THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 517/95

In the matter between

UNIVERSAL HOMES — APPELLANT
(Plaintiff in the Court a quo)

and

DR J N REDDY N O — RESPONDENT
(Defendant in the Court a quo)

In the matter between

UNIVERSAL HOMES — APPELLANT
(Plaintiff in the Court a quo)

and

THE HOUSING DEVELOPMENT BOARD (HOUSE OF DELEGATES) — RESPONDENT
(Defendant in the Court a quo)

CORAM: HEFER, VIVIER, FH GROSSKOPF, OLIVIER JJA

et STREICHER AJA.

HEARD: 4 MARCH 1997

DELIVERED: 26 MARCH 1997

JUDGMENT

VIVIER JA:

The appellant ("the plaintiff) instituted two separate actions for damages in the Durban and Coast Local Division, the first one against the Minister of Local Government, Housing and Agriculture in the Ministers' Council of the House of Delegates ("the Minister") and the second one against the Housing Development Board (House of Delegates) ("the Board"). Both actions arose from an application made by the plaintiff to the Board for the allotment of 399 serviced erven in Lenasia South, Extension 4 and the grant of a loan for the purpose of enabling the plaintiff to construct dwellings on the erven and to sell it to the members of the public referred to in the application. The two actions were consolidated for purposes of trial and at the commencement of the hearing Page J ordered that the issue of the liability of the Minister and/or the Board be tried separately before the issue of the quantum of

damages, if any, suffered by the plaintiff. At the end of the trial Page J made an order in both actions of absolution from the instance with costs. With the leave of the Court a quo the plaintiff now appeals to this Court.

The application for the allotment of erven and the grant of the loan was made against the following legislative background. At the time there existed in this country the so-called Tri-Cameral Parliament in which the House of Delegates was responsible for providing housing for the Indian population group in certain areas. The Board was established by sec 2 of the Housing Development Act (House of Delegates) 4 of 1987 ("the Act") and its functions, insofar as the Indian Population group was concerned, corresponded to those of the previous Community Development Board. By virtue of Government Notice 657 of 27 March 1987 the assets, rights, liabilities and obligations of the Community

Development Board in regard to any area which had been declared as an area for the use of the Indian population group vested in the Board from 1 April 1987. The objects of the Board are set forth in sec 10(1) of the Act and are generally to ensure that persons in a declared area are properly housed (sec 10(l)(d)). For the purpose of achieving its objects defined powers are conferred on the Board in sec 10(2) of the Act. The exercise of some of these powers is made subject to the approval of the Minister and/or subject to such conditions as he may determine. The power of the Board to "approve projects and grant loans for the execution of projects so approved to a . .housing utility company. . . ." (sec 10(2)(b)(ii)) is, in terms of sec 10(2) (b) of the Act, a power which can only be exercised -

> "with the approval of the Minister given either generally or in a particular case, and subject to such conditions as he may determine."

"Project" is defined in sec 1 of the Act and a project approved in terms of sec 10(2)(b)(ii) becomes an "approved project".

In terms of sec 30(2) of the Act the Board is empowered to grant loans with the concurrence of the Minister and the Minister of the Budget from the Housing Development Fund established in terms of sec 12. Sec 32(1) of the Act provides that where such a loan is granted to a local authority, the revenue and assets of the local authority shall constitute the security for the repayment of the loan and interest thereon. Sec 32(2) provides that

> "Except in the case of a loan granted to a local authority, any loan granted by the board shall be secured by a first mortgage bond passed in favour of the board over the land on which the relevant dwelling, building or other structure has or is to be constructed or which is intended to be used for the

carrying out of an approved project ...."

It will be seen that sec 10(2)(b)(ii) refers, inter alia,to loans granted to a housing utility company. A housing utility company is defined as a company registered under the Companies Act as well as under sec 44 of the Act, and the articles of association or constitution of which forbids it to declare or otherwise divide profits among or for the benefit of its members. Sec 44(1) of the Act provides that a utility company which provides or intends to provide housing may apply to the Department of Local Government, Housing and Agriculture of the Administration: House of Delegates ("the Department") to be registered as a housing utility company. The plaintiff was incorporated as a company limited by guarantee in terms of sec 21 of the Companies Act 61 of 1973 on 4 April 1990 and was registered as a housing utility company pursuant to sec 44 of the Act on 29 June 1990.

The plaintiff's case against the Minister as pleaded was that on 22 November 1990 the Board, with the approval of the Minister, and pursuant to its powers under sec 10(2) of the Act, approved the project for which the plaintiff had sought approval, in terms whereof the plaintiff was allotted 399 serviced sites in Lenasia South, Extension 4, and was granted a loan for the purpose of enabling it to construct houses thereon and to sell such houses to the persons referred to in the application. It was alleged that the plaintiff on 26 November 1990 accepted the benefits of the said approval. It was further alleged that on 22 January 1991 the Minister wrongfully and intentionally induced the Board to repudiate its obligations to the plaintiff under the contract which had come into existence between the plaintiff and the Board by purporting to rescind the Board's approval of the project, thereby causing the plaintiff to suffer damages in an amount of R3 077 147-11.

In the second action the plaintiff sued the Board on two alternative bases. The main claim was based upon the allegation that the Board on 22 January 1991 repudiated its obligations under the said contract, causing the plaintiff to suffer the damages alleged in the first action. In the alternative claim against the Board, which was advanced only in the event of the Court finding that the Minister had not approved of the project as required in terms of sec 10(2)(b)(ii) of the Act, the plaintiff relied on an alleged negligent misrepresentation. The allegation was that the Board, by advising the plaintiff in a letter dated 26 November 1990 that the project had been approved, impliedly represented to the plaintiff that the said approval had been effected pursuant to the provisions of sec 10 of the Act, that the Minister had thus approved thereof and that the Board's approval was consequently proper and valid. It was alleged that the Board acted negligently in failing to verify the

accuracy of these representations. It was alleged that the plaintiff, acting upon the strength of the representations, accepted the benefits of the approval. It was further alleged that the representations were false in that the approval had not been effected pursuant to the provisions of sec 10 and that the Minister had not approved of the project. It was alleged that the plaintiff had suffered damages in an amount of Rl 340 094-11 as a result of the alleged negligent misrepresentation.

While it was not in issue that the Board itself granted its approval to the project at a meeting of the Board held on 22 November 1990, and informed the plaintiff accordingly in the said letter dated 26 November 1990, both the Minister and the Board denied that the Minister had approved of the project as required by sec 10(2)(b)(ii) of the Act. The Board furthermore denied the alleged misrepresentation.

The Court a quo held, firstly, that the plaintiff had failed to prove that the Minister had given the requisite approval. It held further that the requirement of the approval by the Minister in sec 10(2)(b)(ii) of the Act was peremptory without which the approval by the Board alone would be a nullity. With regard to the alleged negligent misrepresentation the Court a quo held that on a proper interpretation of sec 10(2)(b)(ii) the Minister's approval could validly have been given before or after the approval of the Board, so that the Board's notification to the plaintiff that the project had been approved at its meeting of 22 November 1990 carried no implication that the Minister had also given his approval. Page J further held that the Board had in any event, as regards the alleged misrepresentation, not acted in breach of any legal duty owed by it to the plaintiff and had therefore not acted wrongfully.

It is convenient to deal first with the submission made by counsel for the appellant that even if the Minister's approval was not obtained this did not render the Board's approval void. The legal principles applicable and the indicia invoked in deciding the validity or otherwise of anything done in breach of a statutory provision or in disregard of a statutory requirement, are well-known and have often been stated in decisions of this Court. See Swart v Smuts 1971 (1) SA 819 (A) at 829C-830C; Palm Fifteen v Cotton Tail Homes (Pty)Ltd 1978 (2) SA 872 (A) at 885D-G and Neugarten and Others v Standard Bank of South Africa Ltd 1989 (1) SA 797 (A) at 808F-G.

The Act contains no express declaration of nullity in the case where the Minister's approval is lacking. The essential question then is whether, upon a proper construction of the provision in question, the Legislature intended that anything done contrary to it

was necessarily to be visited with nullity (see the Palm Fifteen case, supra, at 885F-G).

In construing sec 10(2)(b)(ii) of the Act it is significant that, as opposed to the general powers conferred in sec 10(2)(a) of the Act, for the exercise of which no Ministerial approval is required, the Legislature has seen fit to provide in express terms for such approval in the case of the specific powers entrusted to the Board in sec 10(2)(b). In the case of the projects referred to in sec 10(2)(b)(ii) questions of policy may well be involved which would require direct Ministerial control. Furthermore the public interest demands that the Board's approval of housing projects, involving as it does the alienation of State property and the loan of State funds should be under direct Ministerial control so as to guard against the abuse of State property and funds. If the Minister's approval was no more than an internal formality the lack of which would not

affect the validity of the Board's decision, as was submitted by counsel for the appellant, the required Ministerial approval would be illusory. I accordingly agree with the Court a quo that the Minister's approval for a project approved by the Board under sec 10(2)(b)(ii) of the Act is a peremptory one and that failing such approval any act done by the Board would be a nullity.

I proceed to consider the question whether the Minister ever granted his approval to the project. The relevant facts may be summarised as follows. The plaintiffs first application for approval for the said project was lodged with the Board on 6 June 1990. This was followed on 20 July 1990 with an updated application. On 31 July 1990 the Regional Representative of the Departement in Johannesburg, Mr Meiring, submitted a report to the Board on the application. It appears from the updated application and the report that the application was aimed at providing housing for the middle

income group ie those people who earned between Rl 635-00 and R2 876-00 per month. It provided for the plaintiff to acquire the land from the Board at cost plus 10% plus 5% community facility contributions. Total building costs involved in the project were estimated at R12,5 m with the selling prices of the houses varying between R41 926-00 and R46 000-00. The nett amount of the loan required from the Housing Development Fund was R15,9m at an interest rate of 11,25% per annum which was well below the market rate. It was contemplated that the Board would pass transfer of the erven direct to the ultimate owners who would simultaneously bond the erven in favour of a building society or similar institution as security for a loan which would enable them to pay the purchase price to the plaintiff. From this money the plaintiff would, in turn, after deducting its profit, repay its loan and interest thereon to the Board. The project managers for the

proposed scheme were stated to be a firm called Urban Development Services ("UDS").

The Regional Representative recommended that the Board approve of the project. Mr Steenkamp, who was the head of the Department, did not agree with this recommendation and instead recommended that the erven in question be set aside for development by private developers and that an advertisement be placed in newspapers inviting new applications by developers. Among the reasons stated by Steenkamp for not agreeing with Meiring's recommendation were that the plaintiff was acting as a front for UDS and that since the plaintiff intended selling the erven to people in the middle and high income brackets the erven should be sold to the plaintiff at market value.

The Board considered the application on 23 August 1990 and resolved to refer it back so that the development of the land

could be advertised for utility companies and private developers to submit development proposals. An advertisement was duly published inviting such applications to be submitted before 15 October 1990.

In reaction to this advertisement the plaintiff on 12 October 1990 submitted another application to the Board for the allotment of 400 serviced erven in Lenasia South, Extension 4. In its covering letter the plaintiff referred to its previous applications and stated that as these were slightly outdated it was enclosing its latest revised constructing packages, house plans, cash flow and sales program which would result, inter alia, in a reduction of the total estimated building costs to Rl 1,3 m with house prices increased to between R42 275-00 and R52 121-00. The plaintiff stated that the project was designed to cater for people with income levels of between Rl 600-00 and R3 500-00 per month.

When it lodged the new application the plaintiff at the same time appealed to the Board's Regional Representative in Johannesburg to be allowed to resubmit its previous applications to the Board for reconsideration and to be given an opportunity to address the Board. The request was granted and the matter was placed on the agenda for the next Board meeting on 22 November 1990.

Early on the morning of 22 November 1990 a meeting took place between members of the Board and the Minister and Deputy Minister. The Minister was Dr J N Reddy. After the meeting the Minister and his deputy left and they did not attend any of the further meetings. Later that morning three of the plaintiff's officials viz Mr Hay, the chief executive officer, Mr Huff, a director and Mr Cottrill addressed the Board. Messrs Huff and Cottrill were also directors of a company called Huff, Cottrill

Consortium (Pty) Ltd trading as UDS, the project managers for the plaintiffs proposed scheme. After the plaintiffs officials had addressed the Board they left the meeting and the Board then proceeded to consider the plaintiffs application. It appears from the transcript of the proceedings that the Board confined itself to a consideration of the application dated 20 July 1990, as summarised in Meiring's report, and had no regard to the application submitted on 12 October 1990. The Board resolved to approve the application. The plaintiff was notified of the approval in a letter written to it by Mrs Govender, a senior administrative clerk in the House of Delegates, on 26 November 1990. The letter informed the plaintiff as follows:

> "1. The Housing Development Board at its meeting held on 22 November 1990 resolved as follows : (a) the Board approves the project as reflected in paragraph 2.1 of the report and detailed in Annexure A to the report;

(b) tenders be invited for the construction of the housing units;

(c) the 399 erven enumerated in Annexure A be made available to Universal Homes at the fixed prices (including 5% Community facilities contribution) reflected in column 3 of the Annexure and that transfer of the erven be affected direct from the Board to the new owners at the Company's expense which it may recover from it's clients;

(d) a loan of R15 987 464 be granted to Universal Homes at 11,25% interest per annum payable over 5 years subject to the Board's approved conditions applicable to housing utility companies; and subject to the houses being sold to first time home buyers;

(e) regular monthly progress and financial reports be submitted to the Department by the Company;

(f) the company in the first instance select its clients from the Johannesburg Regional Office's waiting list;

(g) the 5% and other community facility contributions realised by the company be paid over to the Board on a regular basis when proportionate redemptions of the loan are made

and that such payments are clearly identified; and (h) interim interest not exceeding R545 760 be capitalised.

2. Reflected below is 2.1 of (a) of the above:

2.1 Total estimated stand cost @ cost plus 10% profit plus 5% Community Facilities R 3 531 660

2.2 Total estimated building costs R12 524 279

2.3 Total overheads R 478 800

2.4 Total Sales Commission R 111 720

2.5 Total Professional Fees R 1 377 671

2.6 Total Interest Charges R 545 760

2.7 Total Profit to the Company R 1 302 232

2.8 Total Legal Fees R 1 570 433 SUBTOTAL R21 442 555 LESS INTEREST 545 760 LESS PROFIT R 1 377 671 PROJECT COST : SUB TOTALR19 519 124 LESS LAND VALUE FOR WHICH A LOAN NEED NOT BE ISSUED R 3 531 660 NET AMOUNT OF LOAN R15 987 464"

After receiving this letter the plaintiff on 29 November 1990 wrote a letter to UDS confirming the latter's appointment as project managers for the scheme and a contract bearing the date 30

November 1990 was concluded to that end between Mr Huff on behalf of the plaintiff and Mr Cottrill on behalf of UDS. On 30 November 1990 the plaintiff wrote a letter to the Department requesting bridging finance in view of the fact that the land involved in the scheme had not yet been proclaimed. The letter stated that the matter of bridging finance had already briefly been discussed with Dr Reddy and the Chief Director, Mr van Zyl. On 10 December 1990 a letter signed by Mr Ramloutan on behalf of the Director-General was sent to the plaintiff stating that the Department was prepared to make bridging finance available until a township was proclaimed in respect of the land involved in the project. In the event no bridging finance was ever provided.

The plaintiff did not hear further from the Department until it received a letter dated 18 January 1991 from the Director-General stating that "the proposed project must not proceed until further

notice. For administrative reasons it must be re-adjudicated". This was followed by another letter from the Director-General dated 25 January 1991 that the Minister "had revoked the Board's approval" and that the project had to be regarded as cancelled. The plaintiffs reply was that it did not accept the purported cancellation and requested an urgent meeting with the Minister. On 13 March 1991 the Minister, through his administrative secretary, wrote to the plaintiff reiterating that the Minister "had revoked the Board's approval" and stating that he was not prepared to enter into any further discussion or hear any representations regarding the matter. The letter further stated that the Minister had informed the chairman of the Board that the plaintiffs application would be considered along with those of the many other applicants who had responded to the said advertisement.

The only direct evidence placed before the trial Court

concerning the events which led to the Minister's said letter was that given by the Minister himself. He testified that he was entirely unaware of the plaintiff's applications or the Board's approval of the project until Mr Padyachee, who was a member of the House of Delegates, came to see him in his office on 14 January 1991. Mr Padayachee appeared overjoyed and said that he understood that the Minister had approved a project for the building of 399 houses in Lenasia South. The Minister immediately said that he had done no such thing but that he would investigate the matter. After Mr Padayachee had left he immediately called in his secretary and asked him to obtain the relevant documentation. After about half an hour his secretary produced a copy of Meiring's report dated 31 July 1990 which he proceeded to study immediately. Certain features of the project caused him great concern such as the average selling prices of the houses which he regarded as far too

high, the professional fees which he regarded as exorbitant, the legal fees and the fact that the fundamental requirement of registering a bond before advancing money to a housing utility company would not be met. The Minister said that it became clear to him that the provisions of the law had been overlooked and that he would be held politically responsible unless he acted immediately. He wanted to know how the matter had come before the Board, what procedure had been followed and whether other utility companies had also been afforded an opportunity to submit tenders. He accordingly set in motion a full-scale investigation into the matter and gave instructions that the plaintiff be notified to suspend operations pending the outcome of an independent enquiry.

The Minister's evidence that he ordered an immediate detailed investigation is fully borne out by the documentation which was

handed in at the trial. On 15 January 1991 the Director-General submitted a memorandum referring to an inquiry made by the Minister the previous day as to why the plaintiff had been appointed to undertake the said project. On 17 January 1991 Van Zyl wrote a letter to the Minister from which it appears that the latter had discussed the issue with him earlier that week and that he had endeavoured to explain to the Minister how the Board had come to approve the project. The letter concluded with the following recommendation.

> "Under the circumstances and in view of the fact that there are a multitude of persons now investigating and reporting to you directly on the particular issue, I wish to confirm what I said earlier this afternoon namely, that an <u>independent</u> and <u>objective enquiry</u> into the issues raised by you would be welcomed and fully supported."

The enquiry recommended by Van Zyl was conducted by Mr Hall whose report was dated 17 January 1991. This report was

unfavourable to the plaintiff's application in a number of respects and recommended that the application should not be approved but that the plaintiff should be permitted to participate together with other utility companies in a revised submission which would accord with the general policy of the House of Delegates to provide housing for persons with an income of less than Rl 200-00 per month. The Minister testified that this report confirmed his initial concern and doubts.

After the receipt of Hall's report the Minister decided not to give his approval to the Board's resolution of 22 November 1990 and on 21 January 1991 he wrote to Van Zyl instructing him not to implement the Board's decision. On the same day the Minister wrote a letter to the Chief Director of the Department of Budgetary and Auxiliary Services informing him that no funds whatsoever were to be advanced to the plaintiff. Still on the same day the

Minister wrote another letter to Van Zyl demanding an explanation why the Board's resolution of 22 November 1990 had not been routed through the proper channels but had been conveyed directly to the plaintiff by Mrs Govender. It was pointed out in this letter that a very important communication which involved almost R16 m was written by a clerk so that any omission by the Board which may have been noticed by a senior official was allowed to pass unnoticed.

With regard to the events of 22 November 1990 the Minister testified that his meeting with the Board early that morning was concerned with matters which had nothing to do with the plaintiff's application and that this matter was not discussed. He was not aware that it was on the agenda for the Board meeting later that morning and he had not seen a copy of the agenda. He left after his meeting with the Board. He said that he did not as a rule

peruse either the agenda or the minutes of Board meetings. They were only brought to his attention if there was something which required his specific attention. He was also unaware of the Director-General's letter of 10 December 1990 to the effect that the Administration was prepared to grant the plaintiff bridging finance.

Regarding the general policy of the House of Delegates towards the provision of houses for the Indian community the Minister testified that at the time when he took over the housing portfolio, the priority was to provide homes costing less than R30 000-00 for people with an income of less than Rl 000-00 per month. These ceilings were subsequently raised to R35 000-00 and Rl 200-00 respectively. He understood sec 10 of the Act as giving him as the Minister authority to approve of projects generally or in a particular case. He said that shortly after it came into

existence the House of Delegates took a general policy decision to approve of schemes for the construction of houses within the said ceilings. This policy was embodied in the guidelines contained in the Housing Code ("the Code") and after he became Minister of Housing he merely continued to follow that policy. The Minister said that, as he understood it, his general approval only extended to projects which involved building houses within the said limits. Although the provision of houses to persons falling outside these limits was permissible under the Code, this required his specific approval in each particular case and fell outside the ambit of the general approval which he had granted to the Board. He said that he had never given any general approval that housing for the middle income group be engaged in by his Administration.

This evidence accords with the answers the Minister gave in the House of Delegates on 12 March 1991 when he said that he had

not approved of the Board's decision because the land in question was intended for the lower income group and that the plaintiffs project concerned a category of people who earned between R2 000-00 and R3 500-00 per month. He then also said that the power of the Board to lend money to a body other than a local authority was limited by the requirement that a bond be registered over the land involved in the project. He said that neither he nor the Board had any power to disregard this requirement.

The Minister made frequent reference in his evidence to the provisions of the Code and it is clear that he regarded himself bound by this document as providing an authoritative policy statement on the provision of housing. There is no provision for the Code in the Act and, as is pointed out in LAWSA Vol 11 para 74, its exact legal status is unclear. What is clear is that the Minister was firmly of the view that the plaintiffs project fell

outside the limits of those projects which were accorded priority by the Code so that it was not covered by his general approval which was confined to applications which fell within those limits. As the following references will show there is ample justification in the Code for the Minister's view that the Department's priority was to provide housing for the lower income group and that any project which went beyond that required special consideration.

Chapter 1, clause 3.1.5 of the Code provides that priority in the allocation of housing development funds is accorded to housing projects for persons in the lowest income group. Clauses 3.3.3.4 and 3.5.2.1 of chapter 3 set the maximum permissible building cost (including the serviced erven) and the maximum income at R30 000-00 and Rl 000-00 per month respectively. As I have said these limits were subsequently increased to R35 000-00 and Rl 200-00 per month respectively. Chapter 6, clause 2.3

provides for loans to utility companies at an interest rate of 11,25%. The next sub-clause provides for loans for the development of projects for persons with an income of more than Rl 000-00 (now Rl 200-00) per month and states that the interest rates for such loans are determined by the Board and are currently the treasury rate of interest. The following is then added: "This type of loan is only approved in extra-ordinary cases and is treated as an absolute exception to the rule". Chapter 7, clause 5.2.1 again lays down that families with an income of Rl 000-00 (now Rl 2000-00) per month enjoy priority and that those earning more will only be assisted if the circumstances allow it at any time.

Chapter 9, clause 7 deals with the alienation of residential erven by the Board and contrasts the sale of an erf at cost price to a breadwinner whose monthly income does not exceed Rl 200-00 with a sale to someone in the income group above Rl 200-00 per

month where the market value should prevail (clauses 7.1.2 and 7.1.3.1). Clause 8.5 of this chapter provides as follows:

> "Profits made in respect of land sold in the manner described in this paragraph must be used to reduce the cost of projects for those categories of persons for whom the Board may cater, i.e., the income groups below Rl 200 per month."

Chapter 17 of the Code lays down guidelines for self-build projects undertaken by utility companies using housing development funds and contains similar priorities for persons who earn less than Rl 200-00 per month. Clause 8.2, for example, states that persons who normally qualify for housing in mass housing projects also automatically qualify for participation in self-build projects and adds the following:

> "It is actually recommended that erven also be made available to persons above the Rl 000 p m income limit set by the Board. These persons must purchase the erven for cash if their income is above Rl 200 and must obtain their own financing if they earn more than Rl 000 per month."

Clause 12.2.3 of chapter 17 puts it bluntly that "the group with an income above Rl 000-00 (now Rl 200-00) per month is not excluded but the finances of the Fund cannot be utilised to grant loans to such individuals or to create bridging finance facilities". Similar priorities are reflected in chapter 20 which provides for local authority housing loans to individuals and loans direct to individuals by the Board.

The Code contains a further requirement for housing utility company projects. Chapter 12, clause 16.2 provides that "for every loan granted to a housing utility company, a first bond over the land must be registered in favour of the Board. .". This is a restatement of the requirement in sec 32(2) of the Act to which I have already referred. Counsel for the plaintiff submitted that sec 32(2) of the Act and thus also clause 16.2 of chapter 12 of the Code apply only if a loan is granted for the purpose of providing housing

on land owned by the borrower. I am unable to agree. There is nothing in sec 32(2) or in clause 16.2 which supports the limitation contended for. Sec 32(2) states that "any loan" granted by the Board shall be secured by a first mortgage bond. In my view the requirements of sec 32(2) and its said counterpart in the Code applied also to the plaintiffs application for a loan. The wording of sec 32(2) is peremptory and on this ground alone the Board's approval was invalid. Counsel for the plaintiff also submitted that the financial assistance required by the plaintiff did not amount to a loan so that it was not affected by the provisions of sec 32(2) of the Act. There is no merit in this submission. The plaintiff clearly stated in the application to the Board that it was applying for a loan; it was so understood by the Board and was clearly a loan.

In addition the plaintiffs proposed project contained a number of features which not only took it right outside the limits of

those projects which were accorded priority by the Code but also conflicted with the guidelines laid down in the Code. It exceeded the primary limitations relating to income and selling prices which placed it, according to clause 2.4.1 of chapter 6, in the class of extra-ordinary cases, to be treated as an absolute exception to the rule. It required the Board to part with the serviced erven at well below market value whereas chapter 9, clause 7.1 required such land to be sold at market value. It provided for a loan to bear interest at 11,25% which was the rate referred to in the Code as the economic rate. This was in conflict with the provisions of clause 2.4 of chapter 6 that the interest rate on any loan for a project of the kind proposed by the plaintiff was determined by the Board and was currently the treasury rate of interest.

Counsel for the plaintiff submitted in this Court that the Minister's general approval extended to all projects which were

permissible under the Code. In support of this contention reliance was placed on the following passage in his evidence in cross-examination:

> "Dr Reddy, my hypothetical question is simply that if it were in the Code then a decision by the Board would have your general approval -If it was provided for, then I couldn't interfere."

In my view both the question and answer are ambiguous and do not detract from the Minister's evidence as a whole, which was clearly to the effect that any project which fell outside the category which was granted priority by the Code was not covered by his general approval and required his special approval. The sale of land for development for persons earning in excess of the maximum income limit was certainly permissible under the Code, particularly since profits made on such projects had to be used to reduce the cost of projects for those earning less than Rl 200-00 per month,

but the Minister repeatedly said that his general approval did not extend to such projects.

Counsel for the plaintiff next submitted that the Minister had granted his special approval to the plaintiffs project either expressly or tacitly before he was approached by Mr Padayachee. It was submitted that the trial Court erred in not rejecting as false the Minister's evidence that he first heard of the Board's approval when approached by Mr Padayachee. It was further submitted that on the probabilities he had been aware of the Board's approval for some weeks before he was approached by Padayachee and that he himself had granted his approval of the project.

The Minister's evidence was criticised in a number of respects by counsel for the plaintiff. Most of these points of criticism as well as the probabilities were dealt with in great detail by the learned trial Judge who concluded as follows:

"In my judgment, these criticisms fall far short of casting any real doubt on the Minister's evidence that he did not in fact approve the project submitted by the Plaintiff. I accept his evidence that he was not aware of it or its terms until such time as the Board's approval of the project was brought to his attention by Mr. Padayachee. I further accept that his immediate reaction was to cause the matter to be fully investigated and, on the strength of the results of that investigation, to decide to revoke the approval granted by the Board for the reasons furnished by him at the time. There is nothing in the evidence which could justify the conclusion that this was a volte face on his part or involved the retraction of an approval of the project by him, either express or implied, at an earlier stage. I reject the suggestion that it was a reversal of his previous attitude dictated by political expediency as entirely without foundation in the evidence or on the probabilities, apart from being directly contradicted by his own evidence under oath. This was an immediate reaction on his part when he learned of what the Board had done and bore all the hallmarks of genuine disapproval of its actions."

I do not find it necessary to refer to any of the points of criticism of the Minister's evidence advanced on appeal. For the

most part they are of no significance and have left me entirely unpersuaded that any of the findings of the trial Court in the passage quoted above was not fully justified.

In my view the evidence of the plaintiffs witnesses Messrs Hay and Huff as to their earlier conversations with the Minister, takes the matter no further. The trial Court correctly held that, even on the most liberal construction, their evidence amounts to no more than that the Minister had shown himself as favourably disposed in principle to the suggestion that the activities of the Department should be extended to the provision of housing for the middle income group. The evidence of the Minister accordingly stands uncontroverted and the finding that he did not give his particular approval to the plaintiffs project cannot be disturbed.

I am accordingly of the view that the trial Court correctly held that the Minister had given neither a general nor a particular

approval to the plaintiff's project and that the Board's approval was therefore a nullity.

It was submitted on behalf of the plaintiff that the trial Court had erred in refusing an amendment to the plaintiff's replication in order to plead that the Minister was estopped from denying that he had given his approval to the project. The amendment was refused on the basis that the estoppel sought to be pleaded would render the replication excipiable. For the reasons which I have given when dealing with the proper interpretation of sec 10(2)(b)(ii) and the effect of the lack of the Minister's approval I am of the view that the amendment was correctly refused. To hold that the Board is bound by the purported exercise of a power would be to compel the Board to do something which the Act precludes it from doing. See Strydom v Die Land- en Landboubank van Suid-Afrika 1972 (1) SA 801(A) at 815E-816B.

The appeal against the dismissal of the alternative claim against the Board can be disposed of shortly. The alleged misrepresentation was confined to the letter of 26 November 1990 which was written four days after the Board's resolution. As I have indicated the trial Court held that the Minister's approval may validly be given before or after the Board's approval and that the letter carried no implication that the Minister had given his approval. On appeal it was common cause that the Minister's approval may be given before or after the Board gives its approval. In my view a proper reading of the letter of 26 November 1990 shows that it did no more than to record the Board's resolution and to supply details of the project. Sub-paras l(a)-(h) of the letter form part of the Board's resolution and para 2 of the letter records the summary of the financial aspects of the project which was contained in Meiring's report. The sole relevant fact thus stated in

the letter was that the Board had taken a resolution in the terms set forth in the letter.

Both Hay and Huff testified that they knew that the Minister's approval was necessary but that they simply assumed from the letter that the Minister had given his approval. In my view the mere statement that the Board had passed the resolution carried no implication which justified their assumption. The reference in para 1(h) of the letter to tenders being invited, which was relied upon by counsel for the plaintiff, does not convey an instruction to invite tenders but merely records that this was part of the resolution. In this regard the Code specifically provides in chapter 22, clause 1.1 that when a project is approved by the Board no tenders must be invited before the local authority is advised that funds are available. For these reasons I am of the view that the alternative claim against the Board was correctly rejected by the trial Court.

That leaves the question of costs. The appeal record in this case consists of 18 volumes comprising some 2 260 pages. The length of the record was unnecessarily increased by at least 250 pages by certain documents, in particular the annexures to the plaintiffs various applications to the Board, being set forth more than once. This is in breach of A D Rule 5(12). This Court has repeatedly warned against the practice of unnecessarily increasing the length of appeal records and so adding to the already high costs of litigation. See Levco Investment v Standard Bank of SA Ltd 1983(4) SA 921 (A) at 927A. In my view it is proper that the plaintiffs attorneys should pay, de bonis propriis,the cost of preparing one tenth of the appeal record.

In the result the following order is made:

(a) The appeal is dismissed with costs, such costs to include the costs of two counsel.

(b) The appellant's attorneys are ordered to pay, de bonis propriis, all the costs incurred in respect of one tenth of the appeal record and will not be entitled to any fees in respect thereof.

W VIVIER JA.

HEFER JA) OLIVIER JA) Concurred.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between: Case No 517/95

UNIVERSAL HOMES APPELLANT
(Plaintiff in the Court a quo)

and

PR J N REDDY NO RESPONDENT
(Defendant in the Court a quo)

In the matter between:

UNIVERSAL HOMES APPELLANT
(Plaintiff in the Court a quo) and

THE HOUSING DEVELOPMENT BOARD RESPONDENT
(HOUSE OF DELEGATES) (Defendant in the Court a quo)

BEFORE: HEFER, VIVIER, F H GROSSKOPF, OLIVIER JJA
and STREICHER, AJA

DATE HEARD: 4 MARCH 1997

DATE DELIVERED: 26 MARCH 1997

JUDGMENT

STREICHER. AJA:

I have had the benefit of reading the judgment ("the main judgment") prepared by my brother Vivier. I agree that the appeal should be dismissed. However, I do so for somewhat different reasons.

S 10(2)(b)(ii) of the Housing Development Act (House of Delegates), 1987 ("the Act") provides as follows:

> "10(2) For the purpose of achieving its objects the board shall, in addition to any powers vested in it by this Act, in regard to a declared area have power -
>
> (a) ...
>
> (b) with the approval of the Minister either generally or in a particular case, and subject to such conditions as he may determine -
>
> (i)...
>
> (ii) to approve projects and grant loans for the execution of projects so approved to a local authority, utility company or any other person or body, or to a local authority for re-issue to a utility company or a housing utility company or any other person or body."

The court a quo held that the power of the Housing

Development Board (House of Delegates) ("the Board") to conclude a contract of the nature described in s 10 (2) of the Act was conferred upon it by that section and could only be exercised within the framework of that section. Page J stated that once there was such an enabling provision, there was no room for the exercise of a general power to contract without compliance with its requirements. I agree. In terms of s 10(2)(b)(ii) the Board does not, without the approval of the Minister, have the power to approve projects and grant loans for the execution of projects so approved. I therefore agree with the court a quo and with the conclusion in the main judgment that the Board could not validly have approved a project in terms of s 10(2)(b)(ii) without the approval of the Minister given either generally or in the particular case.

The court a quo found that the criticisms of the

Minister's evidence fell far short of casting any real doubt on the Minister's evidence that he did not in fact approve the project proposed by the plaintiff. Like my brother Vivier the criticisms of the Minister's evidence left me unpersuaded that the finding of the trial court was not justified.

As regards a contention that the Minister granted a general approval and that such general approval is to be found in the Housing Code, the court a quo found, inter alia, that the project, in the form in which it was approved by the Board, did not and could not comply with the requirements of clause 16.2 of Chapter 12 of the Code. The clause provides as follows:

> "For every loan granted to a housing utility company, a first bond over the land must be registered in favour of the Board. The exception is where a local authority grants a company the right to develop housing on land which was acquired/serviced by means of finance from the Fund and is registered in the name of the local authority."

The Board was the owner of the land and in terms of the project, which the Board purported to approve, the land was not going to be transferred to the appellant and no bond was going to be registered in favour of the Board in respect of the loan.

Counsel for the appellant submitted that clause 16.2 of the Code only applied if a loan was granted for the purpose of providing housing on land other than land belonging to the Board. That is so, but those are the only loans to housing utility companies contemplated by the Code. The Code can therefore not be construed so as to contain a general approval in respect of a project such as the one proposed by the appellant.

In the result I agree with the conclusion in the main judgment that the Minister had given neither a general nor a particular approval to the project proposed by the plaintiff and that

the Board's approval was therefore a nullity.

The claim against the Minister and the main claim against the Board were therefore correctly dismissed.

The Board, by letter dated 26 November 1990, advised the appellant as follows:

> "1 The Housing Development Board at its meeting held on 22 November 1990 resolved as follows:
>
> (a) the Board approves the project as reflected in paragraph 2.1 of the report and detailed in Annexure A to the report;
>
> (b) tenders be invited for the construction of the housing units
>
> (c) the 399 erven enumerated in Annexure A be made available to Universal Homes at the fixed prices (including 5% Community facilities contribution) reflected in column 3 of the Annexure and that transfer of the erven be effected direct from the Board to the new owners at the Company's expense which it may recover from its clients;
>
> (d) a loan of R15 987 464 be granted to Universal Homes at 11,25% interest per annum payable over 5 years subject to the Boards approved conditions applicable to housing utility companies; and subject to

the houses being sold to first time home buyers.

In its alternative claim the appellant alleges that by so advising the appellant the Board impliedly and negligently represented to the appellant that the Minister had granted his approval.

The court a quo held that the approval of the Minister was not a condition precedent to the consideration of the matter by the Board and that the Minister could grant his approval afterwards. Page J based his finding on the impracticality of requiring ministerial approval to be granted in advance of any consideration of an application by the Board. The court a quo held furthermore that, as a result, the mere statement that the Board had passed the resolution, carried no implication that the Minister had granted his approval. Unlike my brother Vivier, I cannot agree with this finding of the

court a quo.

There can be no objection to the Board considering a project and granting its approval subject to the approval of the Minister. By doing so the practical problems foreseen by Page J can be avoided. If the Board approves a project subject to the approval of the Minister there will be no approval by the Board until the Minister gives his approval.

According to the notification to this appellant the Board had approved the project. By notifying the appellant that the Board had approved the project the Board represented that it had the power to do so and that it validly approved the project. By implication, therefore, the Board represented to the appellant that its approval was granted with the approval of the Minister. This was a misrepresentation. The purported approval by the Board was a nullity.

The court a quo found that, assuming that a negligent misrepresentation had been made by the Board, the conduct of the Board was in any event not wrongful. The court a quo reasoned as follows: The reason for requiring ministerial approval for the type of project dealt with in s 10(2)(b) is that it involves the alienation of State property or the loan of State monies which the public interest demands should be under direct ministerial control and not entrusted to a subordinate body, save within the limits of a general approval emanating from the Minister himself, to ensure that such funds and property are utilised in the most effective way possible, in order to provide the housing envisaged by the Act for the groups intended to be benefited thereby. The legislature did not in these provisions intend to safeguard the applicant for approval of a project against pure economic loss flowing from the grant of such approval without

the approval of the Minister. The approval by the Board without the Minister's approval was consequently not in breach of any legal duty owed by the Board to the plaintiff, and the Board, in doing so did not act wrongfully vis-a-vis the plaintiff.

I agree with the court a quo's conclusion that the Board in making the representation did not act wrongfully vis-a-vis the appellant. I do so for different reasons. The enquiry to determine whether wrongfulness had been established, is whether the Board, in making the misrepresentation, was under a legal duty to the appellant, by exercising care, to avoid loss being caused to the appellant (see Knop v Johannesburg City Council 1995 (2) SA 1 (A) at 27J-28A).

In the Knop-case Botha JA said at p27G-I:

> "The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case. The general nature of the enquiry is stated in the well-known passage in Fleming The Law of Torts 4th ed at

136, quoted in the Administrateur, Natal case supra at 833 in fine-834A:

> In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties arc liable to adjustment in the light of the constant shifts and changes in community attitudes.'
>
> The enquiry encompasses the application of the general criterion of reasonableness, having regard to the legal convictions of the community as assessed by the Court (see, for example, Minister van Polisie v Ewels 1975 (3) SA 590 (A) at 596H-597F and Lillicrap's case supra at 498G-H)."

In the Knop- case the defendant, a local authority, notified the plaintiff that his application for the subdivision of his property had been approved. Subsequently the defendant advised the plaintiff that the subdivision had been granted in error, contrary to the provisions of the relevant Town Planning Scheme. The plaintiff

alleged, inter alia that the defendant caused him loss by the negligent exercise of a statutory power and by making the misrepresentation that the subdivision would not be in conflict with the Scheme. In respect of the alleged misrepresentation Botha J said;

> "The plaintiff had access to the Scheme, and it could reasonably be expected of him to consult its provisions, either personally or through his professional or technical advisers, when preparing the application before its submission for approval. The plaintiff himself did not heed the Scheme and neglected to comply with its requirements. In these circumstances it would not accord with the sense of justice of the community to hold the Council liable in damages to the plaintiff for the negligent misstatement that the subdivision would not be in conflict with the Scheme."

S 32(2) of the Act provides as follows:

> "Except in the case of a loan granted to a local authority, any loan granted by the board shall be secured by a first mortgage bond passed in favour of the board over the land on which the relevant dwelling, building or other structure has or is to be constructed or which is intended to be used for the carrying out of an approved project: Provided that in the case of a loan granted to a natural person for the purpose of repairing a

dwelling, the loan may be secured by means of a second mortgage bond."

Counsel for the appellant submitted that the Board had not granted a loan to the appellant and that the Board's approval was therefore not affected by the provisions of s 32(2). I agree with my brother Vivier that there is no merit in this submission. The appellant applied for a loan and according to the Board's resolution it approved a loan. It was never contended in the court a quo that what the Board purported to approve was anything but a loan. As in the case of clause 16.2 of the Code counsel submitted that s 32(2) only applied if a loan was granted for the purpose of providing housing on land other than land belonging to the Board. I agree with my brother Vivier that the wording of the section is peremptory. It follows that a loan could not be granted to the appellant in respect of a project on land if the loan could not be secured by a first mortgage bond passed

in favour of the Board over such land.

Counsel for the appellant conceded that, if the Board had approved a loan to the appellant and if s 32(2) was interpreted as aforesaid, the appellant could not succeed in respect of the alternative claim. In my view the concession was correctly made. As a housing utility company registered in terms of the Act, and operating under the Act, the appellant should have been aware of the provisions of the Act and should, like the Board, have been aware that its application did not accord with the provisions of the Act. The appellant should therefore have been aware that the Board could not validly have approved the application. In these circumstances it would not accord with the sense of justice of the community to hold the Board liable in damages to the plaintiff for the negligent misstatement that the Board had validly approved the appellant's

application.

It follows that the alternative claim was correctly dismissed.

I agree that a costs order should be made in the terms proposed in the main judgment.

P E STREICHER
ACTING JUDGE OF APPEAL

F H GROSSKOPF, JA - Concurs