IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

REPORTABLE

Case Number: 16773/08

In the matter between:

MAVIS MAKHO DONGWE N.O. Plaintiff

and

WILLIAM THOMAS SLATER-KINGHORN N.O. First Defendant

JOAN AUGUSTA SLATER-KINGHORN N.O. Second Defendant

JUDGMENT

STEWART, A.J.

INTRODUCTION

1. This matter came before me as a trial on 16 November 2009. It was explained to me that no evidence would be led and that the trial would be argued on the facts as admitted on the pleadings, in the Rule 37 minute and in the respective heads of argument. I shall first set out the facts on which the case was argued.

2. The plaintiff and her late husband, who were married in community of property some years earlier, concluded a written agreement with the defendants on 29 December 2000. In terms of the agreement the plaintiff and her husband bought and

the defendants sold an immovable property described as Erf 401 Ashburton for the sum of R50,000 payable as follows:

(1) A deposit of R6,000 on signature of the agreement;

(2) R4,000 on 3 January 2001;

(3) The balance in monthly instalments of not less than R1,000 per month, the first payment to be made on the last day of February 2001 and monthly thereafter.

3. It was also agreed that interest would be payable at 16% per annum calculated monthly in advance on the first day of each and every month on the balance outstanding from time to time. There was no express term with regard to when transfer would take place, save that in terms of clause 8 of the agreement the seller was entitled to withhold transfer to the purchaser until the purchase price and all other charges due by the purchaser were paid or secured to the satisfaction of the seller.

4. In terms of clause 11 of the agreement, in the event of any payment or obligation in terms of the agreement remaining unpaid or unfulfilled by either party for a period of seven days after due notice in writing had been given by the injured party to the defaulting party, the injured party would be entitled to sue for specific performance or to cancel the sale, claim damages, and where the injured party was the seller, to resume immediate possession of the property.

5. The plaintiff and her husband took occupation of the property and commenced paying the required instalments. Had the plaintiffs continued to pay the minimum

that they were required to pay under the agreement the last payment would have been due at the end of October 2005. However, the plaintiff's husband died on 24 May 2002, whereafter some arrears accumulated.

6. The plaintiff was first appointed as representative of the estate of her deceased husband and was subsequently appointed as heir to his estate. As such she succeeded to his rights in the agreement.

7. The last payment by the plaintiff under the agreement was on 5 March 2004. On 21 May 2004 the plaintiff signed an agreement to sell the property to 'Silver Star Trading 124', it not being identified in the agreement whether that was a company, a close corporation, a sole proprietorship, a partnership, a trust or something else. However, the sale to Silver Star Trading 124 was not proceeded with.

8. By December 2004 the plaintiff was arrears in the sum of R6,600.[1] Apparently miscalculating that amount, the defendants wrote to the plaintiff on 6 December 2004 in the following terms:

> 'Your instalments and rates in terms of your Agreement of Sale dated the 29th day of December are now R25,280.89 (TWENTY FIVE THOUSAND TWO HUNDRED AND EIGHTY RAND EIGHTY NINE CENTS) in arrears and as instructed by the Sellers we hereby call upon you in terms of Clause 11 of the aforementioned Agreement of Sale to pay the said arrears into the offices of Messrs Homenet Ashburton at 2 Pope Ellis Drive, Ashburton, by not later than the 20th day of December 2004, failing which the Agreement of Sale is cancelled.
> …

[1] This figure is taken from paragraph 1.20 of the Rule 37 minute although it is stated in paragraph 15.3 of the defendants' heads of argument that the figure is R11,600.00. I am not able to determine which is the correct figure, but it does not matter because both are considerably less than the amount that was claimed which is the fact that the plaintiff sought to rely on.

> If you are not able to make payment by the date specified and should you wish to circumvent a specific performance application or a cancellation of the sale, please contact Mrs Johnston at Homenet Ashburton aforesaid with your written proposal as to how you will settle the arrears in order that your proposal can be submitted to the Sellers for consideration.'

9. The defendants did not thereafter formally cancel the agreement, presumably taking the view that since no further payments were made in the period referred to in the letter of 6 December 2004 the agreement became *ipso facto* cancelled. Then on 18 October 2006, i.e. nearly two years later, the defendants sold the property to a third party for the purchase price of R550,000. The property was transferred to the third party on 31 January 2007.

10. On 17 November 2006 (i.e. after the sale but before the transfer of registration to the third party) the plaintiff's attorney wrote to the defendants. The plaintiff's attorney challenged the validity of the purported cancellation by the letter dated 6 December 2004 and then stated as follows:

> 'Our client now wishes to proceed with the registration of transfer into her name.
>
> We are instructed that our client is in funds. Kindly favour us with a schedule of outstanding balance, so that her final payment may be effected as soon as possible.

11. The letter also recorded that the plaintiff did not intend pursuing the sale to Silver Star Trading 124. The defendants did not respond positively to that letter and on 31 January 2007 the property was transferred to the new buyers. After learning of the transfer the plaintiff purported to cancel the agreement and claim damages by service of the particulars of claim. Such service appears to have been achieved on or about 15 December 2008.

12. The plaintiff calculates her damages as the value of the property as sold to the third party less the balance on the purchase price payable by the plaintiff to the defendants. The parties asked that I make an order in terms of Rule 33(4) separating out the quantification of the claim for later determination, and I made such an order.

THE ISSUES

13. The issues for me to decide are accordingly the following. First, whether the claim has prescribed as pleaded by the defendants in their special pleas. Second, whether the agreement with the defendants was validly cancelled prior to the sale by them to the third party. The parties are agreed that if the claim has not prescribed and if the agreement was not validly cancelled prior to the sale to the third party, then the plaintiff will be entitled to what damages she may prove in due course. Conversely, if a special plea of prescription is upheld or if the agreement was validly cancelled then there should be judgment for the defendants.

PRESCRIPTION

14. The defendants raise two special pleas to the claim. Between them they allege three alternative dates on which prescription of the claim is said to have commenced running, each being more than three years before service of the summons in December 2008. The first is that the plaintiff had by 8 May 2002 paid 50% of the purchase price of the property, which is common cause, as a consequence of which in terms of s 27(1) of the Alienation of Land Act 68 of 1981 the plaintiff was

entitled to demand transfer of the property at that date and that prescription accordingly commenced running from then. Secondly, the defendants pleaded that on 1 July 2004 the plaintiff could have demanded transfer of the property from the defendants to give transfer to Silver Star Trading 124 and that prescription accordingly commenced running on that date. Thirdly, it was pleaded that if the plaintiff had paid the instalments in terms of the agreement prescription would have commenced running from November 2005 when the plaintiff would have been entitled to obtain transfer of the property.

15. In relation to the first date relied on by the defendants the plaintiff pleaded in her replication, *inter alia*, that s 27(1) of the Alienation of Land Act does not entitle the purchaser to obtain transfer, but merely to demand transfer on condition that simultaneously with the registration of transfer a mortgage bond is registered in favour of the seller securing the balance of the purchase price. On that basis it was contended that time for the purposes of prescription of the present claim did not commence running on that date.

16. In relation to the second date relied on by the defendants the plaintiff replicated that the agreement to sell to Silver Star Trading 124 was void *ab initio* as the identity of the purchaser did not appear *ex facie* the agreement as required by s 6(1)(a) of the Alienation of Land Act 68 of 1981. The result, as I understand it, is that it was contended that the plaintiff had no valid claim against the defendants for transfer of the property in order to transfer it to Silver Star Trading 124.

17. In relation to the third date relied on by the defendant, the plaintiff replicated that as a fact she had not paid the purchase price and interest by October 2005 and accordingly was not entitled to obtain transfer during November 2005.

18. In relation to all the prescription special pleas the plaintiff replicated that the claim for transfer had a reciprocal debt as contemplated by s 13(2) of the Prescription Act 68 of 1969, namely payment of the purchase price in instalments, with the result that the claim for transfer could not prescribe until the instalment debts prescribed.

19. In terms of s 12(1) of the Prescription Act, prescription commences to run 'as soon as the debt is due'. It is now well settled that in its ordinary meaning a debt is 'due' when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. A debt can only be said to be claimable immediately if the creditor has the right to immediately institute an action for its recovery. In order to be able to institute action for the recovery of a debt the creditor must have a complete cause of action in respect of it. See *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909C and the cases there cited.

20. The meaning of the term 'cause of action' is discussed in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 as follows:

> 'The meaning of the expression "cause of action", as used in various statutes defining the jurisdiction of courts or providing for the limitation of actions and in other contexts, has often been considered by the Courts. In *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 this Court held that, in relation to a statutory provision defining the geographical limits of the jurisdiction of a magistrate's court, "cause of action" meant -
>
> > "... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the

> court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."'

21. In the present case the plaintiff's cause of action is quite simple. It is that the defendants repudiated the contract with the plaintiff by transferring the property to the third party. As a consequence the plaintiff accepted that repudiation and claims damages. One might have thought that prescription in respect of such a claim only starts to run, at the earliest, at the time of the repudiation, or possibly at the time that the repudiation was accepted, which in this case was less than three years before the action was commenced, because prior to the repudiation there could be no claim based on the repudiation.

22. In *HMBMP Properties* (above) it was held that in the case of a repudiation which constitutes an anticipatory breach time in respect of the claim for cancellation and damages does not commence to run until the repudiation is accepted. That case is distinguishable because in the present case the repudiation occurred after the defendants were supposed to have performed and not before. That is because they should have performed in response to the plaintiff's tender of the purchase price. There is also the difficulty that in such a case if time did not commence running until the repudiation had been accepted, the creditor would by its own action be able to put off the running of prescription indefinitely. That is contrary to the rule in *Benson and Another v Walters and Others* 1981 (4) SA 42 (C) at 49G and *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 742A-G. Prescription of such a claim should only commence running when the creditor gets notice of the repudiation, or perhaps within the reasonable time given to such a creditor to make the election whether to accept the repudiation and cancel the contract or to reject the

repudiation and claim specific performance (as to which see R H Christie *The Law of Contract* (5th ed, 2006) p. 487). In the present case one does not know when the plaintiff learnt that the property had been transferred to the third party. I am accordingly prepared to assume in the defendants' favour that prescription of the plaintiff's claim for cancellation and damages commenced running at the time of the repudiation.

23. The defendants' counsel, however, pressed on me a more complex and nuanced approach to the problem. He contended that any claim that the plaintiff had for transfer of the property had become prescribed by the time that the defendants 'repudiated' the agreement with the result that the claim based on the repudiation had also prescribed. He relied on *Desai NO v Desai and Others* 1996 (1) SA 141 (A) at 146I-147A where it was held that an obligation to transfer property is a 'debt' within the meaning of s 10 of the Prescription Act and that such a debt prescribes three years after the right to transfer became enforceable.

24. The point is well illustrated by *Lamprecht v Lyttleton Townships (Pty) Ltd* 1948 (4) SA 526 (T). As in the present case, there were sales of immovable properties with the purchase prices payable in instalments. Long after the full purchase prices should have been paid in full, but had not been, the plaintiff tendered payment of the balance outstanding on the purchase prices and claimed transfer of the properties. Although the defendant had had the right to cancel the agreements because of the plaintiff's default in paying the instalments timeously it had not done so and had thereby kept the agreements alive. Summons was issued and served after the prescriptive period, which was at that time six years for such a claim, had passed.

The plaintiff excepted to the defendant's special plea of prescription on the basis that the rights of action for transfer first accrued when he first tendered payment of the balance of the purchase prices which was less than the prescriptive period prior to the commencement of the action. In dismissing the exception Murray J reasoned as follows (at 530):

> 'In my mind the flaw in the excipient's present argument is that the tender, or payment, of the purchase price is a condition precedent not to the accrual of the purchaser's right of action under the deed of sale but at most merely to the purchaser's right to demand performance of the seller's obligations under that deed. On the conclusion of a binding contract of sale, reciprocal rights and obligations are immediately created - the seller is obliged to transfer or deliver the res, the purchaser to pay the price. Neither can, however, actually enforce his right unless he is prepared, simultaneously with the other's discharge of obligation, to perform his own peculiar obligation. Where no time has been specified for the performance of either of these reciprocal obligations, the position is I think clear: extinctive prescription commences to run from the date of conclusion of the contract although each party, if desirous of enforcing the contract, must demand performance of such other's obligation, and at the same time tender to perform his own.'

25. That reasoning was cited with approval by the Supreme Court of Appeal in *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) at 255B-G.

26. It is clear that at any time after the conclusion of the agreement of sale the plaintiff could have tendered payment of the whole purchase price and claimed transfer. On the reasoning in *Lamprecht's* case and *Santam v Ethwar* prescription of the claim for transfer would then have commenced on the date of the agreement. But in the present case there was no obligation on the plaintiff to complete paying the purchase price until the end of October 2005, and the defendants could not have demanded payment of the last instalment until that date. Those facts call to the fore the

plaintiff's reliance on s 13(2) of the Prescription Act. That section provides as follows:

> 'A debt which arises from a contract and which would, but for the provisions of this subsection, become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.'

27. It is clear that in the case of a contract for the sale of land with the purchase price payable by instalments the seller's debt to the purchaser to transfer the property and the purchaser's debt to the seller to pay the price are reciprocal debts. See *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 808H-809G, *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 418B-C and cf. *Minister of Public Works & Land Affairs v Group Five Building Ltd* 1996 (4) SA 280 (A). But the fact that the instalments were not paid at the time that the contract was cancelled by the plaintiff does not mean that under s 13(2) prescription had not commenced running in respect of a claim for transfer of the property; the defendants' claim for payment of the balance of the purchase price prescribed at the latest three years after the date that the last instalment should have been paid, which must then be the date on which the plaintiff's claim for transfer prescribed. The last instalment was due on 31 October 2005 with the result that the plaintiff's claim for transfer prescribed on 30 October 2008. She tendered payment of the balance of the purchase price and claimed transfer by the letter of 17 November 2006 which also records that she knew of the sale to the third party by that date and could therefore on that date have cancelled the contract and have claimed damages. She chose instead, at that stage, to stand by the contract and claim specific performance.

28. It was only after the transfer to the third party – when performance by the defendants of the contract with her became impossible – that the plaintiff elected to cancel the contract. She was entitled to first stand by the contract in the face of the sale to the third party and then change her position and cancel in response to the transfer – *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 17E citing *Cohen v Orlowski* 1930 SWA 125 at 133. The common cause facts do not reveal when the plaintiff knew of the transfer, and there is some indication in the correspondence annexed to the pleadings that she may have been misled by the defendants into believing that transfer would not take place pending her claim to enforce the contract. But be that as it may, the earliest the claim for cancellation and damages could have become immediately claimable is when the repudiation in question, namely transfer to a third party, occurred. That was just less than two years before the present action was commenced.

29. The defendants' counsel argued, as I understood him, that the claim for cancellation must have prescribed when the claim for transfer prescribed because once the latter claim had prescribed the plaintiff had no right which could have been repudiated. Whilst I see force in the argument that if repudiation had taken place after the claim for transfer had prescribed then no rights could have been revived by the conduct which would otherwise have been regarded as a repudiation, it seems to me that when the repudiation of rights takes place before the claim to enforce those rights has prescribed, as in this case, then the repudiation gives rise to a fresh and independent claim which will prescribe according to the usual rules at least three years after the repudiation; that is after all the first time when the plaintiff can make the election to accept the repudiation and claim damages.

30. As I have indicated, in the present case the claim for transfer did not prescribe until the defendants' claim for payment of the balance of the purchase price prescribed, which was on 30 October 2008. The repudiation, being transfer to the third party, occurred some 21 months before that date. The result is that, in my view, the plaintiff's present claim did not prescribe before prescription was interrupted by the service of process.

31. The defendants' counsel cited *Mulder v Van Eyk* 1984 (4) SA 204 (SE) at 208E-F as authority for the proposition that in the case of a credit sale of immovable property the obligation to pass transfer arises immediately with the result that the plaintiff's claim for transfer prescribed three years after the agreement was concluded. On that basis the claim for transfer would have prescribed before the 'repudiation' was made with the result, so it was argued, the claim based on the repudiation had also prescribed. But the case in question deals not with the seller's obligation to pass transfer, but with the obligation to give occupation. Citing *Breytenbach v Van Wyk* 1923 AD 541 and *AA Farm Sales (Pty) Ltd (t/a AA Farms) v Kirkaldy* 1980 (1) SA 13 (A) the court stated (at 207I) that a seller may delay the registration of transfer, and hence the passing of ownership, until payment of the purchase price or provision of a suitable guarantee. That is exactly what the defendants would have done in this case had the plaintiff demanded transfer without tendering payment of the balance of the purchase price.

32. The judgment in *Phasha v Southern Metropolitan LC of the Greater Johannesburg Metropolitan Council* 2000 (2) SA 455 (W), which was referred to in argument, seems to be at odds with the reasoning in *Lamprecht's* case. In *Phasha* the

applicant claimed that it had a right to have a right of leasehold registered, whereas the respondent claimed that that claim had long since prescribed. The court held that since the applicant had not paid the deposit and balance of the purchase price that it was supposed to have paid under the agreement the respondent had always had a complete defence to the claim for registration. The applicant's claim had accordingly not become immediately claimable and had therefore not prescribed (see the judgment at 468H-469D) – save for the point that was considered thereafter, namely whether it should be considered to have prescribed by the rule that a party cannot by unilateral action or inaction delay the onset of prescription. It would seem that the same conclusion on the first part of the case could have been reached by reliance on s 13(2) of the Prescription Act – which the applicant presumably did not rely on since there is no mention of it in the judgment, which would have rendered consideration of the delay rule unnecessary because the applicant's claim for registration would have prescribed when the respondent's claim for payment of the deposit and balance of the purchase price prescribed. The point is that on the authority of *Lamprecht's* case the claim for registration had become enforceable by the applicant because in making such a claim he could have tendered payment. In any event, the case is not good authority for the proposition that in the case of an agreement for the sale of immovable property by instalments the seller's claim for transfer is not enforceable until the instalments are paid. On the authorities referred to, that claim is enforceable as soon as a tender of payment can be made, but prescription will not set in until the reciprocal claim for payment of the instalments has prescribed.

33. In summary, the plaintiff's claim for transfer could not have prescribed before the defendants' reciprocal claim for payment of the balance of the purchase price prescribed. Since the claim for transfer prescribed after the defendants' repudiation of the agreement by transferring the property to a third party, and the claim for cancellation and damages based on the repudiation is a fresh claim in respect of which prescription can only run from the date of the repudiation at the earliest, the argument that the latter claim prescribed when the claim for transfer prescribed must fail.

34. This approach has the result that the special plea which asserts that in terms of s 27(1) of the Alienation of Land Act the claim for transfer prescribed when half the purchase price had been paid must fail. That is because in terms of s 13(2) of the Prescription Act that claim could not have prescribed until the defendant's reciprocal claim for the balance of the purchase price prescribed, which was only much later. In any event, s 27(1) of the Alienation of Land Act does not give an immediately enforceable right to transfer of the property when half the purchase price has been paid. The section enables the purchaser to 'demand' transfer on condition that a bond is registered in favour of the seller to secure the balance of the purchase price. If the seller refuses to accept that, in terms of s 27(3) the purchaser's remedy is to cancel the sale. The purchaser cannot by legal process force the seller to transfer the property.

35. The second date relied on by the defendants is also not the applicable date. The fact of the sale to Silver Star Trading 124, even assuming that that sale was valid and enforceable, gave the plaintiff no right to demand transfer from the defendants over and above the right that she in any event had to tender payment of the balance of the

purchase price and demand transfer. I have already held that that claim did not prescribe until the defendants' reciprocal claim prescribed.

36. My reasoning set out above has already dealt with the third date relied on by the defendants, namely the date on which the final instalment should have been paid.

37. During the course of argument it was suggested that even if prescription of the claim for cancellation and damages commenced running not at the time of the repudiation and but when the claim for transfer would have prescribed, the plaintiff's attorney's letter of 17 November 2006 in which the balance of the purchase price was tendered on her behalf to the defendants constituted 'an express acknowledgement of [her] liability' to the defendants. That had the effect, in terms of s 14(1) of the Prescription Act, of interrupting prescription of the defendants' claim against the plaintiff for payment of the balance of the purchase price. In terms of s 14(2) prescription of that claim then commenced running afresh. The result is that in terms of s 13(2) of the Prescription Act the plaintiff's claim for transfer would not have prescribed until three years after that letter, i.e. 16 November 2009 – coincidentally the very day that the case came before me. The result would be that even on the defendants' argument that the claim based on the repudiation must prescribe at the same time as the claim to enforce the repudiated right prescribed the plaintiff's claim did not prescribe before the present proceedings were commenced.

38. That approach to the problem, however, cannot be correct. That is because it would fall foul of the rule referred to earlier, namely that a party cannot by its own unilateral action, or inaction, defer the onset of prescription. If the argument was

correct then the plaintiff could once every three years acknowledge liability to the defendants and thereby prevent her claim for transfer from prescribing.

39. In the result, the special pleas of prescription must fail.

CANCELLATION

40. The special pleas having been dealt with, the way is now clear to deal with what might be referred to as 'the merits'. The defendants' first line of defence was to argue that by the time that they sold to the third party the agreement with the plaintiff and her husband had already been cancelled by the plaintiff by the action of her concluding the sale to Silver Star Trading 124. In my view that cannot be correct. Even on the assumption that that sale agreement was valid and binding, it could not have constituted or amounted to a cancellation of the original agreement because the enforcement or implementation of the sale to Silver Star Trading 124 depended not only on the validity and enforceability of the original agreement, but it depended on performance of that agreement; the only way that the plaintiff could have transferred to Silver Star Trading 124 was if there was performance of the agreement between the plaintiff and the defendants.

41. The result is that not only was the sale to Silver Star Trading 124 not inconsistent with the original sale, it was dependent on it. It therefore could not even have amounted to a repudiation of the original sale, let alone a cancellation thereof. That the agreement was cancelled by the plaintiff concluding the agreement with Silver Star Trading 124 is also in conflict with the defendant's claim for payment of the balance of the purchase price in their letter dated 6 December 2004. The agreement

with the defendants simply could not have been so cancelled. That conclusion means that it is not necessary for me to consider the plaintiff's argument that the sale to Silver Star Trading 124 was void *ab initio* because the identity of the purchaser was inadequately described.

42. The remaining issue in relation to cancellation is whether the letter of 6 December 2004 was a valid breach notice in view of the requirements of s 19 of the Alienation of Land Act. The defendants' case, as clarified by counsel during argument, was not that the notice itself had the effect of cancelling the agreement after the period referred to therein had elapsed, but that the separate and subsequent juristic act of the defendants concluding the sale with the third party was the act causing cancellation – or possibly the communication of that act to the plaintiff. It was accepted on behalf of the defendants that the notice could not by itself cause an *ipso facto* cancellation as it on its terms purported to do.

43. Section 19 of the Alienation of Land Act provides the following in relation to instalment sales of land:

> '(1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled –
> (a) …
> (b) To terminate the contract; or
> (c) …,
> unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.
> (2) A notice referred to in sub-section (1) shall be handed to the purchaser or shall be sent to him by registered post to his address referred to in section 23 and shall contain –
> (a) a description of the purchaser's alleged breach of contract;

(b) a demand that the purchaser rectified the alleged breach within a stated period, which, subject to the provisions of sub-section (3), shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post, as the case may be; and

(c) an indication of the steps the seller intends to take if the alleged breach of contract is not rectified.'

44. Section 19(3), which is referred to in s 19(2)(b), is not relevant for present purposes.

45. In *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA) Brand JA for the court stated the following with regard to the proper interpretation of the section.

> '[13] … Let me start with a proposition which appears to be beyond contention, namely that the purpose of ch 2 of the Act, which includes s 19, is to afford protection, in addition to what the contract may provide, to a particular type of purchaser – a purchaser who pays by instalments – of a particular type of land – land used or intended to be used mainly for residential purposes. In this sense, ch 2, like its predecessor, the Sale of Land on Instalments Act 72 of 1971, can be described as a typical piece of consumer protection legislation (see, for example, *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC and Another* 2007 (3) SA 100 (SCA) para 9). The reason why the legislature thought this additional statutory protection necessary is not difficult to perceive. It is because experience has shown this type of purchaser, generally, to be the vulnerable, uninformed small buyer of residential property who is no match for the large developer in a bargaining situation (cf *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in Liquidation)* 1981 (1) SA 171 (A) at 183F - H).
>
> [14] In this light, the purpose of s 19 was clearly to afford additional protection to purchasers in this category who, by reason of their default, are exposed to a claim by the seller of the kind contemplated in s 19(1). By its very nature, the corollary of this additional protection must, however, involve the imposition of limitations on the contractual rights of the seller. And, in accordance with the general approach to statutory interpretation, legislative limitations on common-law contractual rights will be confined to those that appear from the express wording or by necessary implication from the statutory provision concerned (see, for example, *Wellworths Bazaars Ltd v Chandler's Ltd and Another* 1947 (2) SA 37 (A) at 43).' (At 549D-I.)

46. Against that background the court in *Merry Hill* concluded that the requirements of s 19(2) are peremptory, not directory, as follows:

> '[23] In my view, the provisions of the section are peremptory in the sense that a notice which complies with the section is an essential prerequisite for the exercise of any one of the remedies contemplated in s 19(1). But it has been accepted by this court that, even where the formalities required by a statute are peremptory, it is not every deviation from literal compliance that is fatal. Even in that event, the question remains whether, in spite of the defects, there was substantial compliance with the requirements of the statute. (See, for example, *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) ([2005] 2 All SA 108) para 22; *Moela v Shoniwe* 2005 (4) SA 357 (SCA) paras 8 - 12. See also, for example, *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646C - E.)' (At 552G-I.)

47. The court in *Merry Hill* thus concluded that by stating in the s 19(1) notice that the innocent party would be 'entitled' to pursue one or other of the identified steps if the defaulting party did not remedy the default it had substantially, even though not literally, complied with the requirement in s 19(2) that it indicate its 'intention'. That is to say, the fact that the notice expressed the innocent party's 'entitlement' and not 'intention' was not fatal to the notice.

48. In this case the plaintiff levels three criticisms at the notice of 6 December 2004. First, instead of recording that she was in default in the sum of R6,600 the notice stated that she was in default in the sum of R25,280.89. Second, it states that in the event that the default was not remedied the agreement 'is cancelled', i.e. the agreement would be *ipso facto* cancelled, and not that the defendants intended to cancel the agreement by some further juristic act. Third, the notice gave only 14 days to remedy the breach, and not the requisite minimum of 30 days. To those criticisms I might add another, which is that the notice states that failure to remedy the default will result in cancellation and in the next paragraph it makes the

contradictory assertion that the plaintiff can contact a representative of the defendants if she wishes 'to circumvent a specific performance application'.

49. To the plaintiff's criticisms counsel for the defendants argued that although the letter gave too short a time period, there was nevertheless substantial compliance because even long after the passage of 30 days the plaintiff had still not paid the arrears. A similar argument was advanced in relation to the overstatement of the arrears, namely that the plaintiff did not pay even the amount that was genuinely in arrears.

50. My first difficulty is that it is hard to conceive of how a notice period of 14 days is substantially in compliance with a statutory minimum period of 30 days. See *Rashavha v van Rensburg* 2004 (2) SA 421 (SCA) para 14 at 429C-D. Perhaps less egregious, but nevertheless troublesome, is that the overstatement of the amount of default as double or quadruple the actual default can hardly be in substantial compliance with the requirement that the notice contain 'a description of the purchaser's alleged breach of contract', particularly when coupled to a statement of what has to be done to remedy the breach.

51. My next difficulty with the defendants' contentions is that they seek to rely on the actions, or inaction, of the plaintiff subsequent to the defendants' notice to construe that notice. That cannot be correct. The purpose of the requirements, as identified in *Merry Hill*, is to inform the defaulting party of her default, what she is required to do to rectify the default, the time period within which that must be done and the consequences of failure to do so. The fact that the plaintiff was inactive after the

letter might very well be explained by the fact that the letter told her that she was in default by very much more than her actual default, that she had to pay within a time period which was half the statutory minimum and that the consequences of failure to remedy the default were automatic. It may also be that she was confused by the contradiction in the notice to which I have referred. In other words, the terms of the notice may explain the actions of the plaintiff after the notice, and not *vice versa*.

52. It does not assist the defendants, of course, to contend that the purchaser had the agreement available to her and could have worked out what she actually owed, that she could have seen from the Act that she had 30 days to remedy the default and that she could have known, or been given advice, that a further act of cancellation was required after the period had expired. In that regard, the following *dictum* from *Van Niekerk and Another v Favel and Another* 2008 (3) SA 175 (SCA), which also deals with s 19 of the Alienation of Land Act, is apposite:

> '[12] … it will be convenient to make a further comment about the hypothetical "average purchaser" to whom the legislature may be taken to have intended to afford protection by its enactment. Apart from being "vulnerable" and possibly "uninformed", I think that he should be considered unlikely to be acquainted with the law, or to have an attorney at his beck and call. He would presumably also be reluctant to incur the expense of retaining an attorney for the purpose of obtaining advice concerning the contract, except perhaps at a later stage. On this basis there is plainly no room, in interpreting the subsection, for the application of the general presumption that "the purchaser must know the law" when it comes to deciding precisely what the legislature intended in the Act. What is of paramount importance here is that the remedies mentioned in s 19(1), which the seller will become entitled to exercise (always assuming that they are reserved to the seller in the contract) if he complies with s 19, are all drastic remedies which will no doubt have serious repercussions as far as the purchaser is concerned. Considering the attributes of the "average purchaser", it becomes clear that what is intended is that the purchaser must be put in a position where the extent of his jeopardy becomes clear to him by a reading of the letter alone and without recourse either to the Act or the contract itself or to legal advice.' (At 180H-181B.)

53. In the circumstances, the defendants' notice is clearly not in compliance with the requirements of s 19(2) of the Alienation of Land Act with the result that in terms of s 19(1)(c) the defendants were not entitled to cancel the contract following that notice. The result that it is not necessary to consider whether the much later act by the defendants in selling to the third party constituted a cancellation on the strength of the notice.

CONCLUSION

54. In the result, all the defences fail. As I am not in a position at this stage to speculate on whether any damages will be proved in due course, or whether they will not be within the jurisdiction of the Magistrates' Court, I propose to reserve the question of costs for the court which determines the quantum.

55. I therefore make the following order:

(1) The special pleas are dismissed.

(2) It is declared that the defendants are jointly and severally liable to the plaintiff for any damages that she may in due course prove to have suffered.

(3) The costs thus far are reserved for decision by the court which determines the quantum of the plaintiff's claim.

DATE OF HEARING:	16 NOVEMBER 2009
DATE OF JUDGMENT:	3 DECEMBER 2009
COUNSEL FOR THE PLAINTIFF:	MR J WHITE (ATTORNEY)
ATTORNEYS FOR THE PLAINTIFF:	JON WHITE ATTORNEYS
COUNSEL FOR THE DEFENDANTS:	P. C. BEZUIDENHOUT SC
ATTORNEYS FOR THE DEFENDANTS:	DAWSONS