectural and quantity surveying services are performed by qualified architects and quantity surveyors and thereby outlawed the performance of same by non-architects and quantity surveyors not duly registered. It was submitted that in the instant case, the first plaintiff, though a legal person, did not itself carry out the architectural work but same was done by the second plaintiff, who is a registered architect in terms of the Act. There was, it was contended, no breach of the law for that reason. It was moreover argued that the objects of the Act were not thereby contravened in the special circumstances of this case. Is this contention sustainable?

[43] I am of the considered view that this argument should not hold for the reason that the Act is clear that any other person than a natural person who carries out architectural or quantity surveying work, unless properly exempted in terms of the Act, commits an offence. The only way in which the work done by a person who is not a natural person registered in terms of the Act, is when that person or entity has been exempted in terms of the Act. The plaintiffs are, in a sense, asking the court to pierce the corporate veil and look behind the secret chambers of the first plaintiff, and find that in fact, it was the second plaintiff who was doing the work and not the first plaintiff.

[44] To allow the argument advanced by the plaintiffs to hold would result in this court sanctioning what parliament sought to prohibit, as the court would not only give exemptions, which it is not empowered by law to do, but it would also issue serious decisions on architectural and related matters (including matters of exemptions in terms of the Act) outside the confines of the experience and specialized training available

within the relevant industry with possibly calamitous consequences to consumers. Furthermore, by so doing, the court would also sanction the carrying out of architectural or quantity surveying work awarded to a person who is not exempted under the Act and this would defeat legislative solicitudes expressed in the nomenclature employed in the Act.

[45] It would seem to me that the *raison detre* for the requirement that only natural persons be registered as architects and quantity surveyors, was to protect the public from unscrupulous persons who would float companies or other juristic persons to perform architectural or quantity surveying work and when liability for poor workmanship or other complaint arises, and the court finds that the client was short changed, the client would not have any recourse as the juristic person would have no realizable assets from which execution of any judgment can be properly and satisfactorily satisfied. This would render the clients, who would, in some instances be men or women of straw, bereft and remediless and in the process losing what may have been to them a lifetime worth of investment. This, it is my view not an idle and inconsequential or pedantic requirement.

[46] To adopt the approach recommended by the plaintiffs would, to borrow from the *Tunmer* judgment (*supra*), result in a situation where the court lends its processes and gives its imprimatur to the performance of a prohibited or criminal act, and this I cannot, in good conscience do, whatever the inequities, regrettable as they may be, that may result.

[47] The plaintiffs, on the other hand, contend probably with a lot of justification, that the application of the law as propounded above brings about unfair and inequitable results, considering that the parties had no intention to breach the legislation in question and that a decision that the contract is unlawful and hence unenforceable, would herald unfair consequences. This, it is argued, is so because that there is benefit in this case being derived by the defendant from the impugned contract to the detriment of the plaintiffs who will have performed but may not recover anything for their effort and time.

In other words, the plaintiffs would have ploughed but never enjoy the fruits of their labour, and conversely, the defendants would, on the other hand, derive free labour as it were and reap where they have not sown in a sense.

[48] In support of their argument, the plaintiffs referred the court usefully to the case of *Hubbard v Cool Ideas 1168 CC*[16]. Briefly stated, the facts in that case were that the appellant and the respondent entered into an agreement for the building of home. The respondent, however, did not register as it was supposed to, in terms of the Housing Consumers Protection Measures Act.[17] After the home had been completed, a dispute arose between the parties about the quality of the work done and the appellant refused to pay the amount claimed by the respondent, contending that there was poor workmanship. The appellant filed a claim for remedial works that she needed to make to the building as a result of poor workmanship by the respondent.

[49] The matter was referred to arbitration in terms of the contract and the arbitrator found in favour of the respondent. The respondent, consequent upon the appellant refusing to pay the amount declared in the award, approached the High Court in South Gauteng, seeking an order making the award an order of court. The appellant opposed the order sought and raised the issue that the respondent had not been registered as a home builder in terms of the aforementioned Act and that the award was incapable of being made an order of court. The court dismissed the appellant's contentions and granted the order as prayed for by the respondent. Unfazed by the result, the appellant appealed for leave from the Supreme Court of Appeal (SCA).

[50] Her appeal was upheld by the majority of the S.C.A. with one judge Mr. Justice Willis dissenting. Ms. Bassingthwaite for the plaintiffs implored this court to adopt the reasoning of the dissenting judgment, as being consonant with the interests of justice that apply to this case. It will be seen, from the facts recounted above that the case is, in a sense, on all fours with the main question confronting the court in the instant matter.

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[16] (580/2012) [2013] ZASCA 71 (28 May 2013).
[17] Act 95 of 1088.

[51] Although this may appear to be a work of supererogation, I find it useful to quote quite extensively from the S.C.A. judgment, as it will appear that quite a lot the majority of the court held, appears to coincide with some of the views I have expressed above. Mr. Justice Ponnan, who wrote for the majority of the court made the following major findings:

At para [11]

'The prohibition in those sections is not directed at the validity of the particular agreements but at the person who carries on the business of a home builder without registration. They thus do no more than disentitle a home builder from receiving any consideration. That being so a home builder who claims consideration in conflict with those sections might expose himself or herself to criminal sanction (s21) and will be prevented from enforcing his or her claim.'

[52] At para [14], the court reasoned as follows, addressing the point of the justice of the case raised by the plaintiffs:

'And although on the face of it, it may appear to work an injustice that a consumer should garner the benefit of those labours without having to compensate the home builder that is the outcome that has been decreed by the legislature. It is one that is applicable to all home builders who have failed to register as such, not just those who may prove to be unscrupulous. It is thus wholly irrelevant that the work may have been undertaken with the necessary skill or that, as is the case here, the housing consumer happens to be a fairly sophisticated individual from one of the more affluent suburbs of Johannesburg rather than a historically disadvantaged resident from one of the our poorer townships.'

[53] Then crucially at para 15, the court expressed itself in the following language regarding the need for it follow legislative solicitudes:

'I venture to suggest that it is the very antithesis of the rule of law for a court simply disregard a clear legislative prohibition that neither party has sought to constitutionally impugn. Here the legislature has chosen, in its wisdom, not to vest the courts with a discretion as to whether or not to allow claims by home builders for consideration in circumstances where they have failed to register as such. All such claims, without exception are hit by the prohibition. The

language employed by the legislature could not have been clearer. And where the legislature, as here, has expressed itself in clear and unambiguous terms, a court cannot appropriate for itself a power it does not have under the guise of ameliorating any perceived harshness that may result from the enforcement of that legislation. A court, no matter how well intentioned, is therefore not free simply on a whim to act in flagrant disregard of a statutory prohibition thereby rendering the will of the legislature nugatory. That, in my view, our Constitution does not countenance.' (Emphasis added).

I fully embrace these remarks as being applicable in the instant case, without exception. They, in a sense, coincide with my views expressed earlier in this judgment.

[54] The dissenting judgment of the Willis JA, seems to have been underpinned by the argument that the maxim *nullum crime sine lege* calls for the contemporaneity of the *mens rea* and the *actus reus.* It was his finding that there was no evidence before court that the respondent, Cool Ideas had the requisite *mens rea* to conduct its business illegally. Though that may well be true, the facts of the matter is that to sanction a payment of consideration contrary to express legislative direction would pit the courts against the legislature in matters where there is no absurdity or fluidity in legislative nomenclature and draw an unnecessary contestation on the domain and extent of legislative and judicial turfs. I am, notwithstanding the injustice that appears, of the view that legislative intent must in this case be given supremacy.

[55] It must necessarily be mentioned that the matter did not end up there. It proceeded to the Constitutional Court of South Africa and was reported as *Cool Ideas v Hubbard*[18]*.* Even at the Constitutional Court, the case proved as fractious and divisive, in the legal sense. The Constitutional Court was not unanimous either. The majority of the Court (Moseneke ACJ, Skweyiya ADCJ, Khampepe J and Madlanga J. with Jafta J (concurred in by Zondo J) writing a concurring judgment, although finding that the contract was invalid) concurred in the judgment of Majiedt A.J. and dismissed the appeal by Cool Ideas. The minority concurred in the judgment of Froneman J, namely Cameron J, Dambuza J and Van Westerhuizen J.

[18] 2014 (4) SA 474 (CC).

[56] The majority of the Court in essence upheld the judgment of the majority of the SCA. The minority judgment of Froneman J came to the view that the majority judgment had the effect of depriving Cool Ideas of property within the meaning of section 5 of the Constitution of South Africa, for work fairly and properly done. This panel held that it is preferable to favour an interpretation that protects and enhances a fundamental right. In this connection, the court stated the following at para [67]:

'It is thus reasonable to interpret the provisions of the Housing Protection Act in a manner that is fair, does not deprive Cool Ideas of its property and does not necessitate the enhancement of the power of courts to interfere in private arbitration awards. Will this construction be detrimental to Ms. Hubbard? It will not, because she has enjoyed all the substantive protections under the Act.'

[57] In dealing with the equity considerations, the majority of the court deal with that issue in the following terms at para [52] of the judgment:

'I am of the view that equity considerations do not apply. But even if they do, as my colleague Froneman J suggests, the law cannot countenance a situation where, on a case-by-case basis, equity and fairness considerations are invoked to circumvent and subvert the plain meaning of a statutory provision which is rationally connected to the legitimate purpose it seeks to achieve, as is the case here. To do so would be to undermine one essential fundamentals of the rule of law, namely the principle of legality. The following dictum by Kentridge AJ in *S v Zuma* is apposite:

"If language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination"'.

[58] In the premises, I am of the view that close as the views are on this matter, and considering how the dissentions of the past have over time become the law, it would still be unconscionable for me to sanction the payment of money to the plaintiffs for work done contrary to the express prohibition of statute and under circumstances where this serves to controvert the letter and spirit of a legislative enactment. I choose, in the

circumstances, to lean in favour of the adage that in a multitude of counsellors, there is safety.

[59] Coming close home, the Supreme Court in *Shikale v Universal Distributors of Nevada South Africa (Pty) Ltd*[19], quoted with approval, the words that fell from the lips of Tindall J.A. in *Moser v Milton*[20], where the learned Judge said:

'In our system of law, as Kotze J.A. pointed out in *Weinerlein's* case (at p.295), equity does not prevail as distinct from and opposed to the law; and equitable considerations do not entitle the Court to enforce a contract which a statutory enactment declares to be of no force or effect, . . .'

I accordingly heed this admonition, coming as it does, from the highest court in the land.

[60] The plaintiffs are unfortunately on the wrong side of the law and the court is not, in my view, possessed of the wherewithal to ameliorate the harshness of the result, if that will amount to subverting legislative solicitudes. The plaintiffs have not alleged that they have been exempted from compliance with the provisions of the law. For that reason, I am of the considered view that the exception is well taken.

[61] It will be recalled that there were exceptions taken to both the main and alternative claims and just before the exception on the main claim was to be heard, a proposed amendment on the alternative claim was filed on behalf of the plaintiffs. In order to avoid a work of supererogation, I called the parties in and requested them to indicate whether they intended arguing the exception to the alternative claim. I found it prudent to do this in order to avoid writing two separate rulings on substantially similar issues occurring in one action.

[62] The parties indicated they needed time to closely consider whether it would be necessary to argue the exception to the alternative claim. They eventually indicated that

[19] (SA 10-2013) [2015] NASC (17 April 2015) at para [46]
[20] 1945 AD 517 at 527 to 528

it would be unnecessary to do so as the issues at play are more or less similar and are in any event inextricably linked. It is for the foregoing reason that this ruling comes much later than would have been the case, considering also that the issues up for determination were very complex and required close and careful examination as evident from the foregoing exposition.

[63] In the result, I issue the following order:

[63.1] The exception to the plaintiffs' main claim is upheld with costs. Such costs are ordered to include the costs of one instructed and instructing counsel.

[63.2] The plaintiffs are afforded an opportunity to amend their particulars of claim within fifteen (15) days from the date of this order.

[63.3] The matter is postponed to 21 October 2015 at 15:15 for a status hearing.

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TS Masuku,

Acting Judge

APPEARANCES

PLAINTIFFS:	N Bassingthwaighte Instructed by LorentzAngula Inc.
DEFENDANT:	R Totemeyer SC (with him JPR Jones) Instructed by Ellis Shilengudwa Inc.