THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number : 323/06

In the matter between :

MERRY HILL (PTY) LTD **APPELLANT**

and

HENDRIK JOHANNES ENGELBRECHT **RESPONDENT**

CORAM : **CAMERON, BRAND, LEWIS, MAYA JJA *et* THERON**

AJA

HEARD : **3 MAY 2007**

DELIVERED : **24 MAY 2007**

Summary: Section 19(2)(c) of the Alienation of Land Act 68 of 1981 – though peremptory in its terms substantial compliance sufficient – requirements of section satisfied by notice indicating alternative steps intended by seller upon purchaser's failure to rectify breach.

Neutral citation: This judgment may be referred to as *Merry Hill v Engelbrecht* [2007] SCA 60 (RSA)

JUDGMENT

BRAND JA/

BRAND JA:

[1] This appeal turns on the interpretation of s 19(2)(c) of the Alienation of Land Act 68 of 1981. The appellant ('Merry Hill') sold two residential erven in Cintsa near East London to the respondent ('Engelbrecht') in terms of an agreement of sale by instalments. When Engelbrecht failed to pay some of these instalments, Merry Hill purported to cancel the sale and then resold the erven to two others. Engelbrecht refused to accept the validity of the cancellation on the narrow basis that Merry Hill's preceding notice of demand did not comply with s 19(2)(c) of the Act. As a result, he approached the Eastern Cape High Court for an order interdicting Merry Hill from transferring the erven to the subsequent purchasers. In a judgment which has since been reported as *Engelbrecht v Merry Hill (Pty) Ltd* 2006 (3) SA 238 (E), the court *a quo* (Plasket J) upheld Engelbrecht's contentions regarding the invalidity of Merry Hill's purported cancellation. Accordingly, the interdict sought was granted with costs. The appeal against that order is with the leave of the court *a quo.*

[2] In this court Engelbrecht appeared in person, not represented by counsel or an attorney. In consequence, Mr P J J Zietsman of the Free State Society of Advocates was requested by the court to assist, as *amicus curiae,* in establishing the meaning of the statutory provisions concerned. At the outset I wish to convey the court's appreciation to Mr Zietsman for his able performance of this task in the best traditions of the advocates' profession.

[3] The background facts, which were essentially common cause, are set out in the reported judgment of the court *a quo* (paras 5-10). For present purposes the bare essentials will therefore suffice. They are as follows. Engelbrecht did not deny that he fell into arrears with the instalments stipulated in the agreement of sale. Though he blamed his default on his erstwhile bookkeeper, he accepted that this did not absolve him from his contractual obligations and that he was therefore in breach of

the agreement. In the result, clause 9 of the agreement came into operation. In terms of this clause, failure by Engelbrecht to comply with the contract entitled Merry Hill to insist that he rectify his breach within 30 days 'by way of written demand as set out in s 19 of the Act'. Broadly stated, clause 9 further provided that, upon Engelbrecht's failure to rectify the breach Merry Hill became entitled either to claim immediate payment of the full balance of the purchase price or, alternatively, to cancel the contract and retain all payments already made.

[4] The provisions of s 19 of the Act here relevant appear from subsections (1) and (2). They read as follows:

'(1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled –
(a) to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract;
(b) to terminate the contract; or
(c) to institute an action for damages,
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 subsection (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 rectify the alleged breach within a stated period which . . . 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.'

[5] After Engelbrecht had fallen into arrears on a number of occasions, Merry Hill decided to invoke the provisions of clause 9 of the contract. It therefore instructed its attorney, Mr J E Bax, to demand rectification of the breach in accordance with s 19 of the Act. In an attempt to comply with the provisions of s 19, Bax sent a letter to Engelbrecht by registered post to his address referred to in s 23 of the Act. Since the contents of the letter patently complied with subsecs 19(2)(a) and (b) of the Act, I focus on that part which sought to observe the requirements of s 19(2)(c). It reads as follows:

'In accordance with clause 9.1 of the Deed of Sale we have been instructed by the Seller to demand from you, as we hereby do, payment of the [arrear instalments in the] sum of R22 534,00 at our offices . . . within 32 days of the date of this letter.
Should payment not be made as aforesaid then and in that event, the Seller shall be entitled to claim immediate payment of the full balance of the purchase price and interest as due by you, as well as all costs and collection commission; *or alternatively* shall be entitled to cancel this contract.'

[6] After the 32 days' grace had lapsed, Bax sent another letter, again by registered post, informing Engelbrecht that, as no payment had been made in terms of the letter of demand, he had been instructed by Merry Hill to cancel the agreement of sale. According to Engelbrecht, he became aware of the letter of demand only after Merry Hill had already purported to cancel the agreement. It happened, he explained, when he discovered the letter amongst a pile of documents which had been left by his erstwhile bookkeeper when she was dismissed on account of theft and fraud. Again he accepted, however, that both the letter of demand and the letter of cancellation had reached his chosen *domicilium citandi* and that the omissions of his deceitful bookkeeper could not be laid at the door of Merry Hill.

[7] Engelbrecht's attack on the validity of the cancellation was therefore confined, as I have said earlier, to the contention that the letter of demand preceding the cancellation did not comply with the requirements of s 19(2)(c) of the Act. His argument in support of this contention, which eventually found favour with the court *a quo,* was that the purported notice contained in the letter was defective in two respects, First, because, on a proper interpretation, s 19(2)(c) does not allow the seller to indicate the steps he or she intends to take by way of alternatives, as Merry Hill professed to do. Secondly, and in any event, because the notice did not indicate what Merry Hill *intended* to do, but only recorded what it was *entitled* to do, upon his failure to purge his default.

[8] As appears from the judgment of the court *a quo* (paras 15-21) its endorsement of Engelbrecht's first argument, that s 19(2)(c) does not allow the seller a reservation of choice between alternative remedies, was for the most part influenced by two earlier judicial pronouncements on the interpretation of the provision, to wit in *Oakley v Bestconstructo (Pty) Ltd* 1983 (4) SA 312 (T) and in *Miller v Hall* 1984 (1) SA 355 (D).

[9] The s 19 notice relied upon in *Oakley* (as it appears at 315B-D) tersely informed the purchaser '*that unless we receive your payment of the balance of the purchase price still due to our client within 30 days from date hereof, our client will in its sole and absolute discretion act against you in terms of para 9 of the deed of sale . . .*'. Grosskopf J's finding (at 319A-G) that this notice fell short of what is required by s 19(2) seems to be largely based on subsec 2(a) in that, in his view, the notice did not contain a proper description of the purchaser's alleged breach. The learned judge then added, almost as an aside (at 319G-320D) – and with the express reservation that he did not profess to give an exact interpretation of s 19(2)(c) – that the notice also failed to comply with the last-mentioned subsection, in that it reserved the right to the seller to chose between the alternative remedies available to it under the contract until after the 30-day notice period had lapsed.

[10] More pertinent in the present context was the decision by Page J in *Miller* (at 361F-362D) that s 19(2)(c) requires the purchaser to be apprised of precisely what step, of those enumerated in s 19(1), the seller intends to take in the event of the purchaser's failure to remedy the breach. What the legislature intended, Page J held, is that defaulting purchasers should know exactly what consequences were to ensue if they persist in their default, so as to enable them to arrange their future conduct accordingly. Consequently, the learned judge concluded, a mere recital of the alternative steps which the seller might elect to take after the 30-day notice period, was not enough.

[11] Rather surprisingly, the interpretation of s 19(2)(c) was not revisited, at least not in any reported decision, for over twenty years. When the revisitation eventually took place, it happened twice in quick succession, first by the court *a quo* in this matter and then by a full court of the Witwatersrand Local Division (CJ Claassen J, with Jajbhay J concurring) in *Van Niekerk v Favel* 2006 (4) SA 548 (W). While the court *a quo,* as we know, followed the two earlier decisions in *Oakley* and *Miller*, the full court in *Van Niekerk* came to the diametrically opposite conclusion with regard to what s 19(2)(c) requires.

[12] Accordingly the full court held the letter of demand in *Van Niekerk* (as set out in para 8) to constitute proper notice in terms of s 19(2)(c), despite the fact that it pertinently reserved the seller's option to choose between the alternative remedies of claiming cancellation or acceleration of the payment of instalments, until after the 30-day notice period had lapsed. Central to the court's answer to the reasoning in *Miller* is the following statement by Claassen J (para 30):

'In my view, if the Legislature intended to restrict the contents of the letter of demand to specifics, it could easily have done so by using stronger language, alternatively, demanded an express election of the remedies mentioned in s 19(1) to be stated categorically in the letter. This it did not do. In my view, the statutory requirement to give an "indication" of the seller's future conduct, must be given a broad interpretation, more in line with the meaning of a "hint" or "suggestion". . . . In my view, the Legislature intended to oblige the seller merely to inform the purchaser that he has *elected to act* upon any failure by the purchaser to rectify the breach. He is in effect saying to the purchaser: "I have elected not to abide your breach any longer. Should you fail to remedy it, I will take steps against you. So beware!".'

[13] In considering the meaning of s 19(2)(c), this court therefore has the benefit of well reasoned judgments supporting both points of view, as well as the contributions by academic authors referred to in those cases. Let me start with a proposition which appears to be beyond contention, namely, that the purpose of Chapter 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, chapter 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 eg *Gowar Investments v Section 3 Dolphin Coast and Cameron* [2006] SCA 162 (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 eg *Wellworths Bazaars Ltd v Chandler's Ltd* 1947 (2) SA 37 (A) at 43).

[15] Another consideration of relevance, in my view, is that the stricter interpretation of s 19(2)(c), subscribed to in *Miller* and in the judgment of the court *a quo,* imposes an obligation on the seller that is substantially more onerous than merely requiring the seller to impart more comprehensive information to the purchaser. What the stricter interpretation calls for is that the seller makes an election between alternative remedies and informs the purchaser of that election prior to extending the 30-day notice. Even where the seller has contractually reserved the right to postpone that election until it finally becomes available, ie until after the notice period had lapsed, he or she will be deprived of that right of reservation. Moreover, according to the doctrine of election, the seller would be bound by that choice; he or she will not be able to have a change of mind if the purchaser should fail to purge the default during the 30-day notice period. This appears, in my view, from the following succinct statement of the principles involved by Friedman JP in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) at 542E-F:

'When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. *Once he has elected to pursue one remedy, he is bound by his election and cannot resile from it without the consent of the other party.*' (My emphasis.)

(See also *Segal v Mazzur* 1920 CPD 634 at 644-5.)

[16] An illustration of the finality of an election in the present context is to be found in *Walker v Minier et Cie (Pty) Ltd* 1979 (2) SA 474 (W) at 479A-G (to which reference is made by Page J in *Miller* at 362H-363E). What the seller in *Walker* announced in its letter of demand was that it intended to claim the outstanding balance of the purchase price if the purchaser should fail to remedy the default within 30 days. When that happened, the seller tried to change his mind by cancelling the contract. In applying the doctrine of election, the court held, however, that the seller was precluded from doing so. It is true that it was also held in *Walker* (at 480D-H), *obiter*, as it were, that a seller who has indicated an intention to claim performance of the contract can still claim cancellation at a later stage, if the purchaser persists in his or her default during the 30-days notice period, provided that another 30-day notice is given in which cancellation is signified. Whether this is so, is, in my view, not necessary to decide. I say this for two reasons. First, as I understand the position regarding election, the suggested solution will operate one way only, ie where the seller threatens to demand specific performance. If, by contrast, the seller threatens to claim cancellation he will be finally bound by that choice. He will not be able to change his mind if the purchaser persists in default, whatever the position may be where he threatened to claim specific performance instead (see eg *Consol Ltd t/a Consol Glass v Twee Jongen Gezellen (Pty) Ltd* (2) 2005 (6) SA 23 (C) paras 35-36; Christie, *The Law of Contract in South Africa* 5 ed at 541). Secondly, the suggested solution will in any event require a further 30-day notice period while the financial position of the purchaser or the condition of the property, or both, may be deteriorating.

[17] The court *a quo* appears to have been of the view (para 20) that the strict interpretation of s 19(2)(c) it subscribed to would not really impose an additional burden on the seller, because, so the court reasoned, a party to a contract who gives notice of his or her intention to cancel is in any event required to give that notice in clear and unequivocal terms (see para 20 of the judgment). I am unable to agree with this line of reasoning. The notice in terms of s 19(2)(c) is not yet a notice of cancellation. If the purchaser should fail to purge his or her default during the 30-day notice period, the seller will clearly be required to make an election between the available remedies and to convey that election to the purchaser in clear and unequivocal terms. The point is, however, that on a strict interpretation of s 19(2)(c)

these obligations are imposed on the seller *prior* to the 30-day notice period which, in my view, is indeed a substantial additional burden.

[18] Can this additional burden – and the concomitant inroad into the seller's contractual rights at common law – be said to be imposed by the express wording or to appear by necessary implication from the provisions of s 19(2)(c)? The express wording of s 19(2)(c) clearly does not require an early election by the seller. It may, however, be understood to be required by necessary implication if the notice allowed by the broad interpretation of the section, ie a notice reserving the seller's right to elect at a later stage, would be of no noteworthy benefit to the purchaser. This seems to be the argument adopted by Page J in *Miller* (at 361G-362A). According to this argument mere recital of the steps that the seller may possibly take after the 30-day notice period, would serve no protective purpose. Since the remedies available to the seller already appear *ex facie* the contract, so the argument goes, the purchaser would derive no real assistance from being informed that the seller intends to invoke one of these remedies if the breach of contract is not rectified.

[19] I do not agree with this argument. Though it can be said that an early election by the seller will be more advantageous to the purchaser, that is not the question. The true question is whether a notice that informs a purchaser that persistence in his or her breach will result in either cancellation or a claim for payment of the full balance of the purchase price, can be said to serve no real purpose at all. In *Van Niekerk,* Claassen J concluded (at 368C-E) that such notice would serve the purpose of warning the purchaser that the seller was not prepared to abide his breach any longer and that failure to remedy the breach will lead to one of the drastic steps contemplated in s 19(1). I agree with this view.

[20] I also agree with Claassen J that the broader interpretation of s 19(2)(c) is supported by the wording of the section. What the section requires is '*an indication*' of '*the steps*' (plural) that the seller intends to take. Apart from the fact that the dictionary meaning of 'indicate' tends to suggest a notification of lesser exactitude, the plural 'steps' in my view supports the perception that the seller need not elect a single step. He is allowed to indicate an intention to take more than one step in the

alternative. In *Miller* Page J gave the following answer to this argument (at 364H-365A):

'Some significance was sought to be attached to the use of the plural "steps" and not "step". It was contended that this showed that it was permissible to indicate an intention to take all the steps enumerated in ss (1), albeit in the alternative. In my view the use of the plural does not justify this conclusion, since each of the courses enumerated in ss (1) could comprise more than one step'

[21] I do not find this answer convincing. If the plural 'steps' must be understood to refer to the various actions included in each of the remedies enumerated in subsec (1), a strict interpretation of s 19(2)(c) would in fact require each of those actions – 'steps' – to be mentioned in the notice, which would clearly be absurd. In short, if the legislature intended that the seller should indicate which of the three options enumerated in subsec (1)(a), (b) or (c) he intends to take, it could simply have said so. Though it is not necessary to express a view on everything said in *Van Niekerk*, I agree with the conclusion arrived at, namely that s 19(2)(c) allows a seller to indicate the steps he intends to take in the alternative and that it does not require an election between those alternative steps in the notice of demand.

[22] This brings me to the second objection against the notice contained in the Bax letter, which was also upheld by the court *a quo* (paras 22 and 23). What it amounted to, in essence, was that the letter referred only to the alternative steps the seller would be *entitled* to take (in terms of the contract) and not to any steps that the seller in fact *intended* to take as required by s 19(2)(c). On a literal interpretation of the letter that, of course, is what it says. If the notice is therefore required to follow the exact wording of s 19(2)(c), the Bax letter would probably not make the grade.

[23] Does the answer to this difficulty lie in the notion endorsed in *Van Niekerk* (para 26), that s 19(2)(c) is merely directory and that its non-compliance can therefore be condoned? I do not believe so. 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 eg *Unlawful Occupier, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22; *Moela v Shoniwe* 2005 (4) SA 357 (SCA) paras 8-12. See also, eg *Maharaj v Rampersad* 1964 (4) SA 638 (A) 646C-E.)

[24] On a sensible interpretation of the Bax letter, the message it conveyed is clear: if Engelbrecht should fail to purge his breach, Merry Hill would exercise one of the alternative remedies set out in the letter, which would then become available to it. Thus understood, the letter, in my view, complied in substance - if not in exact form - with the requirements of s 19(2)(c). It follows that the appeal must, in my view, succeed and I can see no reason – and none was suggested by either party – why costs should not follow the event – both in this court and in the court *a quo.*

[25] For these reasons:

(a) The appeal is upheld with costs.

(b) The order by the court *a quo* is set aside and replaced with the following:

'The application is dismissed with costs.'

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F D J BRAND
JUDGE OF APPEAL

Concur:

CAMERON JA

LEWIS JA

MAYA JA

THERON AJA