CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 212/17

In the matter between:

RIAAN MOGAMAT AMARDIEN	First Applicant
TASSANDRA ANNE APRIL	Second Applicant
ASHEEQAH DAMON	Third Applicant
ROEWAYDA JOCHEMS	Fourth Applicant
LOUISE PRIMOE	Fifth Applicant
MARGARETH ROMAN	Sixth Applicant
CASSIEM SAPAT N.O.	Seventh Applicant
CYNTHIA ARENDSE	Eighth Applicant
CRAIG CLOETE	Ninth Applicant
FAIZA GASANT	Tenth Applicant
WARREN KOEN	Eleventh Applicant
KASFICAH SMITH	Twelfth Applicant

and

REGISTRAR OF DEEDS	First Respondent
SHAUN WINGERIN N.O.	Second Respondent
GRAEME MICHAEL SHKOLNE N.O.	Third Respondent
NICOLA MARTINE COHEN N.O.	Fourth Respondent

CAPE TOWN COMMUNITY HOUSING COMPANY (PTY) LIMITED Fifth Respondent

and

WOMEN'S LEGAL CENTRE TRUST Amicus Curiae

Neutral citation: *Amardien and Others v Registrar of Deeds and Others* [2018] ZACC 47

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgment: Mhlantla J (unanimous)

Heard on: 7 August 2018

Decided on: 28 November 2018

Summary: Alienation of Land Act 68 of 1981 — sections 19, 20 and 26 — purchaser not obliged to make payment until recordal complete by seller

National Credit Act 34 of 2005 — section 129 — notice of default — draw default to the attention of the consumer— specify amount of arrears

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ORDER

The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court of South Africa, Western Cape Division, Cape Town is set aside and replaced with:

"(a) The application is upheld with costs.

(b) The cancellation of the instalment sale agreements by the Cape Town Community Housing Company (Pty) Limited is unlawful and is set aside.

(c) The cancellation of the recordal of the instalment sale agreements by the Registrar of Deeds is set aside."

4. The application of the Cape Town Community Housing Company (Pty) Limited to adduce new evidence is dismissed with costs.

5. The Cape Town Community Housing Company (Pty) Limited is ordered to pay costs.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Petse AJ and Theron J concurring):

Introduction

[1] In *Kubyana*, this Court held:

> "One of the main aims of the [National Credit Act] is to enable previously marginalised people to enter the credit market and access much needed credit. Credit is an invaluable tool in our economy. It must, however, be used wisely, ethically and responsibly. Just as these obligations of ethical and responsible behaviour apply to providers of credit, so too to consumers."[1]

[1] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 38.

[2] This judgment deals with two key issues that impact upon the lawfulness of the termination of instalment sale agreements for subsidised housing. The first question is: what is the legal effect of a late recordal of an instalment sale agreement upon a seller and purchaser in terms of sections 20 and 26 of the Alienation of Land Act[2] (ALA)? The second is: must a notice in terms of section 129(1) of the National Credit Act[3] (NCA) indicate the amount that a creditor alleges is owed by a debtor? These questions were considered by Binns-Ward J in the High Court of South Africa, Western Cape Division, Cape Town (High Court) in an application launched by the twelve applicants.[4] The application was dismissed. The applicants now apply to this Court for leave to appeal against that judgment.

Parties

[3] The twelve applicants are all beneficiaries and purchasers of homes bought between 2000 and 2003 under a state-subsidised housing programme administered by the fifth respondent, the Cape Town Community Housing Company (Pty) Limited, through instalment sale agreements with the fifth respondent as the seller.

[4] The first respondent is the Registrar of Deeds, Cape Town who is cited in his official capacity as the person responsible for the registration and cancellation of deeds in terms of section 3 of the Deeds Registries Act,[5] and in particular to this application, in terms of section 20 of the ALA.

[5] The second to fourth respondents are the trustees for the time being of the S & N Trust (Trust). The Trust is cited as the purchaser of the applicants' homes from the fifth respondent. The trustees elected to abide the decision of the High Court and did not participate in proceedings in this Court.

[2] 68 of 1981.

[3] 34 of 2005.

[4] *Amardien v Registrar of Deeds* (2017) 2 All SA 431 (WCC).

[5] 47 of 1947.

[6] The fifth respondent is the Cape Town Community Housing Company (Pty) Limited, a company which is wholly owned by the National Housing Finance Corporation (NHFC). It was set up through a joint venture agreement between the City of Cape Town (City) and the NHFC with the explicit mandate to provide affordable housing to deserving beneficiaries.

[7] The Women's Legal Centre Trust (WLC) has been admitted as amicus curiae. The role of the WLC is to advance and protect the rights of women and girls in South Africa, particularly women who suffer from disadvantage. One of its programmatic focus areas is women's rights to land, housing and property.

[8] The Department of Human Settlements had also been admitted as amicus curiae but withdrew its application, without providing an explanation and without tendering wasted costs.

Background facts

[9] In 1998, the City established a housing initiative to deliver government subsidised housing to poor members of the Cape Town community. The fifth respondent was the driving force for the delivery of the subsidised housing. It receives housing subsidies on behalf of beneficiaries and applies those subsidies towards the construction of new houses. The subsidies are used to reduce the purchase prices of the houses. The applicants were all beneficiaries of government subsidised housing and concluded instalment sale agreements with the fifth respondent as the seller between December 2000 and February 2001.[6] The relevant terms of these agreements are set out in clauses 4, 8 and 17 of the instalment sale agreements. The applicants were, in terms of clause 4, required to make payment in instalments on the last day of each month for a period of four years.

[6] It is common cause that the terms of the instalment sale agreements signed by all of the applicants were identical.

Clause 17 sets out the steps to be followed by the seller in the event that the purchaser breached the terms of the agreement or failed to comply with the seller's notice to remedy the breach.

[10] In terms of clause 8, the fifth respondent was obliged to record these agreements with the Registrar of Deeds in accordance with the ALA. This obligation arises from section 20 of the ALA, which is headed "Recording of contract", read with section 26 which places restrictions on the receipt of consideration by virtue of certain deeds of alienation. These sections provide:

> "20(1)(a) A seller, whether he is the owner of the land concerned or not, shall cause the contract to be recorded by the registrar concerned in the prescribed manner provided a prior contract in force in respect of the land has not been recorded or is not required to be recorded in terms of this section.
>
> . . .
>
> 26(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until—
>
> (a) such erf or unit is registrable; and
>
> (b) in case the deed of alienation is a contract required to be recorded in terms of section 20, such recording has been effected."

[11] The applicants moved into their respective homes at various times between 2000 and 2003, only to discover that the buildings were of an inferior quality. According to the applicants, they spent substantial amounts of money to repair these homes, with little assistance from the fifth respondent. As a result, the applicants paid their instalments with varying levels of regularity. In addition, the applicants advanced the following reasons for this: the instalments due were higher than what the applicants expected, the building standards were of inferior quality; the fifth respondent had failed on numerous occasions to respond to the applicants' complaints, and the fifth respondent had extremely poor accounting and

record-keeping practices making it onerous for the applicants to calculate the outstanding amounts.

[12] The fifth respondent contends that a programme was undertaken to remedy any defects in the homes for its account. In 2004, the fifth respondent suggested and encouraged the applicants to conclude an affordability scheme in an attempt to resolve the problems regarding irregular payments. Those applicants who elected to do so, concluded addenda to their instalment sale agreements in terms of which the monthly payments were reduced and repaid over a longer period.

[13] The fifth respondent failed in its contractual and statutory duty to record the instalment sale agreements. Despite the ALA's statutory bar, the fifth respondent continued to receive payments from those applicants who continued paying. It eventually recorded each of the instalment sale agreements with the Registrar of Deeds on 1 April 2014 – more than ten years after these agreements were originally concluded.

[14] On 25 April 2014, the fifth respondent sent notices in terms of section 129(1)[7] of the NCA (section 129 NCA notices) to the applicants, informing them (amongst other things) that firstly, they were in arrears in terms of their respective instalment sale agreements and provided them with various options to bring the payments up to date. Secondly, the applicants were threatened with the cancellation of the instalment

[7] Section 129(1) of the NCA provides as follows:

> "If the consumer is in default under a credit agreement, the credit provider-
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
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> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—
>
> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130."

sale agreements in the event they failed to respond to the notice within ten days of receipt, and failed to remedy the default of their payment obligations in terms of the instalment sale agreements within 20 days. Lastly, the applicants were informed that their instalment sale agreements had been recorded in terms of section 20 of the ALA.[8] The applicants did not take any steps in response to the section 129 NCA notices.

[15] On 23 June 2014, the fifth respondent sold the applicants' homes to the Trust. At that stage, the fifth respondent had not cancelled the instalment sale agreements, nor had it submitted an application to the Registrar of Deeds for cancellation of the recording of the instalment sale agreements.

[16] The fifth respondent only submitted an application for the cancellation of the instalment sale agreements in April 2015. The Registrar of Deeds cancelled the

[8] The letter inter alia stated:

> "In terms of section 129(1)(a) of the National Credit Act, No 34 of 2005, (hereinafter referred to as "the Act") your attention is hereby drawn to the fact that you are in default under the Agreement.
>
> It is proposed that you refer the agreement to debt counselor, alternative dispute resolution agent, Consumer Court or Ombud with jurisdiction within 10 (TEN) business days from receipt hereof with the intent to resolve any dispute under the Agreement and / or to develop a plan, to be agreed upon by our client, to bring the payments under the agreement up to date.
>
> Should you fail to respond to this notice within 10 (TEN) business days from receipt hereof by either rejecting our client's proposal or by failing to respond at all and should you remain in default with your obligations in terms of the Agreement for a period of 20 (TWENTY) business days from the date of default, and further in terms of the agreement, should you not remedy your default within 20 (TWENTY) business days of receipt of this letter, our client will—
>
> 1. retain all penalty amount that you have paid to it in terms of the Agreement and furthermore our client will institute action against you for the recovery of the amount outstanding under the credit agreement, together with the permissible interest thereon calculated from the due date to the date of final payment, legal and other charges under the National Credit Act that are due and owing to our client, and
> 2. proceed to cancel the installment purchase agreement if necessary, institute legal action for your ejectment and repossession of the repossession of the property together with legal costs thereof.
>
> . . .
>
> Kindly be advised that the Instalment Purchase Agreement has been recorded as required in terms of section 20 of the Alienation of Land Act 68 of 1981."

recording of these agreements on 4 May 2015. On 5 May 2015, the properties were transferred to the Trust.

[17] Following this, the Trust instituted eviction proceedings against the second to sixth applicants in the Mitchells Plain Magistrates' Court, Cape Town and expressed an intention to evict the seventh to twelfth applicants. The eviction applications have been postponed pending the outcome of this application.

Litigation history

In the High Court

[18] In 2016, the applicants launched an application in the High Court against the respondents. They sought a declarator that the actions of the fifth respondent in cancelling the instalment sale agreements had been unlawful. They also sought the review and setting aside of the cancellation of these agreements by the Registrar of Deeds; and a declarator that the subsequent sale of the properties by the fifth respondent to the Trust was unlawful and hence void.

[19] The High Court considered three issues: (a) whether the applicants had been in breach of their payment obligations under their respective instalment sale agreements; (b) whether the applicants had been given notice in terms of section 129(1) of the NCA; and (c) assuming notice had been given, whether the extent of arrears had been indicated.

[20] On the first question, the High Court held that although the instalments had not been due and payable until the instalment sale agreements were recorded, that did not prevent them from becoming due. The Court held that the effect of section 26 of the ALA was only to prevent the creditor from receiving consideration until it had attended to promptly recording the instalment sale agreements. It did not affect the terms of the agreements and accordingly did not prevent the amounts from becoming due under the instalment sale agreements. The High Court held that at the moment of

recordal, all the outstanding amounts became immediately payable and since the applicants were in arrears under the instalment sale agreements and accordingly in default thereof, these agreements were amenable to cancellation by the fifth respondent.

[21] Regarding the alleged conflict between the NCA and the ALA, the High Court held that section 129(1) of the NCA substantively overrides section 19 of the ALA. It noted that while section 19 of the ALA is plainly equivalent to section 129 read with section 130 of the NCA, they inconsistently provided for notice to be given as the sections required different numbers of days' notice before cancellation for breach of agreement can be effected. The Court thus held that section 172(1) of the NCA read with Schedule 1 provides that where there is a conflict, the NCA prevails over those of Chapter II of the ALA. In the result, the High Court held that the fifth respondent was permitted to cancel the agreement subject to compliance with only section 129(1) of the NCA and not section 19 of the ALA.

[22] In respect of the delivery of the section 129 NCA notices to the applicants, the High Court relied on *Sebola*[9] and *Kubyana*[10] and held that the evidence provided by the fifth respondent was sufficient to place the burden on the applicants to adduce evidence to show that delivery of the notice was not effective. The High Court further held that the applicants failed to adduce this evidence.

[23] On the question of whether the extent of the arrears had been indicated, the High Court held that it was not essential for the section 129 NCA notices to set out the amounts in which the applicants were in arrears. The High Court held that the applicants' counsel did not refer to any authority in support of the argument that particulars of the arrears were an essential ingredient of a section 129 NCA notice, nor were there any provisions in the NCA or the regulations thereto that required this.

[9] *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC).

[10] *Kubyana* above n 1.

The Court further held that the legislative purposes set out in section 3 of the NCA would not be frustrated if the particulars of the arrears were not included.

[24] The High Court relied on *Phone-A-Copy*[11] and held that "the applicants were, notionally at least, in as good a position to determine for themselves how much they owed under the agreements". Furthermore, if the applicants were uncertain about the amounts, the notice afforded them the opportunity (directly or through an intermediary) to make the necessary enquiries or engage with the substantive issue. If the amount was lacking information that the applicants required, the fifth respondent would have been bound to provide it upon request.

[25] The High Court thus dismissed the application with costs. An application for leave to appeal was also subsequently dismissed.

In the Supreme Court of Appeal

[26] Aggrieved by the decision of the High Court, the applicants petitioned the Supreme Court of Appeal for leave to appeal. On 28 July 2017, that application was dismissed. The applicants now seek the leave of this Court to appeal the decision of the High Court.

In this Court

[27] This Court has to consider the following issues:

(a) Should leave to appeal be granted?

(b) What is the effect on the purchaser's obligations of the seller's failure to record an instalment sale agreement as required by section 20 of the ALA?

[11] *Phone-A-Copy Worldwide (Pty) Ltd v Orkin* 1986 (1) SA 729 (A); [1986] 2 All SA 12 (A) (*Phone-A-Copy*). In this case, the seller had sent a letter of demand which did not specify the amount. The Appellate Division held that the absence of the specific amount was not fatal to the notice and the seller merely had to inform the purchaser of the failure to pay the balance of the purchase price and interest. The balance was readily capable of ascertainment by both the purchaser and the seller.

(c) Does section 129(1) of the NCA require a credit provider to state the amount alleged to be owing in the notice it sends to the consumer?

(d) Should the new evidence that the fifth respondent seeks to have admitted in this Court be admitted?

(e) What is the appropriate remedy in this case?

Leave to appeal

[28] We are called upon to interpret section 129(1) of the NCA and sections 19, 20 and 26 of the ALA. This Court's jurisdiction is engaged because the statutory interpretation of these provisions raises a constitutional issue directly pertaining to section 26 of the Bill of Rights and has a significant effect on the applicants' right of access to housing.[12] This Court has also previously held that the interpretation of section 129(1) of the NCA raises a constitutional issue.[13] Furthermore, the matter raises an arguable point of law of general public importance which ought to be considered by this Court. There are also reasonable prospects of success. It is thus in the interests of justice that leave to appeal should be granted.

Merits of appeal

What is the effect of the late recordal?

[29] In order to determine the effect on the purchaser's obligations, the following legal questions must be answered: firstly, at what point are the purchaser's obligations, in relation to late recordal of agreements in terms of section 20 of the ALA, activated? This has implications for the cancellation of the instalment sale agreements by the fifth respondent. Secondly, can notice of recordal and cancellation of agreement be provided at the same instance? Thirdly, which provisions of the NCA and ALA govern cancellation as a remedy?

[12] Section 167(3)(b)(i) of the Constitution. See also *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at paras 13-9; and *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at paras 27-8.

[13] *Kubyana* above n 1 at para 17. This ratio was followed in *Nkata v FirstRand Bank of South Africa Limited* [2016] ZACC 12; 2016 (4) SA 257 (CC); 2016 (6) BCLR 794 (CC) at para 33.

Submissions by the parties

[30] The applicants submit that they could not have been in arrears or in default when they were informed that the instalment sale agreements had been recorded because the fifth respondent was only entitled to receive consideration after the recordal of these agreements. The fifth respondent failed to inform them of the exact date of the recordal until service of the section 129 NCA notices, and the applicants were thus unable to ascertain when the debt became due and payable, and therefore unable to make payments as required.

[31] The fifth respondent submits that the effect of the late recordal of an instalment sale agreement is that it constitutes the fulfilment of a suspensive condition. Further, that when the condition is fulfilled, the payment of the instalments become unconditional. The fifth respondent contends that fulfilment of this condition does not create a new obligation but causes contractual obligations created under the instalment sale agreement to become due retroactively. Thus, when the condition is fulfilled, a notice of recordal need not be given.

[32] The WLC submitted that the late recordal and subsequent cancellation diminishes women's access to security of tenure and infringes their right of access to adequate housing. Furthermore, it impacts on the ability of women to access alternative subsidies under the government's housing scheme.

When is the purchaser's debt obligation activated?

[33] The issue of when a debt is due has been considered by this Court most recently in *Makate*, where this Court held that "debts become due when they are immediately claimable or recoverable".[14]

[14] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 188.

[34] In *Mdeyide*, this Court held:

> "A *debt is due* when it is 'immediately claimable or recoverable'. In practice this will often coincide with the date upon which the debt arose, although this is not necessarily always so. In terms of section 12(3) of the [Prescription Act 68 of 1969], a debt is deemed to be due when a creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. A creditor is deemed to have the required knowledge if she or he could have acquired it by exercising reasonable care. Furthermore, section 13 provides for circumstances in which the completion of prescription is delayed, for example, when the creditor is a minor, insane, or outside the Republic, or in certain other circumstances."[15] (Footnotes omitted.)

[35] It is only after the debt becomes due that the debtor has an obligation to make payment or perform, and the creditor acquires the right to demand performance or payment at any time. In *Trinity Asset Management*, this Court held:

> "The necessity of a demand to place a debtor in mora in relation to an obligation where no time for performance has been stipulated, does not detract from the conclusion that specific performance of the obligation is available at any time at the option of the creditor. The exigibility of the primary performance obligation in terms of the agreement stands apart from the creation of a secondary obligation flowing from a breach of contract . . . . Where does this leave [the time clause] of the loan agreement? The clause is not a 'condition precedent' or suspensive condition. It did not suspend the operation of the contract itself, because the loans were advanced. And it did not suspend the exigibility of repayment, because the lender could at any time make demand for repayment on 30 days' notice. Nor is it a time clause 'by virtue of which the creditor grants to the debtor a period within which the latter may discharge his obligation . . . or by which the operation of the contract is restricted to a certain time'. To repeat: the lender could at any time demand repayment. Even if the 30-day demand clause was not a part of the loan agreement, the lender would still have had to place the borrower in mora. A mora demand for repayment must be reasonable, but parties may determine the reasonableness of the period by agreement. That is what happened here . . . . Specific performance for repayment of the loan

[15] *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) (*Mdeyide*) at para 13.

> could have been claimed by [the applicant] immediately upon conclusion of the loan agreement. That is when it became due. There is no underlying injustice in the sense that it was prevented by the clause from enforcing repayment of the loan at any time it wished to do so."[16]

[36] It follows that where there is no additional statutory protection offered – like the requirement for an agreement to be recorded before payment of any instalment – the debt becomes due and payable automatically upon the conclusion of the agreement. It is only subject to terms of the agreement or being placed in mora for the purposes of the cancellation of the agreement.

Is notice of the recordal necessary before a section 129 NCA notice?

[37] The answer to this question depends on what the seller relies on as the default. If it is non-payment in order to claim proper payment as specific performance, then in accordance with *Trinity Asset Management*, the instalments are immediately due and payable and the notice in respect of that default will not be premature. However if the purpose of the section 129 NCA notice is not to claim payment but cancellation, it is premature.

[38] Where there is a statutory requirement that an agreement must be recorded, the correct position is that the payments become due and payable only upon recordal of that agreement. In terms of the ALA, section 26 provides a clear textual statutory bar to the seller receiving payments ("consideration") in the event of non-recordal of the agreement, in the form of criminal liability. It reads:

> "(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until—
>
> (a) such erf or unit is registrable; and
>
> (b) in case the deed of alienation is a contract required to be recorded in terms of section 20, such recording has been effected.

[16] *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* (*Trinity Asset Management*) [2017] ZACC 32; 2018 (1) SA 94 (CC); 2017 (12) BCLR 1562 (CC) at paras 160-3.

> (2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

[39] The purchaser is under a natural obligation to make payment,[17] but that obligation cannot be enforced until the recordal takes place. Considering that the responsibility to record primarily rests with the seller, in most cases the information relating to the date of registration of the instalment sale agreement would be known by the seller. Therefore, it would be incumbent upon the seller to notify the purchaser when the agreement has been recorded so that the purchaser can make the necessary payments. The seller when making demand for payment must also afford the purchaser an opportunity to pay what is due within a reasonable time.

[40] It is only in the event that the purchaser fails to make payment after the debt becomes due and payable, that the seller will additionally be entitled to claim cancellation of the agreement.

How do the provisions of the NCA and ALA govern claims for cancellation?

[41] In *Wary Holdings*, this Court held that statutes must be interpreted with due regard to their purpose and within their context.[18] The purpose of the ALA is to regulate the alienation of land in certain circumstances, and also to fulfil the need for protection of vulnerable purchasers and imbuing good faith and fairness into contractual relationships relating to land. The ALA sets out requirements for, amongst others, the cancellation of credit agreements for the sale of land through instalment sale agreements. Section 19 limits the seller's right to take immediate and

[17] *Allison v Massel and Massel* 1954 (4) SA 569 (TPD) at 576C-D.

[18] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 61. See also *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at paras 21-8; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 91.

unilateral action by providing for certain steps to be taken before it can cancel an agreement concluded with a purchaser. This section provides:

> "(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, subject to the provisions of subsection (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.
>
> (3) If the seller in the same calendar year has so handed or sent to the purchaser two such notices at intervals of more than 30 days, he may in any subsequent notice so handed or sent to the purchaser in such calendar year, make demand to the purchaser to carry out his obligation within a period of not less than seven days calculated from the date on which the notice was so handed or sent to the purchaser, as the case may be.
>
> (4) Subsection (1) shall not be construed in such a manner as to prevent the seller from taking steps to protect the land and improvements thereon or, without or

> after notice as required by the said subsection, from claiming specific performance."

[42] The NCA, on the other hand, is a legislative effort to regulate and improve relations between consumers and providers of credit.[19] It was enacted to ensure that credit is available to vulnerable sections of society who would not otherwise be able to afford it. In line with its purpose of providing consumers with adequate knowledge of debt management, the NCA affords debtors further protection before cancellation or other legal remedies can be enforced in the courts by creditors. This is evident from the text of section 129(1) of the NCA. It reads—

> "(1) If the consumer is in default under a credit agreement, the credit provider—
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—
>
> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130."

[43] Section 19 of the ALA limits the right of the seller to take legal action and outlines those limitations. On the other hand, section 129(1) of the NCA specifies certain obligations the creditor must fulfil before it can proceed to the stage of legal enforcement or unilateral cancellation. The purchaser has to be afforded an opportunity to consider certain steps. Therefore, the requirements of the ALA and the NCA do not conflict, and there is no need to have recourse to Schedule 1 of the NCA. In fact, in instances where they both apply, they can and should be read together:

[19] *Sebola* above n 9 at paras 39-41.

a seller must comply with the NCA in informing the purchaser of the default, and they must inform a purchaser in terms of section 19 if they are going to rely on the remedies in terms thereof if entitled to do so. The two pieces of legislation, specifically sections 19 of the ALA and section 129 of the NCA, serve different purposes.

Application of these principles

[44] In this case, the fifth respondent claims cancellation of the instalment sale agreement in the *same letter* as the notice of default to the purchasers of their arrears. This is problematic because it bypasses compliance with section 19 of the ALA and does not afford the purchasers a reasonable time to manage their debts.

[45] The fifth respondent was obliged to record the instalment sale agreements with the Registrar of Deeds within 90 days of concluding the agreements with the applicants, but failed to do so timeously. The fifth respondent eventually recorded them more than ten years after the conclusion of these agreements and the occupation of the houses by the applicants during that time. It is common cause that the instalment sale agreements were recorded on 1 April 2014. The section 129 NCA notices were issued on 25 April 2014. These notices contained the following information: that the applicants were in default and were advised of their options under the NCA. The fifth respondent also threatened cancellation. At the end of that notice, it was merely stated that these agreements had been recorded. This was the very first communication to the applicants of the recording of the instalment sale agreements by the fifth respondent.

[46] As the fifth respondent was statutorily barred from accepting payment, the applicants could not have been in breach of the agreements at the time of receipt of the section 129 NCA notice, as they had not been aware of the recordal of the instalment sale agreements before that date. The fifth respondent should have alerted the purchasers to this fact before issuing the section 129 NCA notices and claiming cancellation of the agreements. In the proper course of action, the fifth respondent

should have advised the applicants of the recordal, therefore signalling that the debt would then be due and payable, and given them a reasonable opportunity to pay, before moving to enforce the agreement and subsequently cancel the agreement.

[47] Even if the section 129 NCA notice can additionally serve the purposes of section 19 of the ALA it does not, on the facts here, suffice. The actual notice falls short of the requirements set out in section 19 of the ALA as discussed. Having regard to both the plain meaning of section 20 read with section 26 of the ALA and the case law referred to, the effect of the late recordal is clear. The payments under the instalment sale agreements were not due and payable and therefore the applicants were not in arrears as contended by the fifth respondent. For the period that the agreements remained unrecorded, no fault can be imputed to the purchasers for not paying the instalments. It follows that the recordal is not a contractual suspensive condition as contended by the fifth respondent and obligations do not become due retroactively. The interpretation of these sections, in my view, will not have unfair consequences on the seller. It is consistent with the text and fairly balances the rights and responsibilities of the seller and purchaser.

[48] It follows that the section 129 NCA notices were premature and invalid insofar as it was relied upon as a basis for the cancellation of the instalment sale agreements. The effect of this is that the subsequent cancellation of the instalment sale agreements and the cancellation of the recording of these agreements are invalid.

[49] This conclusion will affect the subsequent sale of the properties to the Trust. However, this issue was not ventilated in the High Court. I will refrain from making a finding on the validity of the sale of the properties to the Trust, as it is an affected party and has to be given the opportunity to make representations on this.

[50] My conclusion on the effect of the late recordal of the instalment sale agreements renders it unnecessary to consider the issue relating to the ingredients of the section 129 NCA notice. However, I am constrained to deal with this issue in the

light of the conclusion of the High Court that a section 129 NCA notice need not include the amount of arrears owed by the debtor. The finding of the High Court has far-reaching implications not only for this case but also for other credit providers and consumers. It is thus imperative that clarity be provided on the interpretation of the meaning of the phrase "bring *the default* to the attention of the consumer". I proceed to deal with that question.

Does section 129(1) require a credit provider to state the amount that is owed?

[51] Simply put, what are the ingredients of a section 129(1) notice? Is it mandatory to include the amount of arrears in the notice?

Submissions by the parties

[52] The applicants submit section 129(1) of the NCA must be interpreted harmoniously with section 19 of the ALA. They contend that the text of section 129(1) mentions "the default" which refers to a specific debt that the consumer owes to the creditor, and it is the notice of this default that must be brought to the consumer's attention. They assert that this is not an onerous obligation upon the creditor. Given the long history of this matter and the uncertainty regarding the effect of non-recordal, it is difficult for the debtors to determine how much they owe in order to fully exercise their rights. The applicants contend that this is consistent with the interpretation adopted by this Court in *Nkata*.[20]

[53] The fifth respondent submits that it must be accepted that the section 129 NCA notices contained the arrear amounts. It further contends that the notices would in any event not be invalid if they did not contain the arrear amounts and accordingly, it is not a legal requirement that notices issued in terms of section 129(1) of the NCA must indicate the amount of alleged indebtedness. The fifth respondent contends that it is only required that the default must be "sufficiently"

[20] *Nkata* above n 13 at paras 62-6.

drawn to the consumer's attention; that it is only logical that all a debtor needs to do is to contact the creditor to establish the amount outstanding, bearing in mind that the NCA does not purport to come to the aid of reckless or irresponsible consumers.[21] Alternatively, the fifth respondent submits that this matter should be remitted to the High Court for further evidence in order to prove that the notices did in fact contain the amounts owed by the debtors. In this regard, it has made an application to admit new evidence. The fate of that application will become apparent in due course.

[54] The WLC submits that the purpose of a section 129(1) notice is to explore alternative mechanisms for the payment of a debt. An overly technical approach to interpretation works to the detriment of the rights of vulnerable women. The WLC submits that the intention of social housing schemes such as those implemented by the fifth respondent cannot be to leave the beneficiaries in a worse off situation.

Assessment

[55] It must be borne in mind that a purposive interpretation, as laid out in section 2(1) of the NCA must be adopted. The relevant purposes of the NCA are—

> "[to] promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by—
>
> . . .
>
> (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
>
> (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by—
>
> . . .
>
> (iii) providing consumers with protection from … unfair or fraudulent conduct by credit providers …;
>
> . . .

[21] Id at paras 6-13.

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."[22]

[56] The purposes of section 129 of the NCA are as follows:

(a) It brings to the attention of the consumer the default status of her credit agreement.

(b) It provides the consumer with an opportunity to rectify the default status of the credit agreement in order to avoid legal action being instituted on the credit agreement or to regain possession of the asset subject to the credit agreement.

(c) It is the only gateway for a credit provider to be able to institute legal action against a consumer who is in default under a credit agreement.

[57] This section reveals that in the event of the consumer being in default of her repayments of the loan, the credit provider is obliged to draw the default to the attention of the consumer. It prescribes that the notice given to the consumer must be in writing and specifies what the notice must contain. The notice must propose the options available to the consumer who is in financial distress and unable to purge the default. It must point out that the consumer has the option to refer the credit agreement to a debt counsellor, dispute resolution agent, consumer court or ombudsman. The purpose of the referral must also be stated in the notice.[23]

[58] There are two statutory conditions which must be met before the credit provider may institute litigation under section 129. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before (a) providing notice to the consumer; and (b) meeting further requirements set out in section 130.

[22] Section 3 of the NCA.

[23] *Kubyana* above n 1 at paras 20-1.

[59] The reference to section 130 reveals a strong link between the two provisions hence they are required to be read together. When a credit provider seeks to enforce the agreement by means of litigation, it must first show compliance with section 130, which, by extension, refers back to section 129.[24] The application of these sections is triggered by the consumer's failure to repay the loan. These sections suspend the credit provider's rights under the credit agreement until certain steps have been taken. The credit provider is not entitled to exercise its rights immediately under the agreement. It is first required to notify the consumer of the specific default and demand that the arrears be paid. If the consumer pays up the arrears, then the dispute is settled.[25]

[60] Section 129(1) of the NCA refers to a situation where the consumer is "in default". Section 129(1)(a) and (b) explain the obligations that the creditors must fulfil before moving to enforce their debt. The text explicitly refers to "the default" that must be drawn to the notice of the consumer by the creditor – and not just the fact that the consumer is "in default". Read in conjunction with section 130(4) which provides an opportunity to the debtor to remedy the default, section 129(1) should be interpreted to include the amount so that the debtor knows how much to pay to avoid cancellation. The same applies to the notice under section 19 of the ALA.[26] In addition, in order to "provid[e] consumers with adequate disclosure of standardised information in order to make informed choices"[27] they must be informed of the extent of their arrears in the section 129 NCA notice so as to decide how to move forward regarding the management of their debt.

[61] It is thus a necessary requirement to specify the amount and nature of the default in the section 129 NCA notice. As section 129(1) specifically requires the

[24] Id at para 73.

[25] Id at para 68-70.

[26] See [43] and [47].

[27] Section 3(e)(ii) of the NCA.

credit provider to "draw the default to the attention of the consumer" it is clear that this will only be met if the amount of arrears is specified in the notice, since the consumer's attention will not have been drawn to the amount of the default otherwise. If the basis of the default is that the debtor has fallen into arrears, it must follow axiomatically that "drawing the default to the attention of the consumer" entails that the consumer should be advised of the amount in arrears. It is only when this has been done that it can be said that notice of the "default" has been drawn to the attention of the consumer.

[62] If the consumer is not advised of the arrear amount she will be left none the wiser. The referral by the consumer of the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction presupposes that the consumer has been apprised of the facts to enable her to, amongst others, develop and agree on a plan to bring the payments under the agreement up to date. One may rhetorically ask: how is the consumer to agree on a plan to bring payments under the agreement up to date if she is not notified of the amount in arrears?

[63] This Court in *Nkata* held that the onus is on the credit provider to take appropriate steps if it wants to recover the cost for enforcing an agreement with the consumer.[28] The creditor is in a better position to determine the amount of the debt and must be required to stipulate the amount owed by the debtor. The burden of determining the amount is an onerous one to place upon the consumer, as the consumer may not be aware of complex calculations that are to be taken into account while calculating interest. On the other hand, it will be significantly easier for the creditor to state the amount concerned. After all, it is the credit provider itself that claims that the consumer is in arrears with her payments.

[28] *Nkata* above n 13 at para 122.

[64] In the result, a section 129 NCA notice must specify the default – that is, the actual amount of the arrears. The High Court thus erred in its conclusion that it was not essential that the section 129 NCA notices set out the amounts in which the applicants were in arrears.

[65] Since the cancellation of the instalment sale agreements and the cancellation of the recordals are invalid, it follows that the instalment sale agreements are extant and the applicants have payment obligations pursuant thereto, arising from the date of recordal. The fifth respondent will have to calculate the amounts and inform the applicants accordingly.

Should the new evidence be admitted?

[66] On 16 March 2018, the fifth respondent filed an application to introduce new evidence. This is an affidavit by the Chief Operations Officer of the fifth respondent explaining how the applicants' attorneys did in fact receive copies of the section 129 NCA notices in which the arrear amounts were included by the fifth respondent, but had been deleted.

[67] I have already concluded that the applicants were not obliged to make payment until the instalment sale agreements were recorded. On recordal, the fifth respondent was obliged to provide the applicants with an opportunity to make payment before issuing the section 129 NCA notice in which it simultaneously claimed payment and cancellation of the agreement. It is therefore not necessary to consider the application for admission of new evidence, and that application falls to be dismissed.

Outstanding issues

[68] There are two outstanding issues that must be dealt with before considering the appropriate remedy in this case. The first relates to the withdrawal of the Department of Human Settlements and the second to the sale of the properties to the Trust.

Withdrawal of first amicus curiae

[69] The Department of Human Settlements was initially admitted as first amicus curiae. However, six days before the hearing and after the parties had already responded to the Department's written submissions, a notice of withdrawal was filed without any explanation and without a tender for costs.

[70] The role of an amicus curiae was described by this Court in *Treatment Action Campaign*:

> "The role of an amicus is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court." [29]

[71] The Department is responsible for ensuring that the government housing subsidy is accessible to low to middle income groups in furtherance of their right of access to adequate housing in terms of section 26 of the Constitution. It is the only entity that can assist the Court regarding the impact of the fifth respondent's cancellation of the instalment sale agreements upon the subsidy amount granted to the fifth respondent to implement the housing scheme. The Court thus takes a serious view of the withdrawal by the Department without reasons, as the Department is the only entity that can provide information to the Court on the conditions of the financial arrangements regarding the institutional subsidy and the constitutional implications of the fifth respondent's management of that subsidy. Regard must also be had to section 165(4) of the Constitution, which specifically states that "[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts". The

[29] *In re: Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* [2002] ZACC 13; 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) (*Treatment Action Campaign*) at para 5.

withdrawal of the Department amounts to an abrogation of its duty to assist the Court in this matter.

Validity of the sale of the properties to the Trust

[72] The trustees elected to abide the High Court's decision and did not participate in the proceedings in this Court. They took the same stance in the High Court. The Trust is an affected party in respect of the validity of the sale of the impugned properties. However, this issue has not been ventilated in the High Court. This Court thus cannot pronounce on this issue without *all* the affected parties in this instance making representations. Accordingly, no order in that regard will be made.

Remedy

[73] It follows that the cancellation of the instalment sale agreements was premature. The effect of this is that the subsequent cancellation of the instalment sale agreements and the cancellation of the recording of these agreements are also invalid. The appeal must thus succeed and the order of the High Court be set aside.

[74] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court of South Africa, Western Cape Division, Cape Town is set aside and replaced with:
   "(a) The application is upheld with costs.
   (b) The cancellation of the instalment sale agreements by the Cape Town Community Housing Company (Pty) Limited is unlawful and is set aside.
   (c) The cancellation of the recordal of the instalment sale agreements by the Registrar of Deeds is set aside."
4. The application of the Cape Town Community Housing Company (Pty) Limited to adduce new evidence is dismissed with costs.

5. The Cape Town Community Housing Company (Pty) Limited is ordered to pay costs.

For the Applicants:	M Bishop and R Matsala instructed by the Legal Resources Centre.
For the Fifth Respondent:	D C Joubert SC and R M G Fitzgerald instructed by A Parker & Associates.
For the Amicus Curiae:	S Samaai instructed by the Women's Legal Centre Trust.