

HOUSING CONSUMER-PROTECTION TO RECEIVE A FACELIFT

LAW MATTERS



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THE Housing Consumer Protection Bill (the Bill) was published for public comment on 30 August 2019. The Bill will ultimately replace the existing Housing Consumer Protection Measures Act (the Act). The Bill envisages the replacement of the existing National House Building Registration Council (NHBRC) with a new regulatory body – the National Home Building Regulatory Council (the Council). While many core features of the Act are retained, the Bill aims to improve the protection afforded to housing consumers and more stringent regulation of home builders.

Some of the notable sections in the Bill are dealt with in this article.

◆ **The definition of a housing consumer**
The definition of a housing consumer has been extended to create an unlimited class of housing consumers. This means, for example, that beneficiaries of subsidised housing programmes (as contemplated in

the National Housing Code) will be included in the definition. This would be a welcome inclusion as currently under the Act many de facto housing consumers are excluded from protection, in particular that afforded by the Home Warranty Fund.

◆ **The definition of a homebuilder**
The definition of a homebuilder has been amended by the deletion of the word “person”. In a recent SCA decision the Court determined that a “person” for purposes of the Act included a trust. The question remained, however, whether “person” is inclusive of all other types of juristic person. The Bill will clarify the position by stating that a homebuilder may be a company, close corporation, partnership or trust.

◆ **No registration equals no consideration**
A distinguishing feature of the Bill is the omission of section 10 of the Act which

states that no person is entitled to receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home if that person is not registered with the NHBRC. The application of section 10 was affirmed by the Constitu-

tional Court in 2013. This provision has been dropped in the Bill and the onus now rests on the housing consumer to ensure that the homebuilder is registered prior to concluding a building agreement. The Bill however does introduce a prohibition against homebuilders from procuring construction work unless registered. Section 78 of the Bill provides for the imposition of a R1.5 million fine or a period of imprisonment on homebuilders who fail to register.

◆ **Further regulation of construction contracts**
In addition to the implied contractual warranties imposed by section 13 of the Act relating to quality of workmanship, section 49 of the Bill provides that building agreements are deemed to include a warranty by the homebuilder that: 1. the homebuilder is registered with the NHBRC; and 2. the home is enrolled in terms of the Act. Further, in

the event of a housing consumer having to vacate his home due to structural defects, the homebuilder is liable to pay for the reasonable relocation and accommodation costs of the housing consumer until the necessary remedial work is completed. If the home forms part of a new development, the developer will be jointly and severally liable with the homebuilder.

◆ **The Home Warranty Fund**
The Bill retains the warranty fund (now to be named the Home Warranty Fund). The Bill also retains the five-year warranty period for major structural defects but extends the currently existing 12-month warranty against roof leaks to 2 years. As is the case under the Act, the housing consumer must first call on the homebuilder to remedy the defect before looking to claim against the Home Warranty Fund.
The Bill is still open for public comment

until 29 October 2019 so there may be further iterations before it is promulgated. While many of the changes proposed by the Bill are welcomed, the implementation of those changes will determine whether housing consumers will enjoy better protection than they do currently.

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TAX TALK



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WHEN CONSULTANCY SERVICES BECOME A TAXABLE FRINGE BENEFIT

THE world-renowned German motor vehicle manufacturer BMW has an international business policy which requires employees to work for a short or medium term in locations where the group has a presence, other than in their home countries. This is done on a tax equalization basis, meaning that the employees' remuneration is structured in such a way that the net income in the countries where they are placed is no less than in their home countries.

In order to facilitate the tax compliance of the expatriate employees, BMW South Africa (“BMW-SA”) engaged the services of tax consultants to, amongst other services, complete taxpayer registrations, assist with the employees' tax returns and deal with objections to assessments. SARS raised an assessment as it was of the view that the payments to the tax consultants constituted a taxable fringe benefit in respect of which each expatriate employee should be liable. BMW-SA objected on several grounds, including that the secondments were not provided as a benefit or advantage of employment, the tax consultants having been instructed to protect the interests of the BMW group and not to provide a private or domestic benefit to the employee.

The question of whether the payments constituted a fringe benefit had to be decided by appeal to the Supreme Court of Appeal in the matter of BMW South Africa (Pty) Ltd v CSARS, the Tax Court and a full court of the Gauteng High Court already having found in SARS favour. Consideration had to be given to whether the tax consultancy services could be valued in money and fell within the definition of ‘gross income’ as read with paragraph 2(e) of the 7th Schedule in the Income Tax Act. This provision requires a benefit to be taxable if it is in the form of a service rendered to the employee, at the expense of the employer, and where the service was used for the employee's private or domestic use.

The Court held that the payments made by BMW-SA to the tax consultants for services were made in terms of the contracts of employment, which services the employees would have otherwise had to pay for personally. The fact that there may have been some peripheral advantage to BMW-SA was irrelevant. The primary question was whether an advantage or benefit was granted by the employer to the employee for his or her private or domestic purpose. The Court was satisfied that there was such an advantage or benefit and dismissed BMW-SA's appeal.

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◆ NOTE: This information should not be regarded as legal advice and is merely provided for information purposes on various aspects of tax law.



Focus on marine conservation

Dr Jennifer Olbers, a marine ecologist with Ezemvelo KZN Wildlife Scientific Services, recently hosted a talk at the Crocworld Conservation Centre on ‘Marine Stranded Animals in KZN’.



Zimasa Ratshikhopha, Ranewa Ratshikhopha, Barbara Raubernheimer and Robin Rouiston.



Dr Jennifer Olbers, Olivia Symcox, Nigel Eady and Luhard Potgieter.

TEA IN THE JUNGLE

The 14th Annual Mum's Mail 'Jungle Fever' High Tea fund-raiser, in association with The Sunflower Fund, was held recently at The Globe at Suncoast.

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Nesh Govender and Kaveshnee Pillay.



Taryn Landsberg, Sam Daykin, Victoria Arthur and Sam Baldwin.



Stephanie Berry, Viv Kuttner, Anna Kelly and Victoria Arthur.



Dominique and Simone Mann, Katherine Anderson and Martinique Palmer.

Birthday bash

The Springfield Retail Centre recently celebrated its 21st birthday and treated shoppers to key rings, shopping bags and doughnuts.



Pierre Venter-Maher with Vanessa and Riann Brits.



Beecham Ramnath, Kajal Ramsookhai and Vimlin Govender.



Dane, Amiley and Dianne David.