



REPORTABLE

CASE NO: SA 41/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CLAUD BOSCH ARCHITECTS CC

Appellant

And

**AUAS BUSINESS ENTERPRISES NUMBER 123
(PTY) LTD**

Respondent

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 3 November 2017

Delivered: 6 February 2018

Summary: This appeal is concerned with the interpretation to be given to a prohibition contained in s 13(1)(b) of the Architects and Quantity Surveyors Act, 13 of 1979 (the Act). This section prohibits any person other than a natural person from performing architectural work for gain. At issue is whether an agreement between a non-natural person in the form of a close corporation to provide architectural services to a client would be unenforceable as a result of the prohibition.

The appellant is a close corporation called Claud Bosch Architects CC, and plaintiff in the court below. Its sole member, Claud Bosch, was at all material times a duly qualified and registered architect as contemplated in the Act. The respondent (defendant) was a client of the plaintiff who engaged it to provide architectural services in respect of a project entailing the design, supervision of construction and development of a restaurant, hotel and parking area complex in Windhoek. In its action, the plaintiff claimed a sum from the defendant as outstanding in terms of the agreement. In the alternative, plaintiff claimed that sum by way of enrichment in the event the court *a quo* found that the agreement between the parties is invalid and/or unenforceable. The defendant excepted to these claims. The principle laid out in *Van Straaten v Namibia Financial Institutions Supervisory Authority and Another* finds application in the determination of exceptions.

In determining the exception, the High Court followed the decision of the High Court in the *Nkandi* matter, where Masuku AJ (as he then was) held that the maxim *ex turpi cause non oritur actio* admits no exception. That court held that with reference to the prohibition contained in s 13 of the Act (where an exception was also taken against a claim for architectural services by a non-natural person), any contract entered into in violation of s 13(1)(b) would render the ensuing contract unlawful and unenforceable. Masuku AJ, further held that the Act prohibited the carrying out of architectural work for gain by entities other than natural persons, unless an exemption was granted. The court in the *Nkandi* matter ultimately found that work carried out by the plaintiff was in violation of the prohibition contained in s 13 and the agreement was unenforceable.

The plaintiff argued that the decision in *Nkandi* was incorrect. It argued that it had not contravened the provisions of the Act by not itself having performed the work, because s 13 meant that reserved work itself must be performed by a registered architect (a natural person) and that it was pleaded that the work was performed by a duly registered architect.

The defendant on the other hand argued that the prohibition contained in s 13 follows upon the requirement contained in s 11 which provides that only natural

persons can be registered as architects. It argued that the decision in *Nkandi* was correct and applied to this matter.

The principles of interpretation of statutes and texts recently summarised in *Namibia Association of Medical Aid Funds and Others v Namibia Competition Commission and Another* applied. The context in which a document is drafted and its purpose are relevant to interpreting the meaning of words used. The primary purpose of the Act in this case is to provide for registration of architects (and quantity surveyors) with the Council and to require that only registered architects can perform the kind of work reserved for architects under s 7(3)(b) of the Act.

Questions arising are whether the legislature intended that an agreement to provide architectural services by a non-natural person is prohibited by s 13 of the Act by reason of the prohibition contained in s 13(1)(b) and further whether the legislature intends that they are void and unenforceable.

Held, the legislative purpose of s 13, determined in this context, is to expressly prohibit an unregistered person from performing reserved work for gain in s 13(1)(a). Under s 13(1)(b) a non-natural person is prohibited from performing reserved work and holding itself out to do so. This latter prohibition is to be read with s 11 which expressly contemplates that only natural persons can register as architects under the Act.

Held, applying the approach in *Standard Bank v Van Rhyn*, it could not have been the intention of the legislature where a non-natural person has agreed to provide architectural services this would result in the further penalty of invalidity of the agreement, where the work is performed by a registered architect, even if this were to conceivably fall foul of s 13(1)(b). A greater inconvenience and impropriety would follow from doing so, resulting in the defendant escaping its liability to pay for work duly performed by a registered architect.

Held, the court in *Nkandi* erred by failing to take into account the approach in *Standard Bank v Estate Van Rhyn* which has been consistently followed in determining the effects of acts done in conflict with statutory prohibitions. Further,

the decisions in *Cool Ideas 1186 CC v Hubbard and another* relied upon in *Nkandi*, are distinguishable.

Held, the court *a quo* accordingly erred in following the *Nkandi* matter. The exception against the main claim should not have been upheld and the appeal succeeds.

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and HOFF JA concurring):

[1] The question for determination in this appeal concerns the interpretation to be given to a prohibition contained in s 13(1)(b) of the Architects and Quantity Surveyors Act, 13 of 1979 (the Act). It prohibits any person other than a natural person from performing architectural work for gain. At issue is whether an agreement between a non-natural person in the form of a close corporation to provide architectural services to a client would be unenforceable as a result of the prohibition.

[2] The High Court on exception, relying upon another decision of the High Court in *Kondjeni Nkandi Architects and another v Namibian Airports Company (Nkandi)*,¹ found that such an agreement would be unenforceable. This is an appeal against that decision.

¹ 2016(1) NR 223 (HC).

The pleadings

[3] The plaintiff (appellant in this appeal) is a close corporation called Claud Bosch Architects CC. Its sole member, Claud Bosch, was at all material times a duly qualified and registered architect as contemplated in the Act. The defendant, (respondent in this appeal) was a client of the plaintiff and engaged the plaintiff to provide architectural services in respect of a project entailing the design, supervision of construction and development of a restaurant, hotel and parking area complex in Windhoek. For the sake of convenience, the parties are referred to as plaintiff and defendant.

[4] It is alleged in the particulars of claim that the parties entered into an agreement for the provision of those services which were to be performed by Mr Bosch, a duly registered architect on behalf of the plaintiff. The fees would be payable to the plaintiff for those services. It is also alleged that Mr Bosch duly performed the services stipulated in the agreement.

[5] The plaintiff rendered interim accounts to the defendant. It is also alleged that during the currency of the contract, the defendant made payments totalling N\$505,000 but an amount of N\$2,291,883.08 remained outstanding. Although the description of the architect in the agreement was given as Claud Bosch Architects, it was alleged that this was incorrect and that the words 'close corporation' should be inserted. Rectification was sought for this.

[6] The plaintiff claimed the outstanding payment due to it under the agreement between the parties.

[7] Two alternative claims are also raised in the particulars of claim. They are based upon enrichment in the event of the High Court finding that the agreement between the parties is invalid and/or unenforceable. It is alleged that the defendant had been unjustifiably enriched at the expense of the plaintiff as a consequence of the value of the work produced and services rendered in the total amount of the outstanding claim.

[8] The defendant excepted to the claims on five separate grounds. In the first and main ground of the exception, it is contended that professional architectural services can only be performed by a professionally registered architect and not by the plaintiff which is not a natural person and cannot be registered as a professional architect. The defendant relies upon s 11 read with s 1 of the Act which embodies the requirement of registration of architects read with the definition of architect contained in the Act. It is contended that the ensuing agreement between the parties is not authorised by legislation and thus unenforceable.

[9] The second ground of the exception claims that there is no allegation in the particulars of claim that the drawings and documentation were submitted to the local authority. Nor is there an allegation that the approved documents were delivered to defendant and as a result a cause of action had not been disclosed. The third ground concerns the allegation made in the particulars of claim that someone other than the plaintiff had performed the professional services. The fourth ground is directed at the enrichment claims. It contends that only a natural person who is a registered architect could render architectural services and that as a result the plaintiff could not perform the services relied upon for its alleged

impoverishment. The fifth ground also is directed at the enrichment claims. It is contended that the architectural services were not rendered by the plaintiff but rather by its sole member and as a consequence the plaintiff had not been impoverished.

Principles governing the determination of exceptions

[10] The approach to be followed in the determination of exceptions was recently reiterated by this court with reference to earlier authority:

‘Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff’s pleadings are taken as correct. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.’² (Footnotes excluded)

The approach of the High Court

[11] After referring to the pleadings and provisions of the Act, the High Court cited the approach followed by Masuku AJ (as he then was) in *Nkandi* where the court held that the maxim *ex turpi causa non oritur actio* (from a dishonourable cause, no action arises) admits of no exception. Masuku AJ further held with reference to the prohibition contained in s 13 of the Act, also raised in an exception taken against a claim for architectural services by a non-natural person, that where the legislature criminalises certain behaviour or conduct, any contract entered into in violation of the statute renders the ensuing contract unlawful and

² *Van Straaten v Namibia Financial Institutions Supervisory Authority and another* 2016(3) NR 747 (SC) and the authorities quoted in support of the above summary.

unenforceable. He held that the Act prohibited the carrying out of architectural work for gain by entities other than natural persons, unless an exemption was granted. The work carried out by the plaintiffs in *Nkandi* was found to be violation of that prohibition and the agreement to do so was held to be unenforceable.

[12] The High Court agreed with the approach taken in *Nkandi* that the prohibition in s 13 meant that any other person other than a natural person commits an offence when carrying out architectural work and proceeded to uphold the exception with costs, even though the first ground was only dealt with in the court's judgment and only addressed the principal claim. The further grounds of exception directed at the alternative claims, although briefly alluded to by way of introductory reference to the pleadings, were not further canvassed or referred to in the court's judgment at all. Yet the court's order is one upholding the exception without any qualification at all.

[13] The respondent's counsel (Mr Heathcote, assisted by Ms van der Westhuizen) correctly acknowledged that the court had erred by upholding the exception without addressing the grounds raised against the alternative claims. After it was pointed out that to determine the other grounds would be as if this court were of first instance on those issues which this court would be reluctant to do.³ Both Mr Heathcote and Mr Marais, SC for the appellant invited the court to determine the main ground of exception upon which the High Court had made its finding as this was the main bone of contention between the parties. This appeal is accordingly confined to the main claim, even though the interpretation to be

³ *Rally for Democracy and Progress and others v Electoral Commission of Namibian and others* 2010(3) NR 487 (SC) at para 75.

accorded to the prohibition in s 13(1)(b) may have a bearing on the grounds of exception raised against the alternative claims.

Submission on appeal

[14] Counsel for both parties focussed their submissions upon the primary ground of the exception dealt with by the court *a quo*.

[15] Mr Marais argued that the prohibition in s 13(1)(b) purposively construed in the context of s 11 and other provisions in the Act only concerns the performance of the kind of work reserved for architects and not the carrying out of an architect's practice. He argued that s 13 meant that reserved work itself must be performed by a registered architect, as was alleged in the particulars of claim. He contended that the plaintiff had not contravened the provisions of the Act by not itself having performed the work which was done by the human agency of its sole member, a registered architect. The plaintiff was thus not, so he argued, precluded from claiming the fees in question. He submitted that *Nkandi* had been incorrectly decided.

[16] Much of the argument on behalf of the respondent was focussed on the prohibition contained in s 13 of the Act, even though no express reference to this provision is to be found in the exception. Mr Heathcote argued that the prohibition follows upon the requirement in s 11 that only natural persons can be registered as architects. This is but one unsatisfactory aspect of the terms of the exception. Statutory provisions relied upon should be expressly pleaded.⁴ But in this case, a reliance upon s 13 is implicit in the position taken by the respondent and was so

⁴ *Denker v Ameib Rhino Sanctuary (Pty) Ltd and 4 others* SA 15/2006; *Yannakou v Appollo Club* 1974(1) SA 614 (A) at 632G and *Wasmuth v Jacobs* 1987 (3) 629 (SWA) at 634I.

understood by the plaintiff, which was not prejudiced by the failure to plead the section.

[17] Mr Heathcote argued with reference to s 13(1)(a) that the Act criminalises any person other than an architect from performing work reserved for architects under s 7(3)(b) of the Act. He also contended that s 13(1)(b) criminalises the conduct of any person other than a natural person performing reserved work. Mr Heathcote argued that the well-established principle that agreements prohibited by law cannot be enforceable was correctly found in *Nkandi* to apply to claim for payment for architectural work by a non-natural person. He argued that the court in *Nkandi* had been correct in following the approach of the majority in the (South African) Constitutional Court in *Cool Ideas 1186 CC v Hubbard and another*.⁵

[18] Mr Heathcote argued that the Act prohibits any person other than a natural person from rendering architectural services and that the court in *Nkandi* had been correct to uphold a similar exception.

The statutory scheme

[19] According to the long title of the Act, it provides for the establishment of a professional council for architects and quantity surveyors and for the registration as architects and quantity surveyors.

[20] An architect is defined in the Act⁶ as a person registered in terms of s 11. The criteria for registration are set out in s 11(2). Registration as an architect lapses if an architect registered under s 11(4)(a) has for ninety days or longer

⁵ 2014(4) SA 474 (CC) ('*Cool Ideas*').

⁶ Section 1 of the Act.

failed to perform any work of a kind contemplated in s 11(2)(c) under the direction of an architect.

[21] Pertinent to this enquiry is s 13 which is quoted in full:

'13 (1) 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 or allows himself to be held out as an architect or a 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 a quantity surveyor in terms of this Act; or

(b) 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 it known that it is prepared to perform any such work; or

(ii) uses any name, title, description or symbol indicating 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 one thousand rand.

(2) Subsection (1)(b) shall come into operation on a date to be fixed by the Minister by proclamation in the Gazette, being a date not earlier than twelve months after the commencement of this Act.'

[22] Section 14, entitled 'improper conduct', provides that architects (and quantity surveyors) will be guilty of improper conduct if they commit any one or more of the various forms of improper conduct described in s 14(1). The Council of Architects and Quantity Surveyors (the Council) has disciplinary powers under s 15 to enquire into and to find members of the professions guilty of improper conduct as defined in s 14(1), including rules prescribed by regulation.

[23] The Act came into force on 1 January 1980 with the exception of s 13(1)(b). The legislature in s 13(2) provided that s 13(2) was to come into operation on a date to be fixed by the executive which was to be at least 12 months after the commencement of the Act.

[24] On 28 April 1983, the Administrator-General determined by proclamation that s 13(1)(b) would come into operation on 2 May 1983.

Principles of interpretation of statutes and text

[25] The approach applicable to the construction of text was recently summarised by this court⁷ with reference to an earlier decision of this court which had in turn followed recent trends in both England and South Africa:

'39. This court in *Total Namibia v OBM Engineering and Petroleum Distributors*⁸ recently referred to the approach to be followed in the construction of text and cited the lucid articulation by Wallis JA of the approach to interpretation in South Africa in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁹.

⁷ In *Namibia Association of Medical Aid Funds and Others v Namibia Competition Commission and another* 2017 (3) NR853 (SC) at paras 39-41.

⁸ 2015 (3) NR 733 (SC) at paras 17-20.

⁹ 2012 (4) SA 593 (SCA) at para 18.

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. 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 to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.”

40. In the *Total* matter, this court also referred to the approach in England¹⁰ and concluded:¹¹

“What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.”

¹⁰ As set out by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 – 913.

¹¹ *Total* para 19.

41. To paraphrase what was stated by this court in *Total*, the approach to interpretation would entail assessing the meaning of the words used within their statutory context, as well against the broader purpose of the Act.¹²

[26] As in the *Medical Aid Funds* matter¹³, the context in this matter is the Act and its purpose. The primary purpose of the Act is to provide for registration of architects (and quantity surveyors) with the Council and to require that only that registered architects can perform the kind of work reserved for architects under s 7(3)(b) of the Act. The further purpose of the Act is to vest the Council with disciplinary powers in respect of specified infractions comprising improper conduct.

[27] This is the overall context in considering the meaning to be given to the prohibition contained in s 13(1)(b).

[28] The legislature intended s 13(1)(b) to come into operation at least a year later than the Act. This was no doubt to provide sufficient time for the promulgation of regulations, including rules contemplated by s 14, which were not promulgated simultaneously when the Act was put into operation. In the ensuing period, regulations were promulgated under the Act on 12 August 1981 which came into force on that date.¹⁴ They included a code of conduct for architects and procedures for the purpose of disciplinary enquiries into the conduct of architects and punishments which could be imposed for improper conduct, as contemplated by the Act.

¹² At para 42.

¹³ Note 7 above, para 43.

¹⁴ In Government Notice AG 91 of 1981 in Official Gazette 4508.

[29] The following rule was included in regulation 4(1)(kk) in the code of professional conduct applicable to architects:

'4.(1) An architect or, where applicable, an architect-in-training shall, in carrying out his profession, comply with the following rules:

.....

(kk) he shall not engage or act in private practice as an architect under the style of a company or through the medium of a company or practice in association with a company purporting to do work which has been prescribed under section 7(3)(b) of the Act, unless –

(i) the company is a private company limited by shares and incorporated under the Companies Act, 1973, the memorandum of association of which shall contain –

(aa) a provision to the effect that the directors and former directors of the company shall be liable, jointly and severally, together with the company, for such debts and liabilities of the company as are, or were, contracted during their periods of office;

(bb) subject to paragraph (dd) the name of the company with the word "incorporated" as the last part of its name;

(cc) a provision to the effect that the company is established for the purpose of carrying out the work of an architect or any work incidental thereto and such work only: Provided that the -

(i) the work aforesaid may include the work of a quantity surveyor and any other work approved by the council;

- (ii) the company shall not carry out the work of an architect unless at least one of its members is an architect;
- (ii) the articles of the company shall contain provisions to the effect that -
 - (aa) the members of the company shall be natural persons only who are architects registered under the Act: Provided that –
 - (i) the members may include quantity surveyors registered under the Act and any other person approved by the council; and
 - (ii) in the event of the death of a member or in the event of his ceasing to be qualified as a member for any reason, any shares in the company held by such member prior thereto may continue to be held by him or his estate for such period as the council may determine but the voting rights attached to such shares shall, during such period, be exercised by a member of the company nominated in writing by the deceased or disqualified member prior to his death or disqualification or, failing such nomination, by the chairman for the time being of the company, who shall be deemed to have been so nominated;
 - (bb) every director of the company shall be a member thereof and every member, whether a director or not, shall be the beneficial owner of the shares registered in his name;
 - (cc) in the event of the death of a member or in the case of his ceasing to be qualified as a member for any reason, the remaining directors shall take steps to ensure that the provisions of subparagraph (ii)(aa) are complied with within the period determined by the council.'

[30] The question to be determined is whether the Act prohibits an agreement by a non-natural person to provide architectural services and furthermore intends that such an agreement is void and unenforceable. The High Court in *Nkandi* found that such an agreement is prohibited and further found it to be void and unenforceable. The court *a quo* followed and applied *Nkandi* in upholding the exception to the appellant's particulars of claim.

[31] If an agreement to that effect is itself expressly prohibited, it would invariably follow that they are unenforceable. This court in *Ferrari v Ruch*¹⁵ made it clear that agreements prohibited by law are unenforceable by virtue of the operation of the *maxim ex turpi causa non oritur actio*.¹⁶ The court in *Ferrari* confirmed the common law position that this maxim would not admit of exceptions as opposed to the maxim *in pari delicto potior est conditio defendentis* which restricts the rights of offending parties to avoid the consequences of their performance or part performance of such prohibited contracts. The latter maxim admits of exceptions to prevent manifest injustice and inequity,¹⁷ often referred to as the relaxation of the *par delictum* rule. As was stressed in *Ferrari*, the object of this *par delictum* maxim is 'to discourage illegal or immoral conduct, by refusing the help of the courts to delinquents who part with their money or chattels in furtherance of prohibited agreements, but if it was never capable of relaxation, it might perpetuate immorality and cause gross injustice in some cases. . . .'¹⁸

¹⁵ 1994 NR 287 (SC).

¹⁶ At 296D-G.

¹⁷ At p 296E-F. Also see *Schweiger v Muller* 2013 (1) NR 87 (SC); *Moolman v Jeandre Development* CC 2016(2) NR 322 (SC) at para 67.

¹⁸ At 296E-F.

[32] Section 13 does not however expressly visit an agreement made by a legal person other than a natural person to perform architectural work with invalidity. In order to determine the consequence of contravening the prohibition upon an agreement, the wording of the prohibition contained in s 13(1)(b) would need to be considered within its statutory context in order to determine whether invalidity of the agreement is the intention of the legislature.

The approach of the court in *Nkandi*

[33] The court in *Nkandi* concluded that to give effect to a contract of the kind in question would be 'seeking to facilitate or encourage the very act or conduct that parliament, in its wisdom, saw fit to proscribe and render a criminal offence'.¹⁹ It was contended in that matter that no criminal offence had occurred as the work had been performed by a registered architect. This contention received short shrift from that court:

'I am of the considered view that this argument should not hold for the reason that the Act is clear that any person other than a natural person who carries out architectural or quantity surveying work, unless properly exempted in terms of the Act, commits an offence.'²⁰

[34] The court in *Nkandi* considered the justification for the prohibition in s 13(1)(b) to be as follows:

'It would seem to me that the *raison d'être* 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

¹⁹ At para 40.

²⁰ At para 43.

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 realisable 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 is not an idle and inconsequential or pedantic requirement.'

[35] The court in *Nkandi* – as did respondent's counsel before us – also relied upon the approach of the majority in *Cool Ideas* in both the Supreme Court of Appeal (SCA) and Constitutional Court (CC) in support of its conclusion that it was precluded from sanctioning the payment of money for work done contrary to the express provisions of the Act.²¹

Analysis of s 13 in context

[36] Section 13 is entitled 'Prohibition against practising as architect or quantity surveyor by unregistered person'. This embodies the thrust of the section – to prohibit reserved work from being performed for gain by any person other than a registered architect. It is subject to exemptions granted under the Act (under s 23). In terms of s 23, the Minister is authorised to exempt persons (including a non-natural person) generally or for specific circumstances or periods, from the operation of the Act. The power to exempt in the context of s 13 would appear to permit designated persons who are not registered under the Act as architects to do the work reserved for architects. This is also how the power of exemption has been invoked by the responsible minister in permitting specifically designated persons to perform reserved work on specific projects as has been gazetted.²² The

²¹ At para 58.

²² In Government Notices 190 of 1994 in Gazette 948 of 15 October 1994 and in Government Notice 12 of 2009 in Gazette 4210 of 16 February 2009.

provision to be exempted from would thus appear to be that of registration (to perform reserved work).

[37] The section is thus directed at preventing persons from performing work reserved for architects for gain unless registered as such. The evil which the section is to prevent is to protect the public from unqualified persons designing and supervising the erection of structures which could have potentially disastrous consequences, like retaining walls, roof structures and the like collapsing with calamitous consequences for an unsuspecting consumer who would stand to sustain severe damage in respect of what for many consumers would be the largest single investment which they would make, as well as the potential of serious injury.

[38] The Act furthers this intention by setting rigorous requirements for registration in s 11. These include setting prescribed examinations and a period of performing architectural work of sufficient variety, satisfactory nature and standard under supervision, and by requiring membership of the professional body (and thus subject to disciplinary action for improper conduct as specified in s 14 and in the rules contemplated by s 14). The disciplinary powers of Council are set out in s 15. The empowering provisions for holding enquiries are set out in s 16.

[39] The legislative intention as interpreted from the entire statute construed as a whole is thus to require registration by architects in order to perform work reserved for them, to render them subject to disciplinary action if committing improper conduct, including transgressing rules prescribed by regulation and

finally prohibiting persons not registered as architects from performing reserved work for gain.

[40] The legislative purpose of s 13, determined in this context, is expressly prohibiting an unregistered person from performing reserved work for gain in s 13(1)(a). In subsection 13(1)(b) a non-natural person is prohibited from performing reserved work and holding itself out to do so. This latter prohibition is to be read with s 11 which expressly contemplates that only natural persons can register as architects under the Act.

[41] The prohibition against performing reserved work for gain by unregistered persons – the thrust of s 13 – is furthered by subsection 13(1)(b) by ensuring that this prohibition is also directed at a non-natural person.

[42] The approach adopted in *Nkandi* is that s 13(1)(b) means that it constitutes a criminal offence for reserved work to be carried out by a non-natural person, even if the actual performance of the reserved work is by a registered architect – as is also pleaded in this case.

[43] The prohibition creating a criminal offence in s 13(1)(b) is to be restrictively construed within its context. The legislature determined that this sub-section was to be put into operation at least a year later than the Act. During that intervening period, regulations were promulgated which set rules of conduct for architects. Included in those rules is regulation 4(1)(kk) which expressly contemplates the

practice of architects within an incorporated company under the then applicable Companies Act.²³

[44] That corporate structure, under regulation 4(1)(kk), requires joint and several liability of directors for the debts and liabilities of that incorporated company set up for the purpose of carrying out the practice of an architect.

[45] Surprisingly the existence of this regulation is not referred to in *Nkandi*. Nor is the nature of the corporate structure of the first plaintiff anywhere stated in that judgment. The first plaintiff is merely referred to as Kondjeni Nkandi Architects in the heading of the judgment and nowhere in the judgment is its legal personality described or even referred to.

[46] Even though the Act is defined in s 1 to include the regulations, it has been held that the meaning to be given to a provision in an Act is to be scrutinised and a meaning assigned to it without using the wording used in a regulation as an aid to interpret the former.²⁴ In this instance, the respondent relies upon s 13(1)(b) which is said in *Nkandi* to create a crime or offence for non-natural persons to carry out architectural work. But can this constitute an offence if the legislature expressly provides that it is to come into operation at a later date and during that intervening period regulations are promulgated establishing professional rules of conduct which expressly contemplate that very conduct? When I posed this to respondent's counsel in argument, he responded that the regulation would appear to be *ultra vires* (beyond the power) of the executive. (The fact that the regulations were promulgated by the Administrator-General who at that stage was also

²³ Act 61 of 1973.

²⁴ *Moodley v Minister of Education and Culture, House of Delegates* 1989(3) SA 221 (A) at 233E-F.

coincidentally vested with legislative powers, having re-assumed legislative powers from the erstwhile National Assembly which passed the Act, takes the matter no further as the power to regulate in the Act is subordinate and was performed in this capacity as repository of executive powers in promulgating that subordinate legislation).²⁵

[47] Regulation 4(1)(kk) has not however been struck down. Nor has that been sought in these proceedings. Until and unless struck down, effect is to be given to it. The rationale ascribed to passing s 13(1)(b) in *Nkandi* quoted in para 34 above, for which there is little indication in the Act, is emphatically addressed by regulation 4(1)(kk).

[48] Whilst the wording employed in regulation 4(1)(kk) cannot of its own be an aid to interpret s 13(1)(b) to determine its meaning, it can be considered within the statutory scheme of the Act and the regulations in considering whether the appellant in this appeal and the first plaintiff in *Nkandi*, committed a crime or offence. That after all is the compelling public policy consideration which could lead to the conclusion that the legislature intended the invalidity of an agreement to perform that work. In *Nkandi*, upon which the court *a quo* based its approach, an examination of the court file shows that the first plaintiff is described as an incorporated company, as is expressly contemplated by regulation 4(1)(kk). It is thus by no means clear that the conduct of the first plaintiff in that case would constitute criminal conduct in the circumstances, by carrying an architect's practice through an entity expressly authorised by the regulations and where the work in

²⁵ The National Assembly was dissolved and its empowering legislation repealed by AG3 of 1983 in official Gazette 4739 of 25 January 1983. All powers previously vested in the National Assembly were transferred to the Administrator-General.

question is performed by a registered architect. On the contrary, it is highly unlikely.

[49] Quite apart from regulation 4(1)(kk), s 13 prohibits the performance of (reserved) work by an unregistered person and a non-natural person. It does not expressly prohibit a non-natural person from entering into an agreement to provide architectural services which are in turn performed by a registered architect. As already said, only natural persons can register as architects.

[50] The legislature chose to confine the prohibition to the performance of reserved work and not to the carrying on of the practice of architects generally. The prohibition in s 13(1)(b), being visited with criminal sanction, is to be strictly construed in accordance with the canons of construction of statutes – so as not to deprive rights unless expressly stated.²⁶ Furthermore s 13 is to be construed so as to interfere as little as possible with established rights.²⁷

[51] It is thus not clear to me that s 13(1)(b), properly construed, means that a non-natural person agreeing to provide architectural services would constitute a criminal offence in the overall context of the Act and its regulations – if the work in question is to be performed by a registered architect.

[52] But even if this were to constitute a criminal offence, despite the narrow wording employed in s 13(1)(b) and the import of regulation 4(1)(kk), which is at best for the respondent doubtful, the question which then arises is whether the legislature intended an agreement to provide those services through a registered

²⁶ Devenish *Interpretation of Statutes* (1992) at p 171 – 172.

²⁷ *Taljaard v TL Botha* 2008 (6) SA 207 (SCA) at para 8.

architect would be a nullity or unenforceable, given the fact that the statute does not expressly provide that such an agreement is void and unenforceable.

[53] In the leading case on determining the effects of acts done in conflict with a prohibition, *Standard Bank v Estate Van Rhyn*,²⁸ Solomon JA held (Innes CJ and Wessels JA concurring):

‘The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet (1.3.16) puts it – “but that which is done contrary to law is not ipso jure null and void, where the law is content with a penalty laid down against those who contravene it.” Then, after giving some instances in illustration of this principle, he proceeds: “The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law”.’²⁹

[54] This approach has been consistently followed over the years, including in *Pottie v Kotze*³⁰ and *Swart v Smuts*.³¹

[55] Corbett AJA (as he then was) in *Swart*, stated the following after a detailed survey of authorities:

‘It appears from these and other relevant authorities that when the statutory provision in question does not itself expressly provide that such a transaction is

²⁸ 1925 AD 266.

²⁹ At 274.

³⁰ 1954 (3) SA 719 (A) at 725.

³¹ 1971 (1) SA 819 (A).

null and void and of no force and effect, the validity thereof depends in the last resort on the intention of the Legislature.³²

[56] Corbett AJA in *Swart* further quoted the following with approval from *Pottie*:

‘The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the legislature wishes to prevent.’³³

After thus quoting from *Pottie*, Corbett AJA, proceeded to state that a further important consideration in this context is whether declaring a transaction a nullity would cause ‘greater inconvenience and impropriety’ than the prohibited act itself and did not vitiate the contract which was in conflict with a statutory provision.³⁴

[57] The court in *Nkandi* however cited the above quoted passage from *Pottie* (although in truncated form) in support of its conclusion entailing an inflexible application of the maxim *ex turpi causa non oritur actio* by stating that agreements in violation of a statute are unenforceable. But this does not however reflect the overall approach of the court in *Pottie*. On the contrary, a reading of the *Pottie* judgment as a whole demonstrates a different and contrary position – the application of a flexible test in applying the approach set out in *Standard Bank v Van Rhyn*.

[58] Fagan AJA (later CJ) in *Pottie* further aptly stated in relation to rendering contracts invalid as a further penalty:

³² At 829E-F, as translated from the Afrikaans by Willis AJA in *Cool Ideas* in SCA at 126B-C.

³³ At p 830B-C.

³⁴ At p 830C-D.

'A further compulsory penalty of invalidity would . . . have capricious effects the severity of which might be out of all proportion to that of the prescribed penalties, it would bring about inequitable results as between the parties concerned and it would upset transactions which, if . . . enforced . . . , the legislature could have had no reason to view with disfavour. To say that we are compelled to imply such consequences . . . seems to me to make us the slaves of maxims of interpretation which should serve as guides and not be allowed to tyrannise over us as masters.'³⁵

[59] The mischief which s 13 is directed at is the prevention of unregistered persons from performing work reserved for architects to protect the public. This is the overriding consideration and not the rationale referred to by the court in *Nkandi*. On the contrary, the considerations referred to in *Nkandi* were subsequently fully addressed in regulation 4(1)(kk). A registered architect may furthermore and in any event be jointly and severally liable in delict with the non-natural person which contracted to do that work.³⁶

[60] The work in this case – and in *Nkandi* – was performed by a duly registered architect – the fundamental mischief sought to be prevented by s 13 thus not eventuating. The regulations furthermore expressly authorise registered architects to practise in a legal entity other than a natural person which would enter into agreements to provide those services to clients (as long as the work reserved for architects is performed by a registered architect). The fact that the appellant is a close corporation and not an incorporated company contemplated by regulation 4(1)(kk) may conceivably be a matter for the Council to consider if that were to constitute improper conduct, but does not detract from the principle embodied in that regulation.

³⁵ At p 727E-G. See *Cool Ideas (CC)* at para 168 per Froneman J.

³⁶ *Van Straaten supra*.

[61] Where the work is performed by a registered architect – as is alleged in this appeal and in *Nkandi* – there would not appear to be any prejudice sustained by either defendant in these two matters. What the exceptions seek is not the Act's protection to secure proper professional work by registered architects but rather to escape payment for work duly performed by registered architects merely by reason of the fact that the agreements to provide that work were entered into with a person other than a natural person, and entirely unrelated to the nature of the performance.

[62] In *Pottie*, the Appellate Division (AD) was concerned with an ordinance which prohibited the sale of a motor vehicle without a valid roadworthy certificate. After referring to 'serious inequities' which may ensue by invalidating a contract, the court declined to vitiate the agreement in question. In *Swart*, the AD found that a deed of sale in conflict with land credit legislation was not invalid because there was a reasonable prospect of the buyer being granted credit by the then Land Bank.³⁷ In a more recent matter, Harms JA writing for a unanimous court in *Oilwell (Pty) Ltd v Protec International Ltd and others*, applied *Standard Bank v Van Rhyn*, and referred to the important consideration contained in the passage of Voet quoted in *Van Rhyn* above in para [53] being:

' . . . whether "greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law". Voet concluded this section with a reference to H De Groot (Grotius to some) Inleidinge 1.2.2, where the author, dealing with the same subject, said that things done contrary to law are only void if the law so expresses itself ("de wet sulcks uytdruckt"), or if someone's ability to perform the act has been curtailed, or if the

³⁷ 2011 (4) SA 394 (SCA).

deed 'heeft een gestadigde onbehoorlickheid' (translated by Gane via Voet, as "if the act performed suffers from some obvious and ingrained disgrace", but more correctly from some "unremitting impropriety").³⁸

[63] Harms JA proceeded to hold that the failure to obtain prior treasury consent for a foreign exchange transaction as required in the regulations did not render the agreement in question a nullity.

[64] In *Noragent (Edms) Bpk v De Wet*,³⁹ it was held by a full bench that a section which prohibits any person from performing any act as an estate agent unless issued with a fidelity fund certificate did not have the effect of invalidity in respect of a contract of mandate of an estate agent acting in contravention of that prohibition and that he or she would be entitled to enforce a contractual claim for commission.

[65] Applying the approach in *Standard Bank v Van Rhyne*, it would seem to me that it could not have been the intention of the legislature where a non-natural person has agreed to provide architectural services that this would result in the further penalty of invalidity of the agreement where the work is performed by a registered architect, even if this were to conceivably fall foul of s 13(1)(b), which is doubtful. A greater inconvenience and impropriety would follow from doing so, resulting in the defendants escaping their liability to pay for work duly performed by a registered architect. Given the mischief which s 13 is aimed at and given the regulations, there is no 'obvious or engrained disgrace' or 'unremitting impropriety' in the words of Voet as varyingly translated, for such an agreement to be valid and

³⁸ At para 19.

³⁹ 1985 (1) 263 (T) (full bench) approved and applied by the SCA in *Taljaard supra*.

enforceable.⁴⁰ This interpretation is one which would not in my view undermine the statutory purpose of the Act and s 13 – that reserved work be performed for reward by registered architect to protect the public as already set out. It would also result in a sensible interpretation as the contrary approach would result in far greater inconvenience and inequity and does not suffer from some “unremitting impropriety”.

[66] The court in *Nkandi* erred by failing to take into account the authoritative approach in *Standard Bank v Estate Van Rhyn* (and subsequently followed) in determining the effects of acts done in conflict with statutory prohibitions.

[67] The decisions in *Cool Ideas*, heavily relied upon in *Nkandi*, are in my view distinguishable. The prohibition in that matter was cast in entirely different terms. It expressly prohibited receiving a consideration unless a builder was registered under s 10 of the Housing Consumers Protection Measures Act.⁴¹ It did so in the following terms:

‘(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.’

⁴⁰ See *Oilwell* at para 19.

⁴¹ Act 95 of 1998.

[68] The statutory context and scheme of that Act also differ from the Act in this matter. The majority in both the SCA and CC found that the building contract was not invalidated (and unenforceable) by the failure of *Cool Ideas* to be registered at the outset of the building works⁴² but that s 10 prevented an unregistered builder from claiming a consideration.

[69] In that matter, *Cool Ideas* and Ms Hubbard entered into a building contract in which *Cool Ideas* undertook to construct a residence and enlisted a duly registered sub-contractor to execute the building project. At the time of entering into the agreement, *Cool Ideas* was not registered but subsequently did so when seeking to enforce an arbitration award in its favour. At the stage of practical completion and after making various payments, Ms Hubbard took issue with the quality of the building works and invoked the arbitration clause in their agreement. The arbitrator made an award in favour of *Cool Ideas*. When the latter sought to enforce the award, Ms Hubbard took the point that *Cool Ideas* was precluded from enforcing the award by virtue of the prohibition contained in s 10(1)(b). The award was not challenged on procedural or substantive grounds. The majority of the SCA and of the CC upheld her point.

[70] As I have pointed out, the prohibition in that legislation is specifically directed at receiving any consideration as a builder unless registered under that Act. That is entirely unlike the terms of the prohibition contained in s 13(1)(b), which does not prohibit the receipt of remuneration. That prohibition is also to be viewed in the context of the provisions contained in that Act in a highly regulated framework of measures to protect consumers where that specific penalty was

⁴² See para 47 of CC judgment.

included. The majority in both courts found that the building contract remained extant but precluded *Cool Ideas* from enforcing the award by reason of its failure to register prior to the commencement of the building works. The majority in the SCA found that there was nothing in the legislative scheme which suggested that the building contract was invalidated by the prohibition in s 10.⁴³ The majority in CC agreed.⁴⁴ This is unlike the approach in *Nkandi* which is premised upon a reliance of the *ex turpi maxim* which would render the agreement as a whole as unenforceable by virtue of its illegality.

[71] Quite apart from the difference in the wording and the distinguishing features of *Cool Ideas* which sufficiently distinguish that matter from this appeal, the interpretation of the legislation by the minority in the CC in the judgment of Froneman, J is in any event in my view to be preferred.

Conclusion

[72] It follows that the court *a quo* erred in following *Nkandi* which was incorrectly decided. It further follows that the exception against the main claim should not have been upheld and that the appeal succeeds. The matter should revert to the High Court for further case management consistent with this judgment.

[73] The following order is made:

1. The appeal succeeds with costs including the costs of one instructing and one instructed counsel.

⁴³ See *Cool Ideas* (SCA) at para 11.

⁴⁴ See *Cool Ideas* (CC) at para 48.

2. The order of the High Court is set aside and replaced with the following order:

'The exception against the plaintiff's main claim is dismissed with costs, which include costs of one instructing and one instructed counsel.'

3. The matter is remitted for further case management in the High Court consistent with this judgment.

SMUTS JA

MAINGA JA

HOFF JA

APPEARANCES

APPELLANT:

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