THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

In the matter between Case No: 1156/2016

WIERDA ROAD WEST PROPERTIES (PTY) LTD **APPELLANT**

and

SIZWENTSALUBAGOBODO INC **RESPONDENT**

Neutral citation: *Wierda Road West Property (Pty) Ltd v SizweNtsalubaGobodo Inc* (1156/16) [2017] ZASCA 170 (1 December 2017)

Coram: Cachalia and Majiedt JJA and Plasket, Meyer and Mbatha AJJA

Heard: 22 November 2017

Delivered: 1 December 2017

Summary: Lease – National Building Regulations and Building Standards Act 103 of 1977 – lease agreement not rendered invalid and unenforceable by ss (4)(1) and 14(1), read with s 4(4) and s 14(4)(a) of the Act.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Francis J, sitting as court of first instance):

1. The appeal is upheld with costs.
2. The order of the high court is set aside and substituted with the following:
   'Judgment is granted in favour of the plaintiff in the sum of R7 867 548.78 together with interest at 8% per annum from 1 December 2014 to date of payment and costs'.
3. The cross-appeal is dismissed with costs.

JUDGMENT

Majiedt JA (Cachalia JA and Plasket, Meyer and Mbatha AJJA concurring):

[1] The appellant, Wierda Road West Properties (Pty) Ltd, instituted action against the respondent, SizweNtsalubaGobodo Inc, for the amount of R7 867 548.78 in respect of rentals and municipal charges for the lease of its property at 41 West Street, Houghton, Johannesburg (the property). Francis J, sitting as a court of first instance in the Gauteng Local Division, Johannesburg (the high court), dismissed the action with costs. This appeal is with the leave of the high court, which also granted the respondent leave to cross-appeal against the finding that the lease agreement was not invalid, but merely unenforceable.

[2] The action was based on a written lease agreement concluded between the parties on 3 August 2012. Although the duration of the

agreement was for five years, the claim was for the period July 2014 to March 2016, as the appellant had sold and transferred the property, in March 2016. The quantum of the claim was not in issue. The respondent raised a number of defences and also instituted a counterclaim for an order declaring the lease agreement to be void ab initio, and for the repayment of the rentals paid during the period of its occupation of the property. During the trial the respondent withdrew its claim for repayment and persisted only with its claim for the declaratory order.

[3] The respondent's defences were premised on its counterclaim, namely that the lease agreement was void ab initio and that the appellant was consequently precluded from enforcing its terms. The defence of the invalidity of the agreement was based on the following grounds, each one pleaded as an alternative to the other:

(a) that the agreement contravened s 14 of the National Building Regulations and Building Standards Act 103 of 1977, (the Act) in that no occupancy certificate had been issued prior to the occupation thereof;

(b) that the appellant had made a fraudulent misrepresentation by failing to inform the respondent of the fact that no occupancy certificate had been issued; and

(c) that the property was not suitable for the purposes for which it was let, as it would have constituted an offence for the respondent to have remained in occupation in the absence of an occupancy certificate.

[4] The high court partially upheld the first defence by finding that even though the agreement was not invalid, it was unenforceable. As stated, this finding prompted a cross-appeal by the respondent. The high court dismissed the second and third defences above. During argument in this court, the respondent abandoned the fraudulent misrepresentation defence. It became evident during the trial that there were no approved building plans for part of the property, as is required by s 4(1) of the Act. This non-compliance was advanced by the respondent as a further ground to invalidate the agreement. The fact of the non-compliance with sections 4(1) and 14(1) is common cause. The issues in this appeal are therefore:

(a) Whether the agreement is void ab initio due to the contraventions of s 4(1), read with s 4(4) or s 14(1), read with s 14(4) of the Act;
(b) Whether the failure to obtain an occupancy certificate rendered the property not suitable for the purposes for which it was let; and
(c) In respect of the cross-appeal, whether the high court erred in its finding that the agreement was not invalid, but merely unenforceable.

[5] A brief narration of the factual matrix is necessary for a proper understanding of the issues. Almost all the background facts were common cause or not seriously disputed. The respondent is a merged entity, comprising Gobodo Incorporated (Gobodo) and SizweNtsaluba VSP (Sizwe). The appellant is a property-owning company entirely owned by the shareholders of the erstwhile Gobodo. It purchased the property in 2009 on auction with a view to house Gobodo, whose premises at that time had become too small. The appellant undertook the refurbishing of the property at Godobo's instance to meet its requirements. On 1 August 2010 Gobodo moved in. In the course of the refurbishment it was discovered that there were no building plans in respect of the new wing added to the property by the previous owner. The original property consisted of a two storey residential dwelling. The new wing, also built by the original owner, comprised three floors, namely the ground, mezzanine and first floors. Despite concerted efforts, the appellant was unable to get building plans from the seller. Consequently, the appellant instructed its architects to draw plans for the new three storey wing and to submit them to the City Council of Johannesburg (City Council).

[6] The appellant concluded a lease agreement with Gobodo for a period of 12 years, commencing 1 August 2010. On 1 June 2011 Gobodo merged with Sizwe to form the respondent, which concluded a new lease agreement in respect of the property with the appellant on 3 August 2012. The duration of the original lease was reduced from 12 years to 5 years. The appellant experienced serious problems getting the plans approved. There were as many as 12 separate approvals required. The building plans were finally approved during mid-2015, almost five years after their submission to the City

Council. Without approved plans the appellant could not obtain an occupancy certificate. This is because s 14(1)(*a*) of the Act rendered the granting of an occupancy certificate subject, amongst others, to the requirement that the building concerned was erected in accordance with the provisions of the Act and with any conditions under which approval was granted.[1] One of the relevant provisions for present purposes is s 4(1).[2]

[7] Pursuant to the conclusion of the lease, the respondent occupied the property from 1 August 2012 until June 2014, when it vacated the premises without notice to the appellant. During this period, the respondent paid the monthly rentals and municipal utility charges in accordance with the terms of the lease.

[8] As the issues in dispute are largely a question of law, it is not necessary to refer in detail to the evidence of the witnesses at the trial. The high court, understandably, did not deem it necessary to make any credibility findings on the oral evidence. For present purposes the discussion can be restricted to a brief summary of the evidence on the central issues, namely the lack of building plans and an occupancy certificate.

[9] Mr Dayalan Manikum Naicker was the main witness for the appellant. He was a shareholder and director of the appellant and, until his retirement in December 2010, a shareholder of Gobodo. All the shareholders in Gobodo were shareholders of the appellant and five of them, including Mr Naicker, were appointed as its directors. Mr Naicker conducted the negotiations regarding the lease agreement on behalf of the appellant. Mr Donavan Simpson, who was the chief financial officer of the respondent and previously

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[1] Section 14(1)(*a*) reads:
'(1) A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building –
(a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7 . . .'

[2] Section 4(1) reads as follows:
'(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act'.

a shareholder in Gobodo, acted for the respondent during the negotiations. The most important part of Mr Naicker's evidence, relevant to the central issue, was that Mr Simpson and all the other Gobodo shareholders were aware of the absence of an occupancy certificate. Mr Simpson was succeeded as chief financial officer by Mr Gerrit Prinsloo, who featured prominently in the events leading up to and after the respondent vacated the property. According to Mr Naicker, the City Council was fully aware that the property was being occupied without an occupancy certificate; its inspectors came to the property to make an assessment of the situation and there was no objection to occupation.

[10] Surprisingly, neither Mr Simpson nor Mr Prinsloo testified for the respondent. Instead, it adduced the evidence only of Mr Victor Mazitha Sekese, the chief executive officer. Although he had signed the lease agreement on behalf of the respondent, he had not been involved in the prior negotiations at all. He had delegated all the negotiations regarding the lease to Mr Simpson. According to Mr Sekese he had no concerns about the agreement when it was brought to him for signature. He said that if he had known about the absence of the building plans and an occupancy certificate, he would not have signed the agreement. It bears emphasis that it was not the respondent's case that the property was not safe for occupation. What is more, Mr Naicker's evidence regarding the problems about the building plans and the occupancy certificate, was unchallenged.

[11] The objective evidence, in the form of e-mail communications between the parties' representatives, prior to the respondent vacating the property in June 2014, is instructive. At no time during the parties' communications during March and April 2014 regarding a possible subtenancy was the absence of an occupancy certificate raised as an issue, except to the extent that the appellant had been alerted to the fact that it may prove problematic for the respondent to procure a subtenant. The respondent did not complain about the absence of an occupancy certificate. As stated, the respondent only became aware of the absence of approved plans during the course of the trial.

[12] On 10 June 2014 Mr Naicker wrote to Mr Prinsloo asking him to confirm the rumours that the respondent would be moving out of the property. This was confirmed by Mr Prinsloo, who indicated that the respondent was to begin looking for a subtenant. On 25 September 2014, after the respondent had vacated the property, in a letter by the respondent's attorneys to the appellant, the absence of an occupancy certificate was for the first time pertinently raised as a reason for the respondent vacating the property. The attorneys also contended that, by reason of the lack of a certificate of occupancy, the lease agreement was invalid, and so the present litigation ensued.

[13] The primary thrust of the attack against the lease agreement was, as stated, the non-compliance with ss 4 and 14 of the Act. It was contended that non-compliance rendered the agreement void ab initio and that this conclusion followed from the penal sanctions imposed in these sections.[3] The high court's finding that the lease agreement was valid but not enforceable, was based exclusively on the *Hubbard* judgment of this court,[4] which was confirmed on appeal to the Constitutional Court.[5]

[14] *Hubbard* is plainly distinguishable on the facts and on the law. That case concerned the provisions of s 10 of the Housing Consumers Protection Measures Act 95 of 1998 (Housing Act) which expressly prohibits an unregistered builder from receiving any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home. Section 14 of the Act, which was the focus of the high court's

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[3] Section 4(4) reads: 'Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building.'
Section 14(4)(*a*) reads: 'The owner of any building, or any person having an interest therein, erected or being erected with the approval of a local authority, who occupies or uses such building or permits the occupation or use of such building –
(i) Unless a certificate of occupancy has been issued in terms of subsection (1)(*a*) in respect of such building;
(ii) . . .
(iii) . . .
(iv) . . .
shall be guilty of an offence.'

[4] *Hubbard & another v Cool Ideas* 1186 CC [2013] ZASCA 71; 2013 (5) SA 112 (SCA).

[5] *Cool Ideas 1186 CC v Hubbard & another* [2014] ZACC 16; 2014 (4) SA 474 (CC).

judgment, differs quite starkly from that provision, as it contains no such statutory prohibition. Section 10 of the Housing Act is plainly intended to protect housing consumers against unregistered builders – thus the Constitutional Court held that 'the protection of housing consumers is a necessary and legitimate legislative objective'.[6] It is therefore not surprising that the respondent eschewed any reliance on this case.

[15] This case was conducted and decided in the high court and argued before us on the basis of non-compliance with s 4(1) and s 14(1). We heard extensive argument on these provisions and in the course of the debate, particularly with the respondent's counsel, some difficulties emerged. As is immediately apparent from the sections (cited in footnote 1 above), it is questionable whether either applies in the present instance. First, s 4(1) applies to a person who *erects* a building. And the penalty provision in s 4(4) also refers to any person *erecting* any building. The appellant did not 'erect' the building in question, within the definition of the word 'erection' in s 1.[7] This much was common cause. Second, s 14(1)(*a*) provides that an occupancy certificate may be issued if the local authority is 'of the opinion that such building has been *erected in accordance with the provisions of this Act* . . .' Section 14(4)(*a*), which contains the penal sanction, refers to '[t]he owner of any building, or any person having an interest therein, *erected or being erected with the approval of a local authority* . . .' It was also common cause that, in the present instance, the building in question had been erected without the requisite plans, ie without the approval of the local authority. Section 14(4)(*a*) therefore deals with instances of occupancy without an occupancy certificate, but where there are approved plans in place.

[16] But even if ss 4(1) and 14(1) were to apply here, and I do not find that they do, there are, in my view, compelling considerations why the lease agreement in the present matter is valid and enforceable.

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[6] Ibid para 42.

[7] 'Erection' is defined in s 1 as 'in relation to a building, includes the alteration, conversion, extension, rebuilding, re-erection, subdivision of or addition to, or repair of any part of the structural system of, any building; and **'erect'** shall have a corresponding meaning.'

[17] The respondents placed much reliance on the trite principle that what the law prohibits it also renders void, and reference was made to the well-known dictum in *Schierhout v Minister of Justice:*[8] '[i]t is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect'.[9] And, as stated, the additional penal sanction in s 14(4)(*a*)[10] was said to fortify a conclusion of invalidity in the case of non-compliance with s 14(1)(*a*). In this regard we were referred to *Christie* where it is explained that 'when a contract is not expressly prohibited but it is penalized, that is the entering into it is made a criminal offence, then it is impliedly prohibited and so rendered void.'[11] But, as the author correctly points out, those are not inflexible rules. What must ultimately be determined is the purpose of the legislative provision. These principles are mere guidelines in ascertaining that purpose. Solomon JA put it as follows in *Standard Bank v Estate Van Rhyn:*[12]

'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 [a]ct 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 [a]ct invalid, we should not be justified in holding that it was. As *Voet* (1.13.16) 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 for 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." These remarks are peculiarly applicable to the present case, and I find it difficult to conceive that the Legislature had any intention in enacting the directions referred to in sec 116(1) other than that of punishing the executor who did not comply with them.'

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[8] *Schierhout v Minister of Justice* 1926 AD 99 at 109.
[9] At 109.
[10] Para 12 above.
[11] G B Bradfield *Christie's The Law of Contract in South Africa* 7ed at 395 (footnotes omitted).
[12] *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274 - 275; see also: *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) at 188F–189A.

[18] In *Swart v Smuts*[13] this Court considered this question in some detail. Referring to the flexibility of this principle, Corbett AJA observed that '[c]areful consideration of the wording of the statute and of its purpose and purview may lead to the conclusion that the Legislature did not intend invalidity' (own translation).[14] In discussing the aids of interpretation in ascertaining the intention of the Legislature, the learned Judge referred to the question whether the attainment of the Legislature's purpose requires the nullification of the prohibited act or whether the sanction, penal or otherwise, would sufficiently meet that objective.[15] In the present instance, this consideration is of particular importance since, as stated, the respondent relies on the penal sanctions in the relevant provisions as proof of the fact that the agreement is rendered invalid by non-compliance. The sentence to be imposed for criminal offences is almost invariably subject to the discretion of a court. There is thus a substantial measure of flexibility involved.

[19] But that is not the case with the law of contract – the contract is either valid or it is not. If the law has been contravened, the contract may be treated as illegal and that is the end of the matter. As Boshoff JA correctly, with respect, cautioned in *Metro Western Cape v Ross*, '[t]he use of contract law to supplement the deficiencies of the criminal law has serious disadvantages which outweigh any utility it has in this respect'.[16] Regard must also be had to the probable unintended consequences ('greater inconveniences and impropriety') which invalidity can cause when compared to the prohibited act.[17] It is axiomatic that each case must be considered on its own facts, taking into account the language, scope and object of the statute in question as well as the consequences in relation to justice and the convenience of adopting one view rather than the other.[18]

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[13] *Swart v Smuts* 1971 (1) SA 819 (A).
[14] At 829 F: 'Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die Wetgewer geen nietigheidsbedoeling gehad het nie'.
[15] *Swart* at 830 A-B.
[16] *Metro Western Cape v Ross* above at 191H.
[17] *Swart v Smuts,* footnote 12 above, at 830C.
[18] *Metro Western Cape* footnote 15 above at 188G-H.

[20] In my view, the penalty provision in s 14(4)(*a*) strongly suggests that the penalty itself was intended by the Legislature to be an adequate sanction, without the lease agreement in this instance also being void. As I see it, the primary purpose of the Act, as its short title suggests, is to provide for national building regulations and standards. The long title of the Act confirms this view: '[t]o provide for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities; for the prescribing of building standards; and for matters connected therewith'. The Act is less concerned with private law relationships between, for example, lessors and lessees, but rather with public law relationships between local authorities and builders, users and occupants. Section 14 is thus concerned in the main with ensuring compliance with the provisions of the Act and with conditions of approval. It is difficult to understand why, over and above the penalty provisions in s 14(4)(*a*), compliance was intended to be achieved also by rendering void agreements which contravene the section. I am fortified in my conclusion in the following respects:

(a) Section 14(1A) provides that permission may be granted by the local authority to an owner of a building or any person having an interest in the building, to use the building prior to the issue of an occupancy certificate.[19] This exemption is strongly indicative of the fact that the Legislature did not intend agreements which contravene the section to be void. As I have said, neither the City Council nor the respondent, both of whom had full knowledge of the facts, had a problem with the absence of an occupancy certificate. The Act does not expressly place a prohibition on the occupation of a building without an occupancy certificate having been issued – it merely creates a statutory offence in respect of the occupation of a building without the requisite occupancy certificate. It was open to the appellant or the respondent to apply for s14(1A) permission if this had become necessary.

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[19] Section 14(1A) reads:

'A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building –

(a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7 . . .'

(b) Second, there are other remedies available to local authorities to enforce the provisions of the Act in order to achieve its primary purpose, set out above. These include:
(i) ordering the alteration or demolition of a building which is dangerous or shows signs of becoming dangerous to life or property (s 12(1)); and
(ii) applying to a magistrate's court for an interdict or the demolition of a building which contravenes the provisions of the Act (s 21).
As stated, the primary focus of the statute is not on private contractual relationships, but on those between local authorities and builders, users and occupants.
(c) Lastly, one of the factors to be considered in a determination of the Legislature's intention is that the additional sanction may have undesirable and unintended consequences.[20] This case vividly demonstrates the unjust and undesirable consequences which may ensue. Through no fault of its own and utterly oblivious to the absence of any plans, having purchased the property at an auction, the appellant would find itself in the invidious position of having a lease agreement declared invalid where it has fully performed all its obligations and where the tenant was fully conversant with all the facts. In addition, the slow grind of the City Council's bureaucratic machinery stood in the way of the appellant's efforts to regularize the situation for five years.

[21] Much of what has been stated in respect of s 14(1)(*a*) with regard to ascertaining the intention of the Legislature must of course also apply to s 4(1), read with s 4(4). For the reasons already outlined, I am of the view that the Legislature did not intend a further sanction of invalidating agreements which contravene the section over and above the penal sanction contained in s 4(4). This conclusion is even more compelling when one considers the nature of the penalty in s 4(4). Provision is made for a maximum fine of 'R100 for each day on which [a person] was engaged in so erecting such building [without plans]' The longer the period of transgression, the harsher the penalty – something which, as already stated, cannot be achieved through invalidating a private contract.

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[20] *Swart v Smuts*, footnote 12 above.

[22] In *Friedshelf 113 (Pty) Ltd v Mysty Blue Trading 559 CC,*[21] an unreported judgment of the South Gauteng High Court, Johannesburg, a similar conclusion was reached. There the applicant had sought a declarator that the lease agreement between it and the respondent was validly cancelled. The basis for that relief was the contention that the respondent had fraudulently failed to disclose that there were no approved plans and occupancy certificate for the particular premises. The respondent also averred that it had an improvement lien over the premises due to the invalidity of the lease agreement by reason of the non-compliance with s 4 and s 14 of the Act. In a closely reasoned judgment, Van der Merwe AJ came to the conclusion that there are no 'valid or compelling considerations which indicate that the private lease agreement in the present instance must be visited with the sanction of voidness and unenforceability by virtue of the fact that it relates to premises in respect of which the requirements of [the Act] have not been complied with.'[22] In reaching that conclusion the learned Judge reasoned that:

(a) there were no allegations that the premises was unsafe for occupation and, on the unchallenged evidence, the applicant was attending to the outstanding requirements;

(b) the authorities were aware of the situation and that the applicant was attending to it;

(c) there are remedies available to the local authority to address the non-compliance, should it wish to do so;

(d) there was 'no pressing need . . . for the court to impose an additional sanction on the applicant regarding the private law relationship between the applicant and the respondent, which is not provided for in the relevant legislation';

(e) the penal sanction was adequate and more appropriate in its flexibility to deal with non-compliance.

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[21] *Friedshelf 113 (Pty) Ltd v Mysty Blue Trading* 559 CC, Case no 2008/39429, delivered on 3 April 2009.

[22] Ibid para 7.

[23] I endorse these conclusions and the underlying reasoning of the learned Judge. This case is on all fours with the present one. For the reasons already set out, I therefore hold that the lease agreement in this instance is valid and enforceable. What remains is to consider the judgment of Rogers J in *Berg River Municipality v Zelpy,*[23] a matter upon which the respondent placed heavy reliance for its contention that, due to the lack of approved building plans, the use and occupation of the property was impliedly prohibited by s 4(1).

[24] In *Berg River Municipality* the municipality sought a final interdict preventing Zelpy, the respondent company, as property owner from occupying or using certain buildings on its property constructed without plans, until an occupancy certificate had been issued by the municipality. Zelpy opposed the application and in its counter-application sought an order directing the municipality to take a decision on Zelpy's request for permission to use the building in terms of s 14(1A). The municipality's refusal to issue a s 14(1A) certificate was based on its stance that an occupancy certificate could, in terms of s 14(1)(*a*), only be issued in respect of buildings constructed in accordance with approved building plans. Zelpy contended that the criminal sanction in s 14(4)(*a*) was adequate, rendering an interdict unnecessary. In the counter-application the central question was whether s 14(1A) permitted a local authority to grant permission for a building to be used where the building had been erected without its approval.

[25] In deciding these issues, Rogers J reasoned that, since Zelpy had been occupying the buildings whithout approved plans, the erection of the buildings was unlawful in terms of s 4(1), but that 'that section does not state, at least not expressly, that it is unlawful to use a building which has been unlawfully erected'.[24] The learned Judge reasoned further that the unlawfulness of Zelpy's use of the buildings is to be found by implication and that that implication is to be found, not in s 14(4), but rather in s 4(1). Rogers J

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[23] *Berg River Municipality v Zelpy* 2065 (Pty) Ltd [2013] ZAWCHC 53; 2013 (4) SA 154 (WCC).
[24] Ibid para 23.

opined that one of the Act's main purposes was to ensure that buildings will be safe and suitable for the intended use. He observed that:

'[t]he erecting of a building is not an end in itself; a building is erected so that it may, upon completion, be occupied and put to use. The reason the Act forbids the erecting of buildings without approved plans and provides for their demolition if they are unlawfully erected is to prevent the existence of buildings which, because of the absence of approved plans, may be unsafe and unsuitable for use (even though no enquiry into safety and suitability is required in order for the act of erecting to be unlawful or in order to obtain an interdict or a demolition order). Even when a building has been erected in accordance with approved plans, s 4 does not permit it to be used or occupied without the local authority's further approval. This is a further mechanism to ensure that the building is safe and suitable for occupation, as is apparent *inter alia* from the requirement for the certificates specified in ss 14(2) and 14(2A).'[25]

[26] The learned Judge furnished comprehensive reasons for his conclusion that s 4(1) contains an implied prohibition against the use or occupancy of a building in the absence of approved plans. He found support for his conclusion in the texts of ss 14(1) and 14(1A), the legislative history of s 14 and the absurdity of reading into the present wording of the introductory part of s 14(4)(1A) the words 'or without' (ie that it would then read: '. . . erected or being erected with the approval of a local authority or without [such approval]'. Rogers J found further support in the textual construction of the two penalty provisions in ss 4(4) and s 14(1)(*a*) respectively. He reasoned thus: '[t]here is a further reason for implying the prohibition in s 4(1) rather than s 14(4)(*a*). In the case of s 4, there is a prohibition in s 4(1) and an offence created in s 4(4). In the case of s 14, the prohibition and offence are not separately legislated – the sole source of unlawfulness is the offence created by s 14(4)(*a*). By implying into s 14(4)(*a*) words which would extend its operation to buildings erected without municipal approval one would be establishing a wider criminal offence than the one expressly created by the lawmaker. The scope of penal provisions must be conveyed with reasonable clarity . . . This is a further obstacle to implying words into s 14(4)(a), and it is only by some such implication that s 14(1A)'s scope could sensibly be read as including buildings erected without municipal approval. The same difficulty

[25] Ibid para 26.

does not exist in s 4. Although the prohibition in s 4(1) necessarily implies, in the context of the Act as a whole, a prohibition against use, it is not necessary, and . . . probably not permissible, to make the same implication in s 4(4), which expressly criminalises the erecting (not the use) of a building in contravention of s 4(1)) and authorises a penalty expressed with reference to the number of days on which the person was engaged in erecting (not using) the building.'[26]

[27] While the reasoning in *Berg River Municipality* appears, on the face of it, rather attractive, the conclusion that s 4(1) contains an implied prohibition against use or occupancy presents serious difficulties. First, the effect of such an implication may result in an offending party falling foul of a criminal sanction by attributing an implied meaning to a statutory provision. However, penal provisions must not only be stipulated with reasonable clarity,[27] but must also be interpreted strictly where there may be ambiguity.[28] The second difficulty is that there is no apparent reason why one must perforce read an implied prohibition against use or occupancy in s 4(1) when ss 14(1)(*a*) and 14(4)(*a*) expressly deal with unlawful use or occupancy where there are approved building plans. Where there are none, the local authority has other remedies available to it to enforce the provisions of the Act. It is well established that great caution must be exercised when seeking to read an implied meaning into a statute. That can only be done when implication is necessary to give effect to the statutory provision as it stands. In addition, the implication must be necessary so that the ostensible intent of the lawmaker is realised or to make the legislation workable. This approach was first laid down authoritatively by this court in *Rennie NO v Gordon NO and another,*[29] and followed thereafter in a long line of cases in this court and in the Constitutional Court, most recently in *Masetlha v President of the Republic of South Africa and others.*[30] I am unable to discern such a need as far as s 4(1) is concerned. And, importantly, the difficulties outlined above strongly militate against this implication. A strained interpretation which entails the implied

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[26] Ibid para 38.
[27] *University of Cape Town v Cape Bar Council & another* 1986 (4) SA 903 (A).
[28] *Rex v Milne and Erleigh* (7) 1951 (1) SA 791 (A) at 823B-F.
[29] *Rennie NO v Gordon NO and another* 1988 (1) SA 1 (A) at 22E-F.
[30] *Masetlha v President of the Republic of South Africa & another*; 2008 (1) SA 566 (CC) para 192.

meaning with its concomitant difficulties, propounded in *Berg River Municipality,* points inescapably to a need for legislative review and correction, if required. Confronted with these difficulties in the course of the debate, the respondent's counsel was driven to concede that the approach in *Berg River Municipality* on this aspect presents insurmountable obstacles. Counsel consequently reverted to what was termed, 'the respondent's principal contention', namely the lack of an occupancy certificate and the effect of s 14(1)(*a*), read with s 14(4)(*a*), discussed above.

[28] To sum up with regard to this first issue: non-compliance with ss 4(1) and 14(1) does not render the parties' lease agreement void and unenforceable. There is no basis to justify reading an implied meaning into s 4(1) that the use or occupancy of a building which has no approved plans is prohibited. I discuss next the respondent's alternative contention that the property was not fit for the purpose for which it had been let, since occupancy would have rendered the respondent liable to criminal prosecution under s 14(4)(*a*).

[29] The respondent was at liberty to request the local authority to pursue the remedies available to it in terms of the Act, had the need arisen to do so. The conclusion is compelling that the respondent, with full knowledge of the lack of an occupancy certificate, had consented to use and occupation under the prevailing circumstances. The respondent received exactly what it had bargained for – office accommodation refurbished to its needs, in a building with an outstanding occupancy certificate which, to its knowledge, the owner (the appellant) was in the process of obtaining. The respondent never complained of this alleged unfitness for letting, and only did so after it had vacated the property and to avoid the consequences of being held to a contract it had freely entered into.[31]

[30] In the premises, the appeal must be upheld and the cross-appeal must fail. Although the appellant had in its summons initially sought payment from

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[31] Compare: *Odendaal v Ferraris* 2009 (4) SA 313 (SCA).

1 July 2014, in this court it altered that relief, seeking payment from 1 December 2014. The following order is issued:

1. The appeal is upheld with costs.
2. The order of the high court is set aside and substituted with the following:

   'Judgment is granted in favour of the plaintiff in the sum of R7 867 548.78 together with interest at 8% per annum from 1 December 2014 to date of payment and costs'.
3. The cross-appeal is dismissed with costs.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

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For Respondent:	M P van der Merwe SC, with C de Villiers
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