IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

CC Case No: 212/17

SCA Case No: 423/2017

WCHT Case No: 5283/2016

In the matter between:

RIAAN MOGAMAT AMARDIEN	First Applicant
ELEVEN OTHERS	Second to Twelfth Applicants

and

THE REGISTRAR OF DEEDS	First Respondent
SHAUN WINGERIN N.O.	Second Respondent
GRAEME MICHAEL SHKOLNE N.O.	Fifth Respondent
NICOLA MARTINE COHEN N.O.	Fourth Respondent
CAPE TOWN COMMUNITY HOUSING COMPANY (PTY) LTD	Fifth Respondent

---

APPLICANTS' WRITTEN SUBMISSIONS

TABLE OF CONTENTS

I INTRODUCTION

1. The State – at all three levels of government – has for several decades sought to provide people with housing by subsidising the purchase of homes. One of the vehicles set up to realise that goal was the Fifth Respondent – the Cape Town Community Housing Corporation (**CTCHC**). The Applicants were beneficiaries of a scheme that allowed them access to a state subsidy in order to purchase houses from the CTCHC.

2. The houses were purchased in terms of instalment sale agreements (**ISAs**) where transfer would pass only when the final payment was made.[1] The agreements are governed both as ISAs under the Alienation of Land Act 68 of 1981 (**ALA**) and as credit agreements under the National Credit Act 34 of 2005 (**NCA**). They were concluded in the early 2000s.

3. The agreements did not proceed as intended. There are allegations of breach from both sides – non-payment by the Applicants and poor construction by CTCHC. However, it is now common cause that none of the ISAs were recorded at the Deeds Office as required by s 20 of the ALA until 2014. Following earlier litigation involving some of the same beneficiaries, it is also settled that CTCHC was not entitled to receive any payment until they did record the ISAs.[2]

4. CTCHC eventually complied with its obligation to record the ISAs on 1 April 2014. It did not inform the Applicants that it had done so. Instead, on or about

---

[1] Or if the purchaser exercised her right under s 27 of the ALA.

[2] *Katshwa and Others v Cape Town Community Housing Company (Pty) Ltd* 2014 (2) SA 128 (WCC). Judgment was delivered on 6 November 2013.

21 May 2014, it sent the Applicants notices in terms of s 129 of the NCA. The notices, for the first time, informed the Applicants that the ISAs had been recorded. It claimed that the act of recordal had immediately placed the Applicants in breach of the ISAs. It demanded that the Applicants pay the outstanding amounts within 20 days, failing which it would cancel the agreements.

5. There is a factual dispute about whether or not the s 129 notices mentioned the amount that was alleged to be owing. The version obtained by the Applicants did not include the amount. CTCHC insists the amount was mentioned. The dispute was not resolved by the High Court.

6. The Applicants did not respond to the s 129 notices.[3] On 23 June 2014 the CTCHC sold the Applicants' homes to the S&N Trust, represented by the Second to Fourth Respondents (**the Trust**). Although it purported to sell the Applicants homes in June 2014, the CTCHC only cancelled the ISAs with the Registrar on 4 May 2015. The very next day, the properties were transferred into the name of the Trust.

7. The Trust then proceeded to seek to evict the Applicants from their homes. That eviction application precipitated the current proceedings. The Applicants approached the High Court to set aside the transfer of their homes on a variety of grounds. The High Court dismissed the application.

8. Following directions issued by this Chief Justice, there are now two issues for determination:

[3] Before the High Court, there was a dispute about whether they received the notices. The Applicants accept for the purposes of this appeal that all the notices were delivered as required by the NCA.

8.1. Does s 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?

8.2. What is the effect on a purchaser's obligations if the seller fails to record an ISA as required by s 20 of the ALA?

9. We address each of those questions primarily as abstract questions of law, as that is how we understand the Chief Justice's directions. We refer to the facts of this case only for illustrative purposes, and to set out what the consequences would be of the various possible findings by this Court.

10. The remainder of these heads of argument are structured as follows:

10.1. **Part II** briefly summarises the proper approach to statutory interpretation in this context;

10.2. **Part III** considers s 129 of the NCA; and

10.3. **Part IV** addresses the ALA.

II STATUTORY INTERPRETATION

11. The primary issue in this case is the proper interpretation of the NCA and the ALA. Identifying the principles that govern this Court's approach to statutory interpretation is therefore vital. We emphasise two elements: (a) s 39(2) of the Constitution; and (b) purpose and context.

Section 39(2)

12. The guiding light for interpreting statutes is s 39(2) of the Constitution, which requires that courts interpreting "*any legislation … must promote the spirit, purport and objects of the Bill of Rights.*" As the Court put it in *Makate v Vodacom*, s 39(2) means that courts are "*bound to read a legislative provision through the prism of the Constitution.*"[4] This obligation is "*activated*" whenever "*the provision under construction implicates or affects rights in the Bill of Rights*".[5] There are three further elements of s 39(2) that bear mention.

13. First, where a provision is capable of more than one meaning, s 39(2) has two effects:

    13.1. Courts must adopt "a *meaning that does not limit a right in the Bill of Rights*";[6] and

    13.2. Even if none of the interpretations limit a constitutional right, the court "*is required to adopt the interpretation which better promotes the spirit, purport and objects of the Bill of Rights*".[7]

14. Second, s 39(2) is not a licence to ignore the text of legislation. The legislation must be "*reasonably capable*" of bearing the assigned interpretation.[8] Or, as Sachs J put it in *SAPS v PSA*, s 39(2) "*require[s] that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution.*"[9] It is not any textual tension that must be avoided, but only "*undue*" strain.

---

[4] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) at para 87.

[5] Ibid at para 88.

[6] Ibid at para 89.

[7] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 46 (emphasis in original). See also *Makate* (n 37) at para 89 and *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 47.

[8] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079(CC); 2001 (1) SA 545 (CC) at para 24.

[9] *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC) at para 20 (my emphasis). The term "*unduly strained*" is drawn from *Hyundai* (n 41) at para 24.

15. Third, at the same time s 39(2) specifically, and the Constitution as a whole, embraces a new approach to interpretation. It requires courts to "*prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees*".[10] To achieve that goal, this Court has regularly adopted interpretations that appear to be at odds with a traditional, textualist approach to the statute.[11]

Purpose and Context

16. Whether or not the legislation implicates constitutional rights, our courts have eschewed the approach of "*blinkered peering at an isolated provision in a statute*" to determine its meaning. As Ngcobo J (as he then was) explained in *Bato Star*: "*The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.*"[12] The exercise of interpretation must instead focus on the purpose of the provision and the context in which it appears.

17. Purpose: In *Daniels v Scribante*, this Court emphasised that courts must adopt "*a purposive interpretation that is compatible with the mischief being addressed by the statute concerned.*"[13] That means that a court must determine the goal of a statute as a whole,

---

[10] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) at para 53.

[11] See generally, M Bishop & J Brickhill "'In the Beginning was the Word": The Role of Text in the Interpretation of Statutes' (2012) 129 *SALJ* 681.

[12] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90 (my emphasis). Endorsed in *Goedgelegen* (n 43) at para 53.

[13] *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 24.

and of a particular provision and seek, as far as possible, to interpret the legislation to further that goal.

18. Context: As Wallis JA has explained: "*Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise.*"[14] Or, as Lewis JA pithily put it: "*Words without context mean nothing.*"[15] The obligation to consider context is required by the Constitution.[16] Context, as Moseneke DCJ explained, includes two elements: "*the social and historical background of the legislation*" and "*the grid … of related provisions and of the statute as a whole including its underlying values.*"[17]

19. In the context of interpreting the ALA, Nkabinde J explained the proper approach as follows:

> "*The general rule of statutory construction is that courts will give unambiguous provisions of a statute their plain meaning unless that meaning creates a result that is contrary to the purpose of the statute itself or when it leads to an absurd result. The legislative history … in addition to the plain language, is also helpful in interpreting relevant provisions of a statute.*"[18]

20. Or, as Mhlantla AJ (as she then was) explained with regard to the NCA in *Kubyana*:

> "*It is well established that statutes must be interpreted with due regard to their purpose and within their context. This general principle is buttressed by section 2(1) of the Act, which expressly requires a*

---

[14] Ibid at para 25.

[15] *Novartis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) at para 28. See also *Goedgelegen* (n 43) at para 53 ("*Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.*")

[16] *Bato Star* (n 45) at para 91 ("*The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, section 39(2).*")

[17] *Goedgelegen* (n 43) at para 53.

[18] *Botha and Another v Rich N.O. and Others* [2014] ZACC 11; 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC) at para 29.

purposive approach to the statute's construction. Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms."[19]

III SECTION 129 OF THE NCA

21. This Part addresses whether a notice sent in terms of s 129 of the NCA must state the amount the credit provider alleges is owing. The wisdom of doing so seems self-evident. However, the High Court found that the statute does not require the credit provider to include this most basic information. The discussion proceeds under the following headings:

    21.1. The scheme and purpose of the NCA;

    21.2. The role of s 129;

    21.3. The need to state the amount; and

    21.4. The consequences of a finding in the Applicants' favour.

The Scheme and Purpose of the NCA

22. This Court has repeatedly considered the history and purpose of the NCA. Its findings can be summarised as follows.

23. First, the NCA was enacted to make "*a clean break from the past*" regulation of the credit industry.[20] That past was "*characterised by discrimination, a lack of transparency,*

[19] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 18.

[20] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 39.

limited competition, high costs of credit, and limited consumer protection."[21] Importantly, it did "*not adequately promote the rehabilitation of consumers, and the available debt relief could also not assist already over-indebted consumers to deal with their debt.*"[22] The NCA was intended to open up the credit market to new participants, while still protecting them from reckless credit.

24. Second, "*the main objective [of the NCA] is to protect consumers*".[23] That appears from s 3 of the NCA which sets out the Act's purposes in these terms: "*The purposes of this Act 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*".

25. Third, whilst consumer protection may be the primary purpose of the NCA, it is not "*relentlessly one-sided and concerned with nothing more than devolving rights and benefits on consumers without any regard for the interests of credit providers.*"[24] Instead, courts must "*strike a balance between [the] respective rights and responsibilities*" of consumers and credit providers.[25]

---

[21] *Sebola* at para 38, quoting Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' (2008) 20 *SA Merc LJ* 200 at 204-5.

[22] Ibid.

[23] *Sebola* at para 40.

[24] *Kubyana* at para 20.

[25] *Nkata* at para 94.

26. Fourth, the NCA "*seeks to infuse values of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate.*"[26] Moseneke DCJ explained this essential element of fairness and good faith as follows:

> "*Unlike in the past, the sheer raw financial power difference between the credit giver and its much needed but weaker counterpart, the credit consumer, will not always rule the roost. … Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. But the human condition suggests that it is not always possible – particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes do. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution.*"[27]

27. Fifth, a "*core innovation*" of the NCA is "*significantly consumer-friendly and court-avoidant procedures … designed to help debtors to restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls.*"[28] The Act "*encourages dialogue between consumers and credit providers*" in order to avoid litigation.[29] Or, as the NCA describes its purpose: "*providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements … which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements*".[30] While the Act encourages non-litigious solutions at all stages, as the Court noted in *Sebola*, "*access to debt counselling*

---

[26] Ibid.

[27] Ibid (our emphases).

[28] *Sebola* at para 59.

[29] *Nkata* at para 96.

[30] NCA ss 3(h)-(i).

and extra-judicial resolution will undoubtedly have their most potent impact when the guillotine is about to fall."[31] Section 129 is central to enabling consumers to take informed choices to avoid litigation.

28. Sixth, while the NCA establishes mechanisms to avoid litigation, it requires consumers to take advantage of those mechanisms. This Court has recognised the idea of the "*reasonable consumer*". Mhlantla AJ (as she then was) explained the point like this in *Kubyana*: "*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.*"[32] The notion of the reasonable consumer was the basis for the Court's decision that a consumer who was remiss in not collecting a registered letter could not avoid litigation to enforce a debt. However, as the Court also made clear: "*The notion of a 'reasonable consumer' implies obligations for both credit providers and consumers.*"[33]

29. Seventh, a clear purpose of the NCA is to ensure that credit agreements are transparent, and that consumers have access to all the information they need to make informed decisions. This appears from a number of sections:

    29.1. Section 3 expressly states that the NCA seeks to create a "*transparent*" credit industry.

    29.2. One of the more specific purposes listed in s 3 is "*addressing and correcting imbalances in negotiating power between consumers and credit providers by- … providing*

---

[31] *Sebola* at para 60.

[32] *Kubyana* at para 38.

[33] Ibid.

consumers with adequate disclosure of standardised information in order to make informed choices".[34]

29.3. Section 63 provides consumers with a limited right to receive information in an official language of their choice.

29.4. In terms of s 64, consumers have a right to receive information in "*plain and understandable language*". The provision defines that term as follows: "*a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and import of the document without undue effort*".[35] While the section goes to the form of the document, not its content, its purpose is obvious – to ensure that a consumer understands the meaning of the document and is able to make an "*informed choice*".

29.5. Section 108 grants consumers a right to receive regular statements of account, ordinarily every month or two months.

29.6. In terms of s 110, a consumer has a right, at any time, to demand a statement of her balance, or amounts due or overdue. The statement must be delivered within 10 days.[36]

30. Jointly, these provisions establish that the NCA intends to ensure that consumers have all the information necessary to exercise both their rights and responsibilities.

---

[34] NCA s 3(e)(ii).

[35] NCA s 64(2).

[36] NCA s 110(2)(a). 20 days if the information relates to a period more than a year before the request was made. NCA s 110(2)(b).

The Role of s 129

31. The key provision is s 129(1). It reads:

> "*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.*"

32. As this Court has pointed out, although the requirement to send notice is framed in permissive terms, it is in fact a mandatory pre-litigation step as the credit provider cannot proceed to court unless the notice has been sent.[37] Section 130(1) prevents the credit provider from approaching a court to enforce the agreement until 10 business days have elapsed from the time the credit provider delivered the s 129 notice, and the consumer has either not responded, or has rejected the proposals.[38]

---

[37] *Sebola* at para 45.

[38] NCA s 130(1) reads, in relevant part:

> *(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-*

33. The central interpretive dispute is whether a credit provider can be said to have "*draw[n] the default to the notice of the consumer in writing*" if the s 129 notice does not mention the amount that the credit provider alleges is outstanding. To make that assessment, it is necessary to understand the role a s 129 plays.

34. In *Kubyana*, this Court explained that that the purpose of s 129 is two-fold:

> "*First, it serves to ensure that the attention of the consumer is sufficiently drawn to her default. Second, it enables the consumer to be empowered with knowledge of the variety of options she may utilise in order to remedy that default. As explained in* Sebola*, the aim of the provision is to facilitate the consensual resolution of credit agreement disputes.*[39] *It is important to emphasise this consensuality – both the credit provider and the consumer have responsibilities to bear if the dispute is to be resolved without recourse to litigation.*"[40]

35. The innovation of s 129 is that it is a "proposal" that the consumer utilise the alternative dispute resolution mechanisms established by the NCA. Section 129 mentions four: a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction. The debt counsellor serves different goals from the ADR agent, the court or the ombud:

> *(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), or section 129 (1), as the case may be;*
>
> *(b) in the case of a notice contemplated in section 129 (1), the consumer has-*
>
> *(i) not responded to that notice; or*
>
> *(ii) responded to the notice by rejecting the credit provider's proposals*".

[39] *Sebola* at para 46. In support of this conclusion Cameron J relied on section 3(h) of the Act, which states that one of the means of achieving the purposes of the Act is the provision of "a consistent and accessible system of consensual resolution of disputes arising from credit agreements" (modified original footnote).

[40] *Kubyana* at para 22 (our emphases).

35.1. A consumer will approach a debt counsellor if she acknowledges the default and is unable to satisfy the debt. The debt counsellor will attempt to assist the consumer to re-arrange her debt.[41]

35.2. The consumer will approach the ADR agent, the consumer court or the ombud if she has a dispute about the credit agreement, or the allegation of default.[42]

36. Accordingly, when a consumer receives a s 129 notice, she has the following five options:

36.1. Pay the outstanding amount within 10 days;

36.2. Approach a debt-counsellor to seek to re-arrange the debt;

36.3. Dispute the validity of the credit agreement or the existence of default before an ADR agent, the consumer court or an ombud;

36.4. Approach the credit provider directly to resolve a dispute or agree on new payment terms; or

36.5. Deny the default – either actively or by refusing to respond – and defend any enforcement action in court.

37. It is inherent in the scheme of s 129 and the NCA as a whole that the notice must enable the consumer to make an "*informed choice*" about which of those options to follow. As we explain in the next section, she can only do so if she is informed about the amount that is alleged to be owing.

---

[41] NCA s 86.

[42] NCA s 134.

Notice of Default Includes the Amount

38. The heart of this dispute is whether a s 129 notice that does not mention the amount that is alleged to be owing complies with the NCA. The Applicants advance five reasons why it does not:

    38.1. The text of s 129, and relevant case law, supports the Applicants;

    38.2. Omitting the amount frustrates the purpose of s 129, and the NCA as a whole;

    38.3. Including the amount places, at most, a trivial burden on the credit provider, while omitting it imposes a significant (and possibly insuperable) burden on the consumer;

    38.4. This Court's decision in *Nkata*[43] strongly supports the Applicants' reading;

    38.5. The High Court's reliance on *Phone-A-Copy*[44] was mistaken; and

    38.6. The Fifth Respondent was required to include the amount in terms of s 19 of the ALA.

39. Before addressing each submission in turn, we emphasise that this is not an attempt to avoid liability. It is about entrenching "*values of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate.*"[45] It is plainly inconsistent with those basic values to deliver a s 129 notice that does not mention, at least, the amount owing.

---

[43] *Nkata v Firstrand Bank Limited and Others* [2016] ZACC 12; 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC).

[44] *Phone-A-Copy Worldwide (Pty) Ltd v Orkin and Another* 1986 (1) SA 729 (A).

[45] Ibid at para 94.

The Text

40. The words that need to be interpreted are: "*draw the default to the notice of the consumer in writing*". The plain wording of the section suggests that the notice should specify the nature of the default and, most importantly, the amount owing. That is because it refers to "*the default*". It is a specific default, not the abstract notion of default that the credit provider is required to draw to the consumer's attention. That implies that the default must be described in sufficient detail for the consumer to understand it. The amount is the most obvious part of that assessment.

41. That interpretation is tacitly supported by the only case we were able to locate that directly addresses the meaning of "*default*" in the NCA: *Nedbank Ltd v Thompson and Another*.[46] In that matter, the consumer was slightly in default as a result of an error by the payment distribution agency. The issue was whether the consumer had "defaulted" on a re-arrangement order in terms of s 88(3)(b)(ii) of the NCA. Gautschi AJ held that he had not. He reached that conclusion for two reasons: (a) because the default was not the consumer's fault; and (b) because the default was negligible:

> "*I baulk at the idea that I should grant judgment against the respondents for R949 012,15 and interest thereon, and declare their immovable property specially executable, because of an inadvertent default by their agent in the relatively insignificant net amount of R440,91 at the time that the application was launched … . In terms of s 2(1) of the NCA I am enjoined to interpret that Act in a manner that*

[46] 2014 (5) SA 392 (GJ).

> *gives effect to the purposes set out in s 3. Section 3 includes as a purpose of the NCA to protect consumers by 'promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers'. These sections would, I consider, require me to interpret the word* 'defaults*' in s 88(3)(b)(ii) to exclude minor, unwitting and excusable defaults of the nature which occurred here, with the result that I would for that reason too find that the requirements of s 88(3) had not been met.*"[47]

42. If the idea of default is linked to a notion of seriousness or non-triviality, then the amount must be mentioned in the s 129 notice for the consumer to assess whether she is, in fact, in default. That would be the reading consistent with the purpose of the Act.

43. The decision of Mogoeng JP (as he then was) in *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc*,[48] also supports this interpretation. The judgment holds that a s 129 notice must not only include a "*regurgitation*" or "*a dry and mechanical reproduction*" of s 129(1).[49] Instead the credit provider must add some "*flesh … to the skeleton*" of s 129 by making a proposal to the consumer that makes the notice "*alive and understandable*" to the consumer.[50] As the learned judge noted, "*this depends on the willingness and commitment, by especially the credit provider, to embrace the spirit of the Act.*"[51]

---

[47] Ibid at para 22.

[48] 2009 (3) SA 348 (B).

[49] Ibid at para 13.

[50] Ibid.

[51] Ibid. It is correct, as the High Court noted in this matter, that the approach in *BMW Financial Services* was not followed in *Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport* 2010 (5) SA 518 (KZP). However, Swain J held only that *BMW Financial Services* was wrong insofar as it sought to "*lay down a legal requirement, that the proposal by a credit provider in terms of s 129(1)(a) contain more information than what is expressly provided for in the section*". Ibid at para 13. It does not directly address the far more basic issue – should the notice include the amount alleged to be owing. Moreover, he seemed to acknowledge that a more detailed notice was "*desirable*", just not legally required. Ibid at para 12.

44. If s 129 is reasonably capable of an interpretation that it must include a more specific proposal in order to further the purpose of the NCA, it is certainly capable of an interpretation that it must mention the amount owing. At worst for the Applicants, both interpretations are textually plausible. As we point out next, excluding the amount frustrates the purpose of the NCA.

Frustrating the Purpose

45. The purpose of s 129 is: (a) to ensure that the attention of the consumer is sufficiently drawn to her default; and (b) to empower the consumer "*with knowledge of the variety of options she may utilise in order to remedy that default.*" That must be read with the core purpose in s 3(e)(ii) of enabling consumers "*to make informed choices*".

46. As noted earlier, a consumer has multiple options available to her when she receives a s 129 notice. Which option she will take will depend substantially on the amount that is alleged to be owing. That is so for two reasons:

    46.1. The consumer can only make an informed decision on whether she accepts she is in default if she is informed of the amount owing and, ideally, some basic information about how that amount was calculated.

    46.2. The consumer can only decide whether she is able to remedy the default on her own, or whether she needs to seek debt counselling, if she knows the amount in which she is in debt.

47. Those two determinations – whether she accepts the default and whether she is able to cure it – are essential for deciding whether or not the consumer will pay the

debt, approach a debt counsellor, refer the dispute to one of the ADR mechanisms, or fight the matter in court. If the consumer is unable to make those determinations, then she cannot make a reasonable choice about what course of action to follow.

48. And that will plainly frustrate the purpose of s 129. The purpose of satisfying responsible consumer obligations, utilising non-litigious dispute resolution mechanisms, and encouraging debt restructuring where appropriate are all obstructed if the consumer does not have the very basic information needed to decide which course to follow.

49. At best, it will result in additional delays as consumers who should have paid their debts seek debt review, consumers who should have sought debt review dispute the default, and consumers who believe they are not in default ignore the notice or go to court. Those delays – while they may not be fatal for any individual consumer – introduce additional inefficiencies and costs into the credit system. As this Court noted in *Sebola*, those are costs that are ultimately borne by consumers, not by credit providers.[52] Ensuring that consumers have the necessary information to make the best choice will increase efficiency and reduce costs.

50. It is good for <u>both</u> consumers and credit providers. Credit providers can have no interest in depriving consumers of the ability to make an informed choice about what course of action to take. Accordingly, the Applicants' interpretation is the

[52] *Sebola* at para 84.

one that best furthers the purpose of s 129(1). Unless there is some strong reason not to adopt it, it should be followed.

Relative Burden

51. The High Court held that a notice that does not mention the amount does not frustrate these purposes because the consumer can either calculate the amount herself, or ask the credit provider to inform her what amount is owing.[53] This is wrong because it fails to consider the relative burden of determining the amount on the consumer and the credit provider. While it is extremely burdensome for a consumer to assess the amount owing, it is a trivial matter for the credit provider to state what is owed.

52. First, the High Court failed to appreciate the nature and extent of the burden imposed on consumers. Modern credit agreements are often extremely complex. The interest owning shifts according to changes in the prime interest rate. They include charges in addition to repayment of capital and interest. But for many consumers, it may be impossible to determine what they owe on even the most basic credit agreement. The ability to exercise the rights in the NCA should not depend on a consumer's ability to perform arithmetic.

53. This point was made in 1983 by Grosskopf J when interpreting s 19 of the ALA. As we explain in more detail below, s 19(2)(a) of the ALA requires the seller to send a notice that includes "*a description of the purchaser's alleged breach of contract*". In

[53] HC Judgment at para 42: Record pp 52-3.

Oakley v Bestconstructo (Pty) Ltd, that was interpreted to mean that the notice specify the amount that is alleged to be outstanding.[54] As Grosskopf J explained:

> "*In my view, it would be an impossible task for the applicants to try to calculate the outstanding balance on a specific date. For example, it does not appear that she was aware of the extent of the municipal charges and fees, or that she knew at what rate interest should be calculated. The question is whether, in those circumstances, the respondent was obliged to inform the applicants by the notice of the precise extent of the obligation which she had to fulfil.*"[55]

54. In this case, interest is calculated at "*a rate of 6 (six) percentage points above the prime overdraft rate per annum from time to time charged by the seller's bankers (or any of them) on overdraft facilities to their most favoured corporate clients from time to time*".[56] It is difficult to understand how the Applicants were meant to determine that rate over a period of 14 years in order to calculate the amount owing.

55. In short, it is wrong to assume that it is possible for the average consumer to determine exactly what amount is owing at any time. That is precisely why s 108 of the NCA requires regular statements of account and why s 110 of the NCA entitles consumers to demand a statement of their account.

56. The possibility of approaching the credit provider to determine the amount owing is also not realistic:

---

[54] 1983 (4) SA 312 (T).

[55] Ibid at 318H-319A (our translation of the original Afrikaans, which reads: "*Na my mening sou dit 'n onbegonne taak vir die applikante gewees het om op enige spesifieke datum die uitstaande balans self te probeer bereken. Dit blyk byvoorbeeld nie dat sy bewus was van die omvang van die munisipale heffings en fooie nie, of dat sy geweet het teen watter koers rente bereken moes word nie. Die vraag is of die respondent in daardie omstandighede verplig was om die applikante deur middel van die kennisgewing in te lig wat die presiese omvang is van die verpligting wat sy moet nakom.*")

[56] Clause 5.1 of the ISAs.

56.1. Assuming the High Court's interpretation of s 129 is correct, the only other obligation in the NCA for the credit provider to inform the consumer what amount is owning is s 110. But that section is of little use once a s 129 notice has been sent. The consumer only has 10 days to act after the notice is delivered. And the credit provider has 10 days to respond to a request under s 110. So there is no guarantee that a request will be met in sufficient time for the consumer to exercise one of her options under s 129(1).

56.2. Assuming an informal request could be made, and the credit provider was obliged to respond, the High Court failed to understand the real burden of making such a request. A consumer must know that she is entitled to request the amount owing, even though the s 129 form will not tell her she has that right. She must know how to contact the credit provider. She must have the time and capacity to contact the credit provider whether by phone, email or some other means. And she must be willing to do so despite the obvious discomfort such a request is likely to cause. While for some consumers those hurdles may be minor, for others they will be extremely difficult to overcome. And poorer consumers will find them more difficult to clear than richer consumers. That is contrary to the NCA's purpose of opening up credit markets to those who were previously excluded.

56.3. Even if a consumer was able to make the informal request, doing so will necessarily reduce the time that she has to respond to the s 129 notice. The 10 days starts to run from the date the notice is delivered. It will often be

several days until the consumer in fact receives the notice. It will often take a day or more for even the most conscientious consumer to contact the credit provider to determine the amount owing. That reduces the time she has to approach a debt counsellor, or an ADR mechanism. For poorer consumers who lack the resources of money and time to make those approaches, every day counts. Reducing the time available by imposing a burden on them to approach the credit provider to determine the amount makes it more difficult for them to make proper use of their rights under the NCA.

57. Second, the High Court failed to compare the burden of asking the consumer to calculate or ascertain the amount, with the burden of requiring the credit provider to simply state the amount. It is virtually certain that, when a credit provider sends a s 129 notice, it will know not only that the consumer is in default, but the amount of the default. If the credit provider does not know the amount, it is difficult to believe that it would know the consumer is in fact in default.

58. Since the credit provider will already have knowledge of the amount, requiring it to include that information in the notice imposes no extra burden on the credit provider. Mogoeng JP made this point of comparative burden in *BMW Financial Services*: "*There is also room for the view that credit providers like the plaintiff, who seem to have the resources, are possibly expected to make s 129(1)(a) understandable and practical to their debtors.*"[57]

[57] *BMW Financial Services* at para 13.

59. The same assessment of ability to bear the burden was part of the motivation for this Court's judgments in *Sebola* and *Kubyana*. It held in *Sebola* that credit providers must show that a s 129 notice was in fact delivered by registered post to the correct post office. The Court accepted that this would "*complicate bulk despatches, but not significantly.*" But what mattered was that the Court "*stay true to the statutory scheme*" even if that *"adds some complexity to bulk processing of debt recoveries*".[58] In *Kubyana*, the Court held that requiring credit providers to establish whether a s 129 notice was in fact collected or not stretched that burden too far.

60. Here, the Applicants are asking the Court to endorse an interpretation that imposes far less of a burden on credit providers than was at stake in *Sebola* and *Kubyana*. As we have submitted earlier, that minimal burden is necessary to "*stay true to the statutory scheme*".

61. In sum, the credit provider should state the amount because it imposes a negligible burden, while requiring the consumer to calculate or ascertain the amount imposes an extremely high burden.

Nkata

62. In *Nkata*, this Court considered s 129(3) of the NCA, which read:[59]

> *"(3) Subject to subsection (4), a consumer may—*

[58] *Sebola* at para 83.

[59] Section 129(3) was subsequently amended by the National Credit Amendment Act 19 of 2014 (Amendment Act), which came into operation on 13 March 2015. However, the litigation in *Nkata* occurred prior to that amendment. Although s 129(3) is not directly relevant to this application, the notices in this matter also preceded the amendment.

> *(a) at any time before the credit provider has cancelled the agreement reinstate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement; and*
>
> *(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.*"

63. The question was what constituted the "*reasonable costs of enforcing the agreement*". In *Nkata*, the credit provider had not given Ms Nkata "*notice of the nature and extent of the legal costs. It had not demanded their payment properly or at all. Also, the legal costs were not shown to be reasonable. Their nature and extent had not been agreed to by Ms Nkata and had not been assessed for reasonableness by taxation or other acceptable means.*"[60] In those circumstances, was Ms Nkata obliged to pay the legal costs before she could avail herself of the benefit in s 129(3)?

64. Moseneke DCJ, writing for the Court, held that she was not. He agreed with the High Court that the burden lay on the credit provider to state the amount owing, not on the consumer to seek to extract that information. As the Deputy Chief Justice wrote:

> "*the consumer could not be expected to take proactive steps to find out what the costs would be for reinstatement to be effected. Neither could a consumer be expected to start taxation or agree with the credit provider on the quantification of these costs. The credit provider is required to take the appropriate steps if it wants to recover the costs for enforcing an agreement with the consumer.*"[61]

---

[60] *Nkata* at para 121.

[61] *Nkata* at para 122. See also *Nkata v Firstrand Bank Ltd And Others* 2014 (2) SA 412 (WCC) at para 43 ("*It might be said that, although [the credit provider's] legal costs were not yet due and payable, Nkata could not reinstate the agreement until those costs (whatever they might turn out to be) were paid. This would mean that a consumer could not reinstate an agreement without proactively taking steps to find out what*

65. As this Court went on to explain: "*By requiring a credit provider to demand separately payment of the reasonable costs of enforcing the agreement, the Act imposes a more transparent practice of billing – one which is in line with the purposes of the Act.*"[62]

66. The parallel with the present dispute is manifest. If the credit provider wishes to demand payment – which is what a s 129 notice does – it must "*take the appropriate steps*" and not require the consumer to take proactive steps to ascertain the amount owing. That interpretation "*imposes a more transparent practice of billing*" that advances the purpose of the NCA. The alternative has the opposite effect by unfairly and unnecessarily shifting a potentially exclusionary burden to the consumer. *Nkata* is strong persuasive authority to support the Applicants' interpretation.

Phone-A-Copy

67. The High Court sought to place significant reliance on the pre-constitutional decision of the Appellate Division in *Phone-A-Copy*. That reliance was misplaced.

68. In *Phone-A-Copy*, the Court was interpreting a very different statute: s 13(1) of the Sale of Land on Instalments Act 72 of 1971. It read:

> "*No seller shall, by reason of any failure on the part of the purchaser to fulfil an obligation under the contract, be entitled to terminate the contract or to institute an action for damages, unless he has by letter handed over to the purchaser and for which an acknowledgement of receipt has been obtained, or sent by*

---

those costs were and either reach agreement with the credit provider on the quantification thereof or initiate a taxation. I do not believe that such an approach would be consistent with the purposes of the Act. If the credit provider wants to recover the costs of enforcing the agreement from the consumer, the credit provider must take the appropriate steps. If the credit provider does not do so, and if in the meanwhile the consumer pays the full amount of the overdue instalments and any other amounts already due and payable, the agreement would be reinstated in terms of s 129(3)." Our emphasis.)

[62] *Nkata* at para 124 (our emphasis).

> *registered post to him at his last known residential or business address, informed the purchaser of the failure in question and made demand to the purchaser to carry out the obligation in question within a period stated in such demand, not being less than 30 days, and the purchaser has failed to comply with such demand.*"

69. As in this matter, the seller had sent a letter of demand which did not specify the amount owing. The purchasers complained that "*it was not possible for them to establish or calculate the balance outstanding … to enable them to comply with the demand*".[63] The Appellate Division rejected the argument. It held that the seller merely had to inform the purchaser of "*the failure to pay the balance of the purchase price and interest. What that balance was, was as readily capable of ascertainment by the purchasers as it was by the seller.*"[64]

70. In the High Court, Binns-Ward J seemed to conclude that this dictum had been approved by this Court in *Sebola*; although he conceded that the focus of this Cameron J's decision "*was on the issue of the effectiveness of delivery of the notice rather than the extent of detail required in its content.*"[65]

71. There are three reasons why the reliance on *Phone-A-Copy* was misplaced and should not persuade this Court.

72. First, generally, the decision interpreted a very different statute enacted in a different time, with a different purpose, and in a different constitutional and socio-economic context. Whatever the merits of the interpretation of a 1971 statute in 1986, it can have very little persuasive power in interpreting a 2005 statute in 2018.

---

[63] *Phone-A-Copy* at 750F.

[64] Ibid at 750G-I.

[65] HC Judgment at para 35: Record p 35.

As we have explained in detail, the NCA has a very specific purpose, context and structure. Section 129(1) must be interpreted in light of those concerns, not to impose artificial consistency with the interpretation of an earlier statute.

73. Second, as we have explained in detail, when the purpose of the NCA, the context of its enactment and its structural provisions are properly assessed, it compels the opposite conclusion reached in *Phone-A-Copy*. That is precisely because the NCA seeks to fairly balance the interests and obligations between consumers and credit providers. It also recognises the imbalance in knowledge and power between the two parties. It does not assume that consumers have the same ability to determine what is owing as credit providers.

74. Third, the High Court was wrong to suggest that this Court in any way endorsed the decision in *Phone-A-Copy* in *Sebola*. Binns-Ward J wrongly attributes the statements on *Phone-A-Copy* to Cameron J's majority judgment. In fact, the passage the learned judge refers to (paras 124-137) appears in the minority judgment of Zondo AJ (as he then was). The majority judgment does not even mention *Phone-A-Copy*. Nor is it mentioned in *Nkata* or *Kubyana*.

75. In any event, as the High Court rightly conceded that even Zondo AJ was considering solely the method of delivery. The passing reference to *Phone-A-Copy* could never be interpreted as endorsing the judgment with regard to a very different question.

Section 19 of the ALA

76. The High Court concluded that the Fifth Respondent was only required to send a notice in terms of s 129(1) of the NCA, and not a notice that complied with s 19 of the ALA. The reasoning was that s 172(1) of the NCA provides that the NCA prevails over the ALA to the extent of any inconsistency.[66]

77. The Applicants have not expressly appealed on the basis that the High Court erred on that issue. But the issue is relevant for a different reason. While the NCA prevails in the case of conflict, the first step of interpretation is to interpret the two acts to avoid any conflict. As was said as long ago as 1911: "*the language of every part of a statute should be so construed as to be consistent, so far as possible, with every other part of that statute and with every unrepealed statute enacted by the same Legislature*."[67]

78. Section 19 of the ALA, like s 129(1), requires the seller to send the purchaser a notice informing her of any breach and demanding payment before it can exercise rights under a contract. Section 19(2)(a) requires that the notice must "*contain a description of the purchaser's alleged breach of contract*". As noted earlier, that must include a statement of the amount owing.[68]

79. This statement is important for interpreting s 129(1) of the NCA for two reasons:

---

[66] NCA s 172(1) reads: "*If there is a conflict between a provision of this Act mentioned in the first column of the table set out in Schedule 1, and a provision of another Act set out in the second column of that table, the conflict must be resolved in accordance with the rule set out in the third column of that table.*" Chapter II of the ALA appears in the table. Chapter II of the ALA includes all the relevant provisions.

[67] *Chotabhai v Union Government (Minster of Justice) and Registrar of Asiatics* 1911 AD 13 at 24 (our emphasis). Quoted with approval in, for example, *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 18; *Genesis Medical Scheme v Registrar of Medical Schemes and Another* [2017] ZACC 16; 2017 (9) BCLR 1164 (CC); 2017 (6) SA 1 (CC) at para 148 (per Mojapelo AJ).

[68] *Oakley* at 318H-319A.

79.1. It shows that, contrary to the approach in *Phone-A-Copy*, courts do not always assume that consumers can determine the amount owing as easily as a seller or credit provider. Indeed, the ALA repealed and replaced the Sale of Land on Instalments Act which was at issue in *Phone-A-Copy*. The interpretation of the newer Act (albeit in an earlier judgment) emphasises that *Phone-A-Copy* should be confined to its specific context.

79.2. Section 129(1) of the NCA and s 19 of the ALA should be interpreted consistently. That can be achieved simply by requiring that the notice in s 129(1) – like the notice in s 19 – must state the amount alleged to be owing. There are no other inconsistencies between the two provisions that prevents a harmonious reading.[69] An agreement that is both a "credit agreement" in terms of the NCA, and an instalment sale agreement in terms of the ALA is covered by both sections. The seller/credit provider must send a notice that complies with both sections.

80. The notice that was sent to the Applicants was deficient because it did not comply with either s 19 or s 129.

[69] While the NCA allows the credit provider to act within 10 days after the notice is delivered, the ALA requires the seller to wait 30 days. This is not an irreconcilable inconsistency. The 10 days is a minimum. In order to read the statutes consistently, when the agreement is governed by the ALA, the period must be at least 30 days, which is still greater than the minimum of 10 days.

Consequences

81. If this Court disagrees with the High Court and upholds the Applicants' interpretation, what are the consequences? If the amounts were not included then the s 129 notices were defective. The subsequent cancellation of the ISAs was unlawful, and the sale and transfer of the properties to the Trust must be set aside.

82. But there is a factual dispute about whether or not the notices sent to the Applicants in fact included the amount or not. Because it found it did not matter whether the amounts were mentioned or not, that dispute (unlike the dispute about whether the notices were properly delivered) was not resolved by the High Court.[70] Nor can or should it be resolved by this court.

83. The correct approach is to remit the matter to the High Court to determine the factual dispute in light of the correct legal position.

III ALIENATION OF LAND ACT

84. The Applicants entered into ISA's with the CTCHC on various dates during December 2000 to March 2001. The ISAs are governed by Chapter II of the ALA and provide that the Applicants were to pay their monthly instalments on the last

[70] HC Judgment at para 43: Record p 53.

day of each month for a period of four years. The Applicants were each allocated a subsidy of R18 400, which was deemed to be the last payment.[71]

85. Section 26(1) of the ALA provides that:

> "*No person shall by virtue of a deed of alienation relating to an erf or a unit receive 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.*"

86. Section 26(2) makes it an offence for a seller to receive consideration contrary to s 26(1).

87. In *Katshwa v Cape Town Community Housing Co (Pty) Ltd*,[72] the Western Cape High Court confirmed that s 26 is applicable to ISAs entered into with the CTCHC. It also held that the CTCHC, as seller, is not entitled to any consideration in the event that it fails to register the ISA as required by s 20 of the ALA.

88. The prohibition in section 26 of the ALA affords protection to the purchaser and relates to any "consideration" which is defined[73] as the purchase price and the interest thereon. Accordingly, the CTCHC was precluded from receiving any payment of the instalments in respect of the Applicants properties until it recorded the ISAs with the Registrar of Deeds in accordance with section 20 of the ALA, which it failed to do until 1 April in 2014. This was over a decade after the Applicants had entered into their respective agreements with the CTCHC.[74]

---

[71] Founding Affidavit: Riaan Mogamat Amardien, page 12, paragraph 25

[72] *Katshwa v Cape Town Community Housing Co (Pty) Ltd and Four Similar Cases* 2014 (2) SA 128 (WCC)

[73] Section 1 of the ALA

[74] Founding Affidavit: Riaan Mogamat Amardien, page 13 – 14, paragraph 29 – 32

89. The question is what is the result of this late recordal. Does it mean that, at the moment of recordal, the Applicants were in breach of their obligations and the CTCHC was entitled to send a s 19 or s 129 notice? Or does it mean that the CTCHC was obliged to inform the Applicants of the recordal and afford them a reasonable opportunity to pay the amounts owed?

90. The Applicants submit that, in light of the constitutional rights at stake and the purpose of the ALA, the second interpretation must prevail. The argument is structured as follows:

    90.1. We consider the purpose of the ALA;

    90.2. We discuss the proper interpretation of s 26; and

    90.3. We address the consequences if the High Court's interpretation was incorrect.

Purpose of the ALA

91. There are three purposes of the ALA that are relevant to the determination of this matter:

    91.1. The need to protect vulnerable purchasers;

    91.2. The imbuing of good faith and fairness into contractual relationships; and

    91.3. The importance of recordal.

Protecting Vulnerable Purchasers

92. Both this Court and the SCA have held that the ALA exists to protect vulnerable purchasers. The history of the Act demonstrates that it was designed to address a specific social problem – purchasers who were rendered homeless or destitute as a result of the application of the common law and holes in the earlier 1971 Act.[75]

93. In *Merry Hill (Pty) Ltd v Engelbrecht*,[76] the SCA described the purpose of Chapter II of the ALA as follows:

> "*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 … . 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.*"[77]

94. The SCA repeated these sentiments in *Van Niekerk v Favel*.[78] Expanding on the types of purchasers that the ALA seeks to protect, it held:

> *"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*

[75] The history was considered by this Court in *Botha v Rich*.

[76] 2008 (2) SA 544 (SCA).

[77] Ibid at para 13 (citations omitted).

[78] *Van Niekerk and Another v Favel and Another* 2008 (3) SA 175 (SCA).

> *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.*"[79]

95. In *Sarrahwitz v Maritz N.O. and Another*, this Court too stressed that the ALA was designed to protect vulnerable purchasers.[80] The case concerned a constitutional challenge to the ALA to the extent that it did not protect cash purchasers from the consequences of the seller's insolvency. Mogoeng CJ emphasised that the ALA was intended to protect vulnerable purchasers:

> "*It could … never have been the purpose of the Land Act to protect all instalment purchasers regardless of the means at their command. The purpose could only have been to protect those who need protection. And these are vulnerable people who have no other place they could call home or lack the resources to acquire another, when the one they had is lost to the seller's insolvency. It defies logic that protection be extended even to those who have either more than one house or the capacity to acquire alternative decent accommodation.*"[81]

96. To cure the invalidity, the *Sarrahwitz* Court read into the ALA a definition of "vulnerable purchaser" as "*a purchaser who runs the risk of being rendered homeless by a seller's insolvency*" and extended the Acts protection to people in that position.[82]

---

[79] Ibid at para 12.

[80] [2015] ZACC 14; 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC).

[81] Ibid at para 35. The Chief Justice continued: "*Otherwise all property, including business premises, should also have been saved from the harsh consequences of insolvency. The fact that protection from this hardship is confined to residential property, coupled with the challenges in relation to home-acquisition that prevailed at the time and still do, points very strongly to only vulnerable purchasers being the targeted beneficiaries of the legislative intervention.*"

[82] Ibid at para 78.

97. The ALA must be interpreted to fulfil this purpose. It cannot be interpreted to assume equal bargaining power between the parties. Like the NCA it does not only create rights for purchasers, always at the expense of sellers. But its primary purpose is to protect purchasers from the risks of homelessness. An interpretation that increased that risk would be at odds with that purpose.

Fairness and Good Faith

98. Closely linked to the purpose of protecting vulnerable purchasers, the ALA also seeks to instil values of good faith and fairness in the relationships between purchasers and sellers.

99. In *Botha and Another v Rich N.O. and Others*[83] this Court considered whether a purchaser was entitled to demand transfer of property under an ISA in terms of s 27 if she had paid more than half the purchase price, although she was subsequently in arrears. This Court held that she was. More importantly, it stressed the obligations of fairness and good faith that are inherent in the ALA:

> "*The Act seeks to ensure fairness between sellers and purchasers. Its provisions are in accordance with the constitutional values of reciprocal recognition of the dignity, freedom and equal worth of others, in this case those of the respective contracting parties. The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard*

[83] [2014] ZACC 11; 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC).

> *to the other party's interests. Good faith is the lens through which we come to understand contracts in that way.*"[84]

100. The lesson for this matter is clear. In determining whether the High Court's approach is correct, this Court must determine whether it is consistent with the values of fairness and good faith for a seller to delay recordal, and then demand the full outstanding payment as if the purchaser was in default before she even knows the agreement was recorded.

The Purpose of Recordal

101. In *Botha v Rich*, Nkabinde J noted that the obligation to record the ISA was one of the primary consumer-protection measures introduced by the ALA. The value of recordal was that it "*gave purchasers the preferent claim over any mortgagee whose mortgage bond was registered against the title of the seller if the latter were insolvent or if the land were sold in execution.*"[85]

102. It is clear from the structure of the ALA that recordal is absolutely central. Not only is the seller precluded from receiving consideration on pain of criminal sanction until the contract is recorded, but the purchaser is entitled to cancel the contract if the seller fails to record the agreement within 90 days.[86] The prohibition in s 26, and the risk of cancellation are clearly meant to incentivise the seller to record the ISA.

---

[84] Ibid at para 46 (our emphasis).

[85] Ibid at para 32.

[86] ALA s 20(1)(b)(aa).

Interpretations of s 26

103. There appear to be three possible interpretations of s 26.

104. First, the **already due** interpretation adopted by the High Court. On this approach, all payments are due whenever they become due in terms of the contract. Section 26 only prevents a seller receiving those payments. As soon as the ISA is recorded in terms of s 20, those payments are already outstanding and the seller is entitled to exercise its rights without informing the purchaser that the ISA has been registered, or making any prior demand for payment.

105. Second, the **due on notification** interpretation. On this approach although the amounts become due in terms of the contract, the seller is not entitled to receive payment until after it has notified the purchaser that the ISA has been recorded and demanded payment of the outstanding amount. The seller must then afford the purchaser a reasonable time to pay the outstanding amounts (at least 30 days), before the purchaser can be in breach.

106. Third, the **not yet due** interpretation which holds that no amount is due in terms of the contract until the ISA is recorded. The first instalment under the ISA will only become payable when the ISA is recorded.

107. Either of the latter two interpretations would mean that the s 129 notices sent to the Applicants was premature because they were not in default when they were sent. Both are also better interpretations of the ALA in light of its history and purpose.

108. For the reasons set out below, the Applicants support the due on notification interpretation. It is more consistent with the text, while fairly balancing the rights and responsibilities of seller and purchaser. The not yet due interpretation, while attractive, is difficult to square with the text of the ALA.

The Due on Notification Interpretation

109. The Applicants submit that there are three reasons why the due on notification interpretation should prevail:

109.1. The text of the ALA and the underlying ISAs supports that reading;

109.2. The principles of fairness and good faith;

109.3. The right to housing;

The Text

110. There are two parts to the due on notification interpretation:

110.1. That the debt is due only once the purchaser is notified that the agreement has been recorded; and

110.2. That the purchaser then has 30 days, alternatively until the next instalment is due, to pay the outstanding amounts.

111. First, it cannot be that a purchaser can be in breach of the contract before she is even notified that the agreement has been recorded. Apart from the obvious

unfairness of such an approach, it is incompatible with the structures created by the ALA.

112. While s 26 prohibits the receipt of payments before an agreement is recorded, it creates two exceptions. One of those permits the purchaser to pay the instalments to an attorney or an estate agent to hold in trust for the benefit of the seller pending recordal.[87] On the High Court's approach, a purchaser who did this would be in breach the moment the agreement was recorded. The amounts would be due, and while held in trust would not have been paid to the seller. The legislature could not have contemplated that a purchaser who took this course would be in breach before even being informed of that the agreement had been concluded.

113. But the same must also be true of a purchaser who does not utilise the optional mechanism in s 26(3)(a) but keeps the money herself, waiting to be told that the agreement has been recorded. There is nothing in the text – and no reason in logic – why the recordal itself should trigger an obligation to pay, before the purchaser becomes aware of that fact.

114. Second, once the purchaser becomes aware that the agreement has been recorded, she must be afforded a reasonable opportunity to transfer the outstanding amounts – whether from a s 26(3)(a) trust account, or from any other source. The question is what that reasonable time is.

---

[87] ALA s 26(3)(a). The other allows the purchaser to pay the money to the seller provided the latter provides an irrevocable and unconditional guarantee if the agreement is not registered within a determined time. ALA s 26(3)(b).

115. Throughout the ALA, the period of 30 days is used as the default measure within which either party must act. It applies to: the seller's obligations with regard to mortgaged land;[88] the obligations of intermediaries;[89] the rights of a remote purchaser to receive a statement;[90] the obligation on the seller to provide the purchaser with a copy of the contract;[91] the calculation of the seller's obligation to provide statements of account;[92] the purchaser's protection from interest payments if the seller fails to send a statement of account;[93] and the period within which arrangements must be made if the owner becomes insolvent.[94] Most obviously, s 19(2) of the ALA requires the notice claiming breach by the purchaser to afford her 30 days to cure the alleged breach.[95]

116. It is built into the fabric of the ALA that 30 days is the default reasonable time within which a party must act. Although the time is not expressly stated with regard to the payment of outstanding amounts following a late recording, read purposively and contextually, it is consistent with the text to require the obligation to be met within 30 days.

117. The ISAs at issue in this contain nothing to suggest that 30 days is not a reasonable time.

---

[88] ALA s 7(1).

[89] ALA s 8(1).

[90] ALA s 10(2).

[91] ALA s 13(1).

[92] ALA s 16(1).

[93] ALA s 16(3).

[94] ALA s 22(2)(a)(ii).

[95] ALA s 19(2)(b).

117.1. Clause 17 of the ISA deals with breach. In line with s 19 of the ALA clause 17.3 requires the purchaser to send a notice to the seller before it can exercise its rights flowing from a breach. The notice must contain:

117.1.1. "*a description of the obligation which the purchaser has breached*";

117.1.2. "*a demand that the purchaser rectify the breach within a stated period which shall not be less than 30 (thirty) days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post*"[96]

It is only after the notice has been sent and the breach has not been remedied that the seller is entitled to exercise any of its available remedies.

118. In the alternative, the Applicants submit that any instalments that became due prior to the recordal are due whenever the next payment is due in terms of the agreement. If there is no further instalment due, then the outstanding amount must be paid within 30 days.

Fairness and Good Faith

119. What do fairness and good faith demand in this situation? As the ALA is founded on these principles, a determination is central to a proper interpretation of the Act. The following considerations seem relevant.

120. First, the Act not only permits purchasers to withhold payment pending recordal but makes it a criminal offence for the seller to receive payment. A purchaser that

[96] Clause 17.3.2 (our emphasis).

does not make any payments prior to recordal is not acting opportunistically or in bad faith. She is acting according to the structure of the Act.

121. Second, at the same time, the failure to record does not absolve the obligation to ensure that the money is available when the agreement is recorded. This appears (as the High Court pointed out) from the definition of "consideration" to include interest.[97] It also flows from the possibility of making payments under s 26(3) – there would be no need for those mechanisms if the first instalment could only be paid after recordal.

122. Third, accordingly where the seller fails to record, the purchaser's rights are limited. She can cancel the agreement.[98] She can register it herself.[99] Or, she can wait for the seller to record and set aside or invest the instalments pending recordal, either through a s 26(3) mechanism or in any other way. All three of those options are consistent with the ALA.

123. Fourth, while a purchaser is given options, we must remember that, generally, she is a "*vulnerable, uninformed small buyer of residential property who is no match for the large developer in a bargaining situation.*" It is vital to recognise the purchaser's autonomy and her vulnerability. Purchasers that do not take advantage of the mechanisms in s 26(3) should not be prejudiced.

124. Fifth, a purchaser who chooses to set money aside with the intention of paying the amounts when the contract is recorded, can only do so once she knows that

---

[97] HC Judgment at para 12: Record p 41.

[98] ALA s 20(1)(b)(aa).

[99] ALA s 20(1)(b)(bb).

recordal has occurred. It would be manifestly inconsistent with notions of good faith and fairness to hold that she is in breach from the moment the agreement is recorded, but before she is aware that has happened. The very idea of breach implies some sense of culpability. But in this situation there is none at all as the purchaser would not (and could not) even be aware that she is in breach.

125. Sixth, the distinction between recordal triggering breach, and recordal triggering an obligation to pay is immense. In the first case, the seller is immediately entitled to send a s 19 notice (or perhaps only a s 129 notice) demanding payment on threat of cancellation or court. In the latter case, the purchaser will still have an opportunity to pay before a s 19 (or s 129) notice can be sent. The latter clearly affords the purchaser more time (ordinarily 60 days as opposed to 10 days), and more protection from the possibility of a s 19 notice going astray.

126. Seventh, it does so at little cost to the seller who is merely required to wait slightly longer to receive payment. Given that any delay in payment is a direct result of the seller's delay in recording the contract, it is difficult to describe such a delay as in any way unfair.

127. Eighth, from the seller's perspective, it could never be fair or in good faith to act in the manner that CTCHC acted in this matter. CTCHC has sought to manipulate the processes to make it easier for it to cancel the agreements. It recorded the agreements more than a decade after they were concluded. It then sent a s 129 notice to the Applicants after the agreements had been concluded. It was only in those notices that the CTCHC informed the Applicants that the ISAs had been

concluded. The Applicants were then afforded only 20 days to pay the (unspecified) amount. And that when the CTCHC received R18 400 in subsidy for each house, amounting to R92 million in total.

The Right to Housing

128. This appeal squarely raises the right to adequate housing.[100] In *Sarrahwitz*, Mogoeng CJ stressed the importance of interpreting the ALA to promote the right of adequate housing. He recognised that "*Ms Sarrahwitz's right of access to adequate housing was or is at grave risk of extinction as a result of the sale in execution or the insolvency of the seller, respectively.*"[101] He spelled out the consequences for Ms Sarrahwitz should the Court not come to her aid:

> "*The very low income bracket within which she falls, the fact that she borrowed money from her then employer to buy the house, that she is unemployed and a financially under-resourced head of the family, means that she and her family would effectively be rendered homeless should the differentiation permitted by the scheme of the [ALA] be left to live on. The negative obligation that section 26 imposes on both the State and a private person like the trustee of the insolvent estate, is that none of them should prevent or impair existing access to adequate housing.*"[102]

129. The Applicants are all people who, like Ms Sarrahwitz, are from a low income bracket and have the opportunity of owning a house only because of a state-subsidised housing scheme. If they lose their present homes, their chances of owning a house again are small as they will no longer qualify for a state subsidy.

---

[100] Constitution s 26.

[101] *Sarrahwitz* at para 43.

[102] Ibid at para 45.

The Applicants have lived in their homes since the early 2000s and have had long-running disputes with the CTCHC about their homes and their payment obligations. But many of them have made substantial payments towards the costs of their homes. And until 2014 none of them had breached the agreements because there was no obligation to pay money to the CTCHC.

130. To interpret the ALA (as the High Court did) to permit the cancellation of the agreements, denying them the possibility of ownership, and likely leading to their eviction does not promote the right to housing.

131. The alternative interpretation advanced by the Applicants does not absolve them from responsibility, nor entitle them to a free ride. It merely grants them more time to consider their rights and obligations, and seek to comply with their agreements. It is a reasonable, constitutionally-defensible alternative.

Consequences

132. If the Applicants are correct, what does that mean for the resolution of this matter? It would mean that the s 129 notices were sent prematurely. At the time they were sent, the Applicants were not in default of their obligations as they had not been afforded the reasonable period of 30 days to pay the amounts that had become owing.

133. If the notice was premature, then everything that followed therefrom was unlawful and must be set aside: the sale to the Trust, the cancellation and deregistration of

the ISA, and the transfer to the Trust. Unlike a finding for the Applicants under the NCA, there is no need for remittal.

MICHAEL BISHOP

RIA MATSALA

Counsel for the Applicants

Legal Resources Centre and Chambers, Cape Town

15 January 2018

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

Case CCT 212/17

SCA Case No: 423/2017
WCHT Case No: 5283/2016

In the matter between:

RIAAN MOGAMAT AMARDIEN	First Applicant
ELEVEN OTHERS	Second to Twelfth Applicants

and

THE REGISTRAR OF DEEDS	First Respondent
SHAUN WINGERIN N.O.	Second Respondent
GRAEME MICHAEL SHKOLNE N.O.	Fifth Respondent
NICOLA MARTINE COHEN N.O.	Fourth Respondent
CAPE TOWN COMMUNITY HOUSING COMPANY (PTY) LTD	Fifth Respondent

---

APPLICANTS' TABLE OF AUTHORITIES

Legislation

1. National Credit Amendment Act 19 of 2014.
2. National Credit Act 34 of 2005.
3. Alienation of Land Act 68 of 1981.
4. Sale of Land on Instalments Act 72 of 1971.

Cases

1. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).
2. *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc* 2009 (3) SA 348 (B).
3. *Botha and Another v Rich N.O. and Others* [2014] ZACC 11; 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC).
4. *Chotabhai v Union Government (Minster of Justice) and Registrar of Asiatics* 1911 AD 13.
5. *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).
6. *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC).
7. *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC).

8. *Genesis Medical Scheme v Registrar of Medical Schemes and Another* [2017] ZACC 16; 2017 (9) BCLR 1164 (CC); 2017 (6) SA 1 (CC).

9. *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079(CC); 2001 (1) SA 545 (CC).

10. *Katshwa and Others v Cape Town Community Housing Company (Pty) Ltd* 2014 (2) SA 128 (WCC).

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

12. *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC).

13. *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA).

14. *Nedbank Ltd v Thompson and Another* 2014 (5) SA 392 (GJ).

15. *Nkata v Firstrand Bank Limited and Others* [2016] ZACC 12; 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC).

16. *Nkata v Firstrand Bank Ltd And Others* 2014 (2) SA 412 (WCC).

17. *Novartis v Maphil* [2015] ZASCA 111; 2016 (1) SA 518 (SCA).

18. *Oakley v Bestconstructo (Pty) Ltd* 1983 (4) SA 312 (T).

19. *Phone-A-Copy Worldwide (Pty) Ltd v Orkin and Another* 1986 (1) SA 729 (A).

20. *Sarrahwitz v Maritz N.O. and Another* [2015] ZACC 14; 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC).

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

22. *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC).

23. *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC).

24. *Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport* 2010 (5) SA 518 (KZP).

25. *Van Niekerk and Another v Favel and Another* 2008 (3) SA 175 (SCA).

26. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC).

Academic Authorities

1. M Bishop & J Brickhill "'In the Beginning was the Word": The Role of Text in the Interpretation of Statutes' (2012) 129 *SALJ* 681.

2. Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' (2008) 20 *SA Merc LJ* 200.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN, JOHANNESBURG

CC CASE NO: **212/2017**
SCA CASE NO: **423/2017**
WCHC CASE NO: **5283/16**

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

THE REGISTRAR OF DEEDS	First Respondent
SHAUN WINGERIN N.O.	Second Respondent
GRAEME MICHAEL SCKOLNE N.O.	Third Respondent
NICOLA MARTINE COHEN N.O.	Fourth Respondent
THE CAPE TOWN COMMUNITY HOUSING COMPANY (PTY) LTD	Fifth Respondent

---

FIFTH RESPONDENT'S WRITTEN ARGUMENT

A. INTRODUCTION

1. The applicants are herein referred to by their surnames where appropriate, the first respondent as "the Registrar", the second to fourth respondents as "the S&N Trust", the fifth respondent as "the CTCHC", and Department of Human Settlements (which has been joined as *amicus curiae*) as "the DOHS".

2. In these written submissions:

   2.1 Part B deals with relevant background facts;

   2.2 Part C deals with the proceedings in the Western Cape High Court ("WCHC"), in particular the issues raised therein and the findings made in respect thereof;

   2.3 Part D deals with the issues surrounding the question as to whether the notices in terms of s 129 ("the s 129 notices") of the National Credit Act, 34 of 2005 ("the NCA") did contain the arrear amounts. The following main submissions are made in this regard:

      2.3.1 On the papers it must be accepted that they did;

      2.3.2 That the notices would not be invalidated even if they did not contain the arrear amounts;

      2.3.3 In the alternative, that this issue ought to be remitted to the WCHC for the admission of the further evidence tendered by the CTCHC and, if necessary, the hearing of oral evidence in

respect of thereof. As has been explained in the CTHC's application for leave to introduce further evidence, the notices are still available in PDF format as attachments to an e-mail on the computer of the CTCHC's attorney, Ms Esmeraldo.

2.4 Part E deals with the issue of the validity of the cancellation of the ISAs.

2.4.1 The applicants contend in this regard that on a proper, constitutional interpretation of s 26 of the Alienation of Land Act, 68 of 1981 ("the ALA"), the CTCHC was obliged to first notify the purchaser that the ISA has been recorded, and afford him/her thirty days in which to pay the outstanding amount, before the purchaser can be in breach.

2.4.2 The short response to this is that, save that twenty days were afforded, this is precisely the procedure that was followed.

2.5 Part F deals with the submissions of the DOHS.

Constitutional issues and leave to appeal

3. On the basis that it must either be accepted that the s 129 notices did contain the arrear amounts or alternatively that the issue ought to be remitted to the WCHC for the admission of further evidence, it is submitted that that question itself does not raise a constitutional issue. Should this contention however not find favour, it is conceded that a constitutional issue is raised by the question as to whether, on a proper interpretation of the NCA, the s 129 notices must

contain the arrear amounts in order to be valid. This arises from the provisions of s 39(2) of the Constitution.

4. As regards the issue of the validity of the cancellation of the ISAs, it is accepted that this entails the interpretation of s 26 of the ALA which, again, implicates s 39(2) of the Constitution. The CTCHC accordingly does not object to leave to appeal being granted in order for this issue to receive this honourable Court's attention.

B. BACKGROUND FACTS

5. The CTCHC is a social housing development company, wholly owned by the National Housing Finance Corporation ("NHFC"),[1] and formed specifically to be a vehicle for the delivery of houses in compliance with the constitutional obligations of the City of Cape Town.[2]

6. It has been decided by the Full Court of the WCHC in the case of **Katshwa and Others v Cape Town Community Housing Co (Pty) Ltd and four similar cases 2014 (2) SA 120 (WCC)** that the CTCHC is not part of "the State" as contemplated in s 4 of the ALA and, accordingly, that it was indeed obliged to cause the recordal by the Registrar of instalment sale agreements in terms of s 20 of the ALA. Whereas the purchasers in **Katshwa** argued that the CTCHC does not form part of "the State", they (and the DOHS) now seek to place constitutional obligations relating to s 26 of the Constitution on it.

---

[1] At the time of concluding the ISAs with the applicants it was co-owned by the City of Cape Town.

[2] Amardien, founding affidavit para 33, Record Vol 1 p 20

7. The applicants are occupiers of houses that formed part of a social housing project that was developed by the CTCHC in Mitchell's Plain, Cape Town.

8. More particularly, they were beneficiaries of a government institutional subsidy which *inter alia* entailed that houses were sold to them in terms of instalment sale agreements ("ISAs")[3], as contemplated by Chapter 2 of the ALA, by the CTCHC. The ISAs were concluded, and occupation of the houses given to the applicants, between 2000 and 2003.

9. In passing, it is submitted that the evidence given by the applicants relating to alleged defects in the houses and poor treatment of them by the CTCHC is irrelevant for purposes of this matter. It must however be pointed out that the applicants' attempts at depicting the CTCHC as a reckless credit provider that provided substandard houses and that has in general adopted an unsympathetic stance towards the purchasers, has been thoroughly and effectively debunked in the answering papers in the main application.

10. Far from being an unsympathetic and irresponsible credit provider, the CTCHC, prior to concluding the ISAs, implemented a comprehensive pre-purchase procedure to identify qualifying beneficiaries. This entailed, *inter alia*, that prospective beneficiaries had to prove that they were able to pay the instalment amounts by a savings scheme and that information "workshops" were presented, attendance at which was certified by a certificate presented to prospective beneficiaries.[4]

---

[3] Their contracts were styled "Instalment Purchase Agreements", but for the sake of uniformity, these will be referred to as "ISAs".

[4] Jurgens, answering affidavit para 24, Record Vol 4 p 371

11. When beneficiaries complained of defective workmanship, the CTCHC, with funding from the City of Cape Town and without a contractual obligation to do so[5], *inter alia* embarked on an extensive remedial and affordability programme, by which defects were attended to and instalments reduced by reduction of interest rates and extension of the contract period. The applicants signed addendums to their ISAs[6] in terms of which they accepted the new, more generous terms, but continued to pay irregularly, if at all. The reason for this, they baldly contend, is that "... *When we still had no feedback from the Fifth Respondent regarding our reimbursements for the repairs we had effected and still received no audited accounting, many of us grew frustrated.*"[7] Upon being invited to provide any documentary or other proof of requests relating to such reimbursements for repairs,[8] the applicants in reply could only state that they do not have documentary proof of their demands, which were allegedly made verbally to the fifth respondent's representatives.[9]

12. The applicants' continued attempts at depicting the CTCHC (even in their written argument to this honourable Court) as a devious institution that followed strategies to deprive people of their right to houses, ought to be wholly rejected. The fact is that the applicants have to date not provided any cogent and legally competent reasons for defaulting on their instalments. They have in fact now been occupying the houses without paying, or even tendering to pay, the instalments for many years, thereby denying housing

---

[5] The beneficiaries did not follow the defect procedures set out in clause 7 of the ISAs. See Jurgens, answering affidavit para 26, Record Vol 4 p 872

[6] See for example "RMA16", Record Vol 2 p 198-204

[7] Amardien, founding affidavit para 51, Record Vol 1 p 24

[8] Jurgens, answering affidavit para 38, Record Vol 1 p 21

[9] Amardien, replying affidavit para 34, Record Vol p 20

opportunities to persons who are prepared to comply with contractual obligations.

13. Continuing the narrative, when the purchasers (including these applicants) fell in arrears with their instalments, the CTCHC successfully obtained eviction orders against them in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, during 2011. The eviction orders were overturned on appeal to the Full Court of the WCHC[10] on the basis that, since their ISAs had not been recorded in terms of s 20 of the ALA, instalments never became due and they could accordingly not have been in arrears. Their ISAs could accordingly not have been validly cancelled and they could not validly have been evicted.

14. The CTCHC then caused the ISAs to be recorded with the Registrar on 2 April 2014 (the tenth applicant's ISA was recorded on 11 April 2014).[11] The CTCHC contends that the applicants, after their ISAs were duly recorded, again defaulted on their ISAs which were thereafter duly cancelled, which cancellation was also duly recorded at the Registrar's office.

15. The CTCHC subsequently sold and passed transfer of the properties to the S&N Trust.

16. The S&N Trust then instituted eviction proceedings in the Mitchell's Plain Magistrate's Court against the first to sixth applicants and threatened eviction proceedings against the seventh to twelfth applicants. A point taken by the

---

[10] Per judgment delivered on 3 September 2013, reported as **Katshwa and Others v Cape Town Community Housing Co (Pty) Ltd and Four Similar Cases** 2014 (2) SA 120 (WCC)

[11] Jurgens, answering affidavit para 48, Record Vol 4 p 378

applicants in those proceedings is that their ISAs were not validly cancelled and that the sale of the houses by CTCHC to S&N Trust was also invalid.

17. The evictions proceedings were by agreement stayed pending the applicants' approach to the WCHC for declaratory relief to that effect.

C. PROCEEDINGS IN THE WCHC

18. In the High Court application, which is the subject of this application for leave to appeal, the applicants sought the following relief:

18.1 Setting aside the cancellation of the recordal of the ISAs;

18.2 Declaring the cancellation of the ISAs to be unlawful;

18.3 Declaring the sale of the properties to the S&N Trust unlawful and void.

19. The central issue underlying the application was the validity of the cancellation of the ISAs. As the court *a quo* put it,[12] this entailed three issues, namely:

19.1 Whether the applicants were in breach of their payment obligations under the contract. This question relates to the second cancellation, i.e. after the ISAs were recorded pursuant to the **Katshwa** appeal;

19.2 Whether the applicants were indeed given notice in terms of s 129 of the National Credit Act, 34 of 2005 ("the NCA") prior to cancellation;

19.3 Assuming notice had been given, whether the notices complied with s 129 of the NCA, given the applicants' contentions that the amount

[12] Judgment para 2, Record Vol 7 p 647

of their alleged arrears was omitted from the letters that were addressed to them.

20. The WCHC, in dismissing the application, made the following key findings:

20.1 That the instalments which the CTCHC was precluded from claiming during the period that the ISAs were not recorded, nevertheless became due and accrued during that period and became immediately payable upon the recordal of the contracts.[13]

20.2 That, on the evidence of the Post Office track-and-trace reports produced by the CTCHC, and by application of the *Plascon-Evans* rule, the applicants' denials of receiving s 129 letters were insufficient to displace the *prima facie* effect of CTCHC's evidence to the contrary. The applicants have accepted this finding.[14]

20.3 As regards the issue of alleged omission of the amounts of indebtedness in the s 129 notices, that on a proper interpretation of s 129(1) of the NCA, it is not essential that the notices set out the amounts in which the applicants were in arrears and it was accordingly unnecessary to consider their application for referral of the issue to oral evidence.[15]

21. The applications of the second to twelfth applicants were accordingly dismissed with costs. As regards Amardien, the question as to whether he had indeed received a s 129 notice, was referred to oral evidence.

---

[13] Judgment paras 8 – 15, Record Vol 7 pp 649 - 652

[14] Judgment paras 30 – 15, Record Vol 7 p 657

[15] Judgment para 43, Record Vol 7 p 63

22. The applicants' application for leave to appeal was dismissed by the WCHC, as was their subsequent application for leave to appeal to the SCA.

D. ISSUES SURROUNDING THE S 129 NOTICES

23. Pursuant to directions issued by the honourable Chief Justice, the parties have already filed written submissions in respect of the two issues referred to in sub-paragraphs 20.1 and 20.3 above. The written submissions already submitted by the CTCHC in this regard are for the sake of convenience repeated in, and accordingly replaced by, these written submissions, with some elaboration.

D.1 THE S 129 NOTICES DID CONTAIN ARREAR AMOUNTS

24. The fifth respondent remains steadfast in its assertion that it must be accepted on the papers before the honourable Court that the s 129 notices did in fact contain the alleged arrear amounts.

25. Since final relief was being sought in motion proceedings, the applicants could only be successful if the facts as stated by the respondent, together with the facts alleged by the applicant which have been admitted by the respondent, justify the granting of such an order, unless the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.[16]

26. It is respectfully submitted that the exceptions to the rule do not apply and, accordingly, that the issue had to be decided on the CTCHC's papers.

---

[16] **Placon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (AD) at 634H – 635C

27. Indeed, on the papers, the evidence by and on behalf of the applicants in their founding papers that they did not receive the s 129 notices must be rejected as false. In some cases the track-and-trace reports annexed to the CTCHC's answering papers showed that the notices were in fact collected[17]. Unsurprisingly, they simply declined to deal with this in reply. This places their credibility in serious doubt.

28. In assuring the Court that the letters did in fact contain the arrear amounts the CTCHC's attorney, Ms Esmeraldo, annexed her PDF records of the notices, which do contain the amounts. The applicants were expressly requested to produce the originals that they received (as the track-and-trace reports showed) in order to ascertain the truth of their evidence that the amounts of indebtedness were left blank.[18] The applicants have also been invited to inspect the CTCHC's computer, including an e-mail from Ms Esmeraldo to which PDF versions of the notices were attached.[19] That they have to this day not done so must attract an adverse inference.

29. It is accordingly respectfully submitted that this issue can be decided on the papers in the CTCHC's favour.

D.2 THE S 129 NOTICES WOULD IN ANY EVENT NOT BE INVALIDATED BY ABSENCE OF THE ARREAR AMOUNTS

---

[17] Jurgens, answering affidavit para 45, Record Vol 4 p 377

[18] Jurgens, answering affidavit para 47, Record Vol 4 p 377-8; Esmeraldo, confirmatory affidavit, Record Vol 5, p 467 a.f.

[19] Jurgens, additional affidavit para 9, Record Vol 7 p 683

30. This is the first of the two questions posed by the honourable Chief Justice per directions dated 29 November 2017.[20] The answer to the question must be found in the correct interpretation of s 129(1) of the NCA.

(a) Relevant principles of statutory interpretation

31. The point of departure in the interpretation of any statute is s 39(2) of the Constitution[21] which provides as follows:

> "(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

32. Human dignity, equality and freedom are identified in s 1 of the Constitution as the foundational values of the Republic of South Africa and as the democratic values affirmed in s 7(1) of the Constitution. They are the "triumvirate values" [22] that form the bedrock of the Constitution.

33. To the "mandatory constitutional canon of statutory interpretation" provided by s 39(2)(b) must be added the following two principles:

33.1 The purposive approach to interpretation which requires that the interpretation that best promotes the purpose of the legislation be

---

[20] Record Vol 11 p 1055

[21] This court stated in **Fraser v Absa Bank Ltd** 2007 (3) SA 484 (CC) at para [43] that s 39(2) "*...fashions a mandatory constitutional canon of statutory interpretation.*"

[22] **S v Mamabolo (ETV and Others Intervening)** 2001 (3) SA 409 (CC) para [41]. See also: **Cheadle *et al*: South African Constitutional Law: the Bill of Rights** at 33-2

adopted, during which process it is legitimate to "*...identify the mischief sought to be remedied*"[23];

33.2 The contextual approach in terms of which "*...the process of interpretation does not stop at a perceived literal meaning of (the) words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being*".[24]

34. This Court has succinctly combined and summarized the aforestated principles in **Kubyana**[25] thus (emphasis provided):

> "[18] It is well established that statutes must be interpreted with due regard to their purpose and within their context. This general principle is buttressed by s 2(1) of the Act, which expressly requires a purposive approach to the statute's construction. Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms."

35. Importantly, the Court went on to caution:

> "However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament."

36. To summarize the aforegoing, it is submitted that any statutory interpretation requires consideration of:

---

[23] **Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd** 2007 (6) SA 199 (CC) at para 53

[24] **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk** 2014 (2) SA 494 at para 12.

[25] **Kubyana v Standard Bank of South Africa Ltd** 2014 (3) SA 565 (CC) at para 18

36.1 the relevant framework of constitutional rights and norms;

36.2 the purpose of the legislation;

36.3 the context.

37. What follows are general comments regarding the relevant constitutional framework, the purpose of s 129 and the relevant context in which it is to be considered, and thereafter a discussion in which submissions are made supporting the conclusion that s 129(1) does not require the amount of the alleged debt to be stated in the notice.

(b) Section 129 placed within the relevant framework of constitutional rights and norms

38. It is submitted that care must be taken in distinguishing the specific issues that required resolution in cases such as **Nkata**[26] and **Sebola** and **Kubyana**,[27] and the present instance, namely (allegedly) the absence of an amount in the notices. Self-evidently, the question as to whether the purpose of the NCA has been met depends on the specific alleged defect.

39. Whilst any interpretation of the NCA in general clearly raises constitutional issues,[28] it is submitted that the specific question as to whether a s 129(1) notice must contain the amount of the indebtedness, does not directly implicate any of the rights enshrined in the Bill of Rights.

---

[26] **Nkata v Firstrand Ltd** 2016 (4) SA 257 (CC); Reinstatement of a credit agreement in terms of s 129(3).

[27] Methods and proof of delivery of s 129 notices.

[28] **Nkata** (*supra*) at para [33] (minority judgment of Cameron J)

40. In this regard it is respectfully submitted that the reliance by the applicants on the right to housing contained in s 26 of the Constitution is tenuous at best. The applicants do not fall in the category of the most vulnerable people. They qualified to be beneficiaries of this specific project, they have been occupying the houses for free for many years, and have not alleged convincingly, if at all, that they would be homeless if evicted.

41. Whilst obliquely referring to the right of **access** to courts enshrined in **s 34** of the Constitution, the applicants appear (correctly, it is submitted) to have attempted to develop such an argument in their written submissions.

42. However, the NCA, in the words of Moseneke DCJ[29] "*seeks to infuse values of fairness, good faith, reasonableness and equality...*" and it is accordingly submitted that these are the values that require consideration in resolving this particular question.

(c) Purpose of s 129

43. Section 2 of the NCA provides "somewhat redundantly"[30] that the Act "*must be interpreted in a manner that gives effect to the purposes set out in s 3*".

44. This Court has emphasized in cases such as **Sebola**[31] and **Kubyana**, the promotion of social and economic welfare of South Africans, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and the aim of protecting consumers, as being the main purposes of the NCA.

---

[29] **Nkata** (*supra*) para 94

[30] **Nkata** (*supra*) para 93

[31] **Sebola and Another v Standard Bank of South Africa Ltd and Another** 2012 (5) SA 142 (CC)

45. The Court, in **Kubyana**, however cautioned that[32] (emphasis provided):

> "[20] There can be no doubt that the Act is directed at consumer protection. However, this should not be taken to mean that the Act is relentlessly one-sided and concerned with nothing more than devolving rights and benefits on consumers without any regard for the interests of credit providers. No. For just as the Act seeks to protect consumers, so too does it seek to promote a competitive, sustainable, efficient and effective credit industry. This objective is to be attained by promoting responsibility in the credit market; 'encouraging responsible borrowing [and the] fulfilment of financial obligations by consumers'; discouraging contractual default; and adhering to a debt-enforcement system that prioritises 'the eventual satisfaction of all responsible consumer obligations under credit agreements'."
>
> [21] Thus, the promotion of equity in the credit market is to be achieved by balancing the respective rights and responsibilities of credit providers and consumers. It follows that the correct interpretation of s 129 is one that strikes an appropriate balance between the competing interests of both parties to a credit agreement."

46. As regards the purpose of s 129 in particular, the Court stated the following:

> [22] It is also fitting to have regard to s 129 in particular. This section sets out the procedures a credit provider must follow before enforcing a debt. Its purpose is twofold. First, it serves to ensure that the attention of the consumer is sufficiently drawn to her default. Second, it enables the consumer to be empowered with knowledge of the variety of options she may utilise in order to remedy that default. As explained in Sebola, the aim of the provision is to facilitate the consensual resolution of credit agreement disputes. It is important to emphasise this consensuality — both the credit provider and the consumer have responsibilities to bear if the dispute is to be resolved without recourse to litigation."

---

[32] At para [20]

47. In summary, it is submitted that, as far as the purpose of s 129(1) of the NCA is concerned, the resolution to the question at hand must take into account the following:

47.1 The notice must "*sufficiently draw*" the default to the consumer's attention.

47.2 The notice must empower the consumer with knowledge of the variety of options available.

47.3 In all this, it must be borne in mind that the Act is not intended to be relentlessly one-sided, and also has as its object the promotion of responsibility in the credit market.

(d) Context

48. Although the applicants do not expressly refer to context considerations, they do make submissions regarding s 19 of the ALA, which could be regarded as considerations of context. The applicants submit that s 129 of the NCA must be interpreted so as to conform as much as possible with s 19 of the ALA.

49. It is respectfully submitted that the reasoning employed by the applicants is flawed. The fact of the matter is that there is an inconsistency between the ALA and the NCA as regards the content of the required notice. Section 172(1) of the NCA provides, simply, that it prevails over the ALA in instances of conflict. The reasoning employed by the applicants has the opposite result – the ALA would prevail over the NCA.

(e) Discussion

50. It is respectfully submitted in the first instance that the reasoning of the WCHC in respect of this issue cannot be faulted. It is submitted, in particular that:

50.1 Whilst not referring to s 39(2) of the Constitution directly, the WCHC carefully considered the purposes of the NCA as set out in s 3 thereof and, by implication, the constitutional values of fairness and equality to which the purposes of the NCA are "directly attributable".[33]

50.2 The WCHC also considered the "*significantly consumer-friendly and court-avoidant*" character of the requirements of s 129 as emphasized by this honourable Court in **Sebola**.

50.3 It is respectfully submitted that the WCHC was correct in its reliance on the judgment of Swain J in **Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport**,[34] in which it was held that though it may be desirable to "flesh out", the requirements specifically laid down by s 129, this cannot result in the elevation of such an approach to that of a legal requirement, in the face of the clear wording of the Act to the contrary. It is, after all, only required that the default must be "sufficiently" drawn to the consumer's attention.

50.4 The reliance by the WCHC on **Phone-A-Copy Worldwide (Pty) Ltd v Orkin and Another**[35] was indeed very apposite. Although the

---

[33] **Nkata** (*supra*) para 96

[34] 2010 (5) SA 518 (KZP) [paras 6 – 13]

[35] 1986 (1) SA 729

case dealt with the now repealed Sale of Land on Instalments Act, 72 of 1971, the facts and the provision concerned were similar.[36]

50.5 The applicants, in their written submission,[37] seek to distinguish the cases on the basis that Act 72 of 1971 was "*a very different statute enacted in a different time, with a different purpose, and in a different constitutional and socio-economic context*". However, whilst it is obviously true that Act 72 of 1971 was enacted and **Phone-A-Copy** decided in the pre-constitutional era, the *ratio* for the finding by the erstwhile Appellate Division that the absence of the specific amount was not fatal to the notice, namely that the balance "*was as readily capable of ascertainment by the purchasers as it was by the seller*"[38] remains appropriate and relevant.

50.6 Lastly, it is submitted that there is unassailable logic in the fact, referred to by the WCHC, that all that 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.[39]

51. As the applicants submit, the credit provider will know the amount of the default[40] and it is submitted that the practical and logistical burdens on the

---

[36] Section 13(1) of Act 72 of 1971 required that a notice be sent to the purchaser in which he has been "*...informed...of the failure in question and made demand...to carry out the obligation in question...*" which, it is respectfully submitted, does not differ in any material manner from the operative provision in s 129(1)(a), namely that the credit provider "*may draw the default to the notice of the consumer in writing...*".

[37] Paras 71 - 74

[38] At 750I

[39] **Kubyana** at para 38

[40] Applicants' written submissions pursuant to first directions para 57

consumer, referred to by the applicants in the submissions, are more conjecture than real. A responsible consumer will immediately contact the credit provider upon receipt of the notice in order to establish the amount outstanding, and will immediately be given the necessary information.

52. The purpose of s 129 as explained in this Court in **Kubyana**, namely first, to ensure that the attention of the consumer is sufficiently drawn to her default and second, to empower the consumer with knowledge of the variety of options that may be utilized in order to remedy the default,[41] is accordingly not undermined by the mere fact that the actual amount of indebtedness does not appear in the notice.

53. Lastly, it is submitted that the values of fairness, good faith, reasonableness and equality are also not offended by this interpretation. Whilst it will undoubtedly make it more convenient for the consumer if the amount appears in the notice, it is not unfair or unreasonable to expect of her to make a simple enquiry. There is also no basis for concluding that the omission of the amount constitutes bad faith or that the requirement of equality is not met as a result such omission.

54. It is accordingly submitted that it is not a legal requirement that s 129(1) of the NCA must indicate the amount of alleged indebtedness.

D.3 IN THE ALTERNATIVE, REMITTAL TO WCHC FOR FURTHER EVIDENCE

[41] **Kubyana** at para 22

55. The principles regarding the admission of new evidence on appeal are trite[42], and are properly set out in the applicants' written submissions.

56. It is submitted, on behalf of the applicants, that there are four reasons (although only three reasons are actually given) why the new evidence should not be admitted.

57. The first reason is that there is no adequate explanation for why it was not provided at the hearing in the WCHC. It is contended that the CTCHC ought to have determined its version before it delivered its answering affidavit; instead it elected to accuse the applicants of altering the s 129 notices with tippex.

58. There is plainly a reasonable and adequate explanation as to why what is now sought to be adduced as new evidence was not adduced in the WCHC proceedings: the facts only came to light when Jurgens discussed the s 129 notices with Faizel Moos ("Moos"), the client services manager and the person who sent the s 129 notices to Ashersons Attorneys (the S&N Trust's attorneys) for the purpose of the eviction applications, in March 2017.[43] The WCHC heard argument on 31 January 2017, and delivered its judgment on 23 February 2017.[44]

59. Jurgens states on oath that he had been bothered by fact that the s 129 notices did not reflect the amounts from the outset, but his discussion with

---

[42] **Rail Commuters Action Group v Transnet Limited t/a Metrorail 2005 (2) SA 359 CC)** at para 43; these principles were affirmed in **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others** 2014 (1) SA 604 (CC) at [94]

[43] Jurgens, additional affidavit paras 4-6, Record Vol 12 p 1182

[44] Judgment Record Vol 7 p 646

Moos only took place on 17 March 2017.[45] It was then, for the first time, that Jurgens discovered that Moos had in fact tippexed out the amounts owing, on the basis the Moos considered the amounts to be commercially sensitive information.[46]

60. The application to adduce this new evidence was made soon thereafter, on 27 March 2017.[47]

61. Jurgens simply did not know that Moos had tippexed out the figures when the CTCHC delivered its answering affidavit in the WCHC proceedings, and so could not have 'determined', or put up this version then.

62. Since the true facts came to light it has consistently maintained that version, without deviation, at each stage of the proceedings thus far.

63. It is submitted that absent knowledge of the true state of affairs, it was entirely reasonable to assume that someone had tippexed out the amounts in the s 129 notices, especially in light of the fact that the fifth respondent's attorney, Esmeraldo, had PDF versions of the s 129 notices (all reflecting amounts) on her computer.[48]

64. It was, moreover, reasonable to assume that the applicants had tippexed out the amounts, as they put the s 129 notices up in that form, and their case

---

[45] It is not clear on what basis it is contended, in footnote 134 of the applicants' written submissions, that the fifth respondent "was aware of the situation once the Applicants filed their replying affidavits". It was only served on 1 August 2016 – see Record Vol 5 p 497

[46] Jurgens, founding affidavit in application to adduce new evidence, para 7.3, Record Vol 12 p 1175-6; Moos, confirmatory affidavit, Record Vol 12 p 1214

[47] Jurgens, founding affidavit in application to adduce new evidence, para 2, Record Vol 12 p 1174

[48] Jurgens, founding affidavit in application to adduce new evidence, para 8, record Vol 12 p 1176

largely hinges on the fact that the s 129 notices (they claim) did not reflect the arrear amounts.

65. In the premises, and in light of reasonable explanation put up (which the applicants are in no position to gainsay), the first reason cited is not a sufficiently good reason to refuse the admission of this new evidence.

66. The second reason cited is that the admission of the new adduce will mean that this honourable Court will have to determine a dispute of fact as a court of first instance.

67. That is indeed so, and so it is submitted that it would be appropriate to remit the matter back to the WCHC so that it can resolve this dispute of fact, as has in fact been suggested by the first applicant.[49]

68. However, the applicants also contend that the new evidence will not resolve the dispute of fact, but will rather serve to complicate it more.

69. In support of this, they contended that Moos' explanation is implausible, in that he does not explain why he thought that the amounts were commercially sensitive.

70. It is submitted that the explanation is not implausible. It may be that Moos did not understand the import of what he had done, or that he thought he had acted properly. He is a client services manager. There is no evidence that he has any legal training, and it is quite possible that he thought it better not to disclose the amounts to the purchasers' attorneys.

---

[49] Amardien, answering affidavit in application to adduce new evidence, para 12, Record Vol 12 p 1222

71. Reliance is also placed on Moos' email to Ashersons Attorneys.[50] It is contended that in that email he confirms that those are the actual letters that were sent to the applicants, and that he does not say that the quantum was deleted.

72. However, the applicants' contention as to what Moos actually said in his email is opportunistic. It may be that he was simply being expedient, in sending the letters to Ashersons without saying more.

73. Moreover, the applicants have not dealt with what Moos states in his confirmatory affidavit, namely that "*In particular I confirm that I tippexed out the amounts of indebtedness on s 129 letters that had been sent to the applicants in this letter, since I considered that information to be commercially sensitive.*"[51] He has thus confirmed his actions on oath.

74. Once again, the applicants simply cannot gainsay Moos' explanation, and they have not done so.

75. It is accordingly submitted that the second reason cited is also not a sufficiently good reason to refuse the admission of the new evidence

76. Further, the applicants complain that the original s 129 notices have never been placed before the court for inspection.

77. The original s 129 notices were sent to the applicants. All that the fifth respondent has in its possession now are the PDF versions on Esmeraldo's computer. Inspection of these was tendered, but the applicants have declined

---

[50] Annexure "WJ44", Record Vol 12 p 1185

[51] Annexure "WJ3" Record Vol 12 p 1214

to inspect them. The explanation for this is as follows: "*I do not believe there is any purpose in my attorneys inspecting computers at the [fifth respondent's] attorney of record. Insofar as it may prove necessary these matters will be further addressed in argument.*"[52]

78. It is submitted that this troubling statement, and the failure to inspect the PDF versions of the s129 notices on Esmeraldo's computer is telling. Plainly a purpose would be served by doing so. It could potentially resolve the whole dispute, and render this appeal moot, or academic. The applicants appear to have chosen to rather present themselves as victims of a devious, irresponsible and inefficient social housing provider, possibly to bolster their case on other aspects.

79. In any event, it is denied that the new evidence will confuse the matter. In contrast, it provides a plausible and reasonable explanation as to why the s 129 letters put up in evidence by the appellants do not reflect the arrear amounts.[53]

80. In the premises, the three reasons cited by the appellants as a basis to refuse admission of the new evidence ought to be rejected.

81. It is submitted that the aforegoing demonstrates that there are exceptional circumstances for the admission of this new evidence. The new evidence is weighty, material and credible. The existence of a reasonable explanation is not decisive, but is an important factor. Such a reasonable explanation has been put up: Moos tippexed the amounts out, and the CTCHC's deponent,

---

[52] Amardien, answering affidavit in application to adduce new evidence, para 21, Record Vol 12 p 1224-5

[53] The rule in ***Plascon Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd*** *(supra)* would in any event not apply against the CTCHC, but rather against the applicants here.

Jurgens only became aware of these facts in March 2017, as a result of which leave to adduce the new evidence was sought.

82. However, to the extent that a dispute of fact requiring oral evidence exists, which this Honourable Court cannot determine, then it is submitted that it is appropriate to remit the matter back to the WCHC so that it can resolve this dispute, a course of action also suggested by the applicants.[54]

E. SUBMISSIONS REGARDING VALIDITY OF CANCELLATION OF THE ISAs

83. It is submitted that what remains of the two questions which the honourable Chief Justice already previously directed the parties to address, is the effect of a late recordal of an Instalment Sale Agreement, considered with reference to s 26 of the Alienation of Land Act, 68 of 1981 ("the ALA").

84. As has been mentioned, the WCHC held that s 26(1) of the ALA contains a prohibition against receiving considerations while the ISAs are unrecorded, which is to be distinguished from the notion that the instalments do not fall due on their due dates.[55]

85. It is submitted that the distinction between a debt that came into existence and one that is payable is well established in our law[56] and that the facts of this case provide a particularly clear example of such a distinction. Moreover, it does not appear that the applicants take issue with the finding of the WCHC in this regard.

---

[54] Amardien, answering affidavit in application to adduce new evidence, para 12, Record Vol 12 p 1222

[55] Judgment paras 11 – 13, Record Vol 7 pp 650 - 651

[56] **List v Jurgens** 1979 (3) SA 107 (AD) at 121C-E; **Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd** at para [100]

86. Instead, the applicants contend for a "*due on notification*"[57] interpretation of s 26 in terms of which the seller would not be entitled to receive payment until after it has notified the purchaser that the ISA has been recorded and demanded payment of the outstanding amount. In terms of this interpretation the seller must then afford the purchaser a reasonable time to pay the outstanding amounts, namely at least 30 days, before the purchaser can be in breach.

87. The short response to the aforegoing is that that is precisely what occurred. The s 129 notices informed the applicants that the ISAs had been recorded, which on the applicants' own submissions rendered the historical debts due, and the applicants were simultaneously afforded 20 business days to pay same.

88. Again, in the light of the provisions of s 172(1) of the NCA, there is no reason to apply the 30 days required by the ALA as opposed to the 20 days required by s 130 of the NCA. The applicants in any event did not comply within 30 days nor did they even attempt to do so, and the issue is accordingly of academic interest only.

89. A more comprehensive response is as follows:

89.1 Clause 8.1 of the ISAs provides, under the hearing "Recording of Contract", as follows:

"8.1 The seller shall procure this contract to be recorded in accordance with the provisions of s 20 of the Act. If the

[57] Applicants' written submissions para 105

seller fails to do so the purchaser shall be entitled to procure such recording."

89.2 The reference to s 20 of the ALA by law introduces s 26(1)(b) which provides that:

"(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until –

(a) ...

(b) In case the deed of alienation is a contract required to be recorded in terms of s 20, such recording has been effected."

89.3 It is submitted that clause 8.1 of the ISA read with ss 20 and 26 of the NCA creates a suspensive condition in the ISA, namely that the payment of instalments shall not be due until recordal of the contract.

89.4 This construction has the following legal consequences:

89.4.1 When a suspensive condition is fulfilled, the obligation which it qualifies (being payment of instalments) becomes unconditional;

89.4.2 Fulfilment does not create a new obligation, but simply resolves the uncertainty which existed until then. The

contract becomes *negotium perfectum*, and the obligations become due retroactively.[58]

89.4.3 The condition suspending the obligation to pay instalments does not mean no obligations are created in the interim. The right to receive payments prior to recordal are conditional rights which may be ceded, are transmissible upon death, be taken into account upon insolvency and form the basis of a valid suretyship.[59]

89.4.4 The condition is immediately fulfilled upon the occurrence of the required act, and does not require notice to the other party. It is to be noted that neither the ALA, nor the ISAs provide for notice of the recordal to be given to purchasers.[60]

90. Lastly, in this regard it is submitted that the applicants' reliance on **Sarrahwitz v Maritz and Another 2015 (4) SA 491 (CC)** is misplaced.

91. **Sarrahwitz** dealt with a completely different set of facts and issues. The applicants in this case are not "vulnerable purchasers" as per the definition contained in the order of that Court. Moreover, in this case the applicants have not paid the purchase price for their houses and have in fact defaulted.

---

[58] **Van der Merwe *et al*: Constract General Principles** (4th ed) p 253; **Peri-Urban Areas Health Board v Tomaselli and Another** 1962 (3) SA 346 (AD) at 351G-H

[59] **Van der Merwe *et al*** (*supra*) at 254. See also **De Wet & Van Wyk: Die Suid Afrikaanse Kontraktereg en Handelsreg**, 5th Ed, at 151

[60] See e.g **Gallic Living (Pty) Ltd and Another v Belo** 1980 (1) SA 367 (WLD) at 371C-F; **Remini v Basson** 1993 (3) SA 204 (NPD) at 212E-I; **Phepeng and Another v Estate Combrinck and Others** 2017 (4) SA 266 (FB) at 270E – 271A

92. In fact, in that case, Ms Sarrahwitz's complaint was precisely that she did not enjoy the same rights as the purchasers in terms of ISAs, such as the applicants in this case.

93. It is accordingly submitted that the effect of the late recordal of an ISA is that it constitutes the fulfilment of a suspensive condition, which has the retroactive effect that the instalments which would have been payable but for the non-recordal, immediately become payable upon such recordal.

F. RESPONSE TO DOHS SUBMISSIONS

94. The DOHS indicated that it intended to raise four specific issues, according to it not dealt with by the parties, which submissions are stated to be unique and provide the Court with an opportunity of expanding the understanding of the constitutional obligations relating to s 26 of the Constitution. The DOHS submits that the WCHC failed to interpret the contractual rights of the CTCHC within the obligation to give effect to the rights in the Constitution.[61]

95. The four submissions are:

95.1 First, that the CTCHC's right to terminate the instalment sale agreements involving paid subsidies "*must be exercised only where it advances the constitutional right to access to adequate housing. Where such a right would result in homelessness as is the case in this matter, the right should be curtailed*".

[61] Tshangana, founding affidavit in admission as *amicus curae* application, paras 19 & 20, Record Vol 12 pp 1138 - 1140

95.2 Second, (which appears to be related to the first), that "*a decision to terminate an instalment sale agreement creates conditions of homelessness and therefore appears to be inimical to the very purpose for which a subsidy is offered by the State*". This is followed by the statement that "*The subsidy offered by government is not subject to an instalment sale agreement. The conclusion of an instalment sale agreement is to recover the investment made on the subsidy by a housing entity or a private party*".

95.3 Third, that "*It is the supreme constitutional duty of the fifth respondent to ensure that the right to housing, which is secured when a subsidy is paid to a housing entity, is not taken away from beneficiaries because of their failure to pay in terms of an instalment sale agreement*".

95.4 The fourth submission relates to the proper approach to interpreting s 19 of the ALA.

96. In response to all these submissions, the CTCHC submits as follows:

96.1 The applicants in this case have not persuasively, if at all, shown that they would be homeless if evicted. It is reiterated that they qualified as beneficiaries, which *inter alia* entailed that they had to show the ability to pay the instalments, which they have not done for approximately fifteen years. None of them has for example explained that they have met with some kind of misfortune, such as having become unemployed, or that they have become destitute.

96.2 The DOHS offers no solution as to what a social housing company such as the CTCHC must do when purchasers simply default. Somewhat surprisingly, the DOHS does not consider the constitutional rights of other persons who are willing and able to replace the defaulting applicants as purchasers of the houses concerned.

96.3 The DOHS also does not explain how the State subsidy system is to be implemented other than by the ISA scheme implemented by the CTCHC.

96.4 It is submitted that placing a "*supreme constitutional duty*" on the CTCHC, as contended, is simply too onerous even if the CTCHC were burdened with the constitutional obligations arising from s 26 of the Constitution. Again, no solution is offered as to what the CTCHC is expected to do when sellers simply default.

96.5 However, as has been alluded to, it has been held in **Katshwa** that the CTCHC is not part of "the State" as contemplated in Chapter 2 of the ALA. It is precisely that finding that placed an obligation on the CTCHC to record the ISAs in the first place and there is, with respect, some perversity in an approach which now seeks to place constitutional duties of "the State" on the CTCHC.

96.6 It is submitted that the DOHS's submission that s 19 of the ALA is more favourable to a purchaser than s 129 of the NCA, is simply incorrect (other than the fact that the notice period is thirty days in terms of the former, whereas s 129 of the NCA (read with s 130

thereof) requires a twenty day notice period). In this regard it is submitted that the rights of a consumer afforded by the NCA as a whole must be considered in comparison with the rights afforded by s 19 of the ALA. Moreover, in terms of s 172(1) of the NCA, it prevails over the ALA.

96.7 The issue of the notice period provided is in any event irrelevant, given that the applicants have to this date failed to pay the arrear amounts or even to tender same.[62]

97. It is accordingly respectfully submitted that the DOHS's submissions do not take the matter further.

G. CONCLUSION

98. In the premises, the CTCHC submits that the appeal ought to be dismissed with costs.

ADV DC JOUBERT SC
ADV RMG FITZGERALD
Counsel for Fifth Respondent
Chambers
29 June 2018

[62] **G B Bradfield Christie's "Law of Contract in South Africa" (7th Ed)** p 592; **Chesterfield Investments (Pty) Ltd v Venter** 1972 (2) SA 19 (T) at 26H-27G