



CONSTITUTIONAL COURT OF SOUTH AFRICA

Cool Ideas 1186 CC v Anne Christine Hubbard and Another

CCT 99/13

Date of hearing: 5 February 2014

Date of judgment: 5 June 2014

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court dismissed an appeal against a judgment and order of the Supreme Court of Appeal.

In February 2006 the applicant (Cool Ideas) entered into a building contract with the first respondent, Ms Hubbard. Cool Ideas enlisted the services of a building construction company, Velvori Construction CC, to undertake the construction of Ms Hubbard's home. Velvori was registered as a home builder in terms of the Housing Consumers Protection Measures Act (the Act). Cool Ideas, a property developer, was not so registered at the time of entering into the agreement and at the time that construction of the building commenced.

The building works were completed in October 2008, but Ms Hubbard took issue with the quality of the work and refused to make final payment. She instituted arbitration proceedings in terms of an arbitration clause in the building contract, claiming the costs of remedial works. Cool Ideas counter-claimed for the balance of the contract price. The arbitrator found in favour of Cool Ideas. However, Ms Hubbard failed to comply with the arbitral award.

Cool Ideas approached the South Gauteng High Court, Johannesburg (High Court) for an order enforcing the arbitral award. Ms Hubbard opposed the application, contending that Cool Ideas was not a registered home builder in terms of the Act. However, Cool Ideas subsequently registered during the litigation proceedings. It also argued that the

construction was done by Velvori, which was a registered home builder. The High Court granted the order and made the arbitral award an order of court.

Ms Hubbard appealed to the Supreme Court of Appeal. The majority upheld her appeal, stating that the purpose of the Act is to protect consumers and therefore both Cool Ideas and Velvori were required to be registered before commencing with construction. Further, they held that enforcing the arbitral award would disregard a clear prohibition in law. The dissenting judgment found that Cool Ideas did not intentionally fail to register and that refusing to enforce the award would be unjust.

The Constitutional Court granted leave to appeal but dismissed the appeal. The majority judgment, written by Majiedt AJ (Moseneke ACJ, Skweyiya ADCJ, Khampepe J and Madlanga J concurring), held that a purposive reading of the Act makes it clear that Cool Ideas was prohibited from commencing building works and that by enforcing the arbitral award; this Court would be condoning an illegality. The majority held further that neither Cool Ideas' right to property nor its right of access to courts were infringed. A concurring judgment, written by Jafta J (Zondo J concurring) held that the order made by the majority was correct, but it disagreed that the underlying building contract remained valid.

The dissenting judgment, written by Froneman J (Cameron J, Dambuzza AJ and Van der Westhuizen J concurring), held that in determining whether the enforcement of an arbitral award will be against public policy, it is necessary to take into account that the parties choose to engage in private arbitration. Public policy must also embrace issues of fairness in the interpretation, application and enforcement of contracts. Froneman J further held that the Act should be interpreted in a manner that is less damaging to the right to property, including an applicant's right to payment for work fairly done.