IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO. A3082/2005
DATE:01/03/2006

In the matter between

ADRIAAN ADAM VAN NIEKERK	First Appellant
ALETTA MAGDALENA VAN NIEKERK	Second Appellant (Respondents *a quo*)

and

MAC EDWARD FAVEL	First Respondent
CATHERINA PETRONELLA FAVEL	Second Respondent (Applicants *a quo*)

JUDGMENT

CJ CLAASSEN J

[1] The appellants appeal an eviction order issued by Mr. Moyana on 24 August 2005 in the magistrates' court at Vereeniging. On 30 November 2000 the respondents, as the owners of certain immovable property, concluded a written instalments sale agreement with the appellants as the purchasers. The appellants took occupation of the land on 1 January 2001. The respondents alleged that the appellants were in breach of various terms of the written agreement. The respondents, through their attorneys, demanded in writing

rectification of the breaches within 30 days. After the lapse of 30 days, the respondents, in writing, cancelled the contract.

[2] On 1 June 2005 the respondents issued a notice of motion claiming the eviction of the appellants from the property. The notice of motion and supporting affidavits were also served on the relevant local authority. The appellants opposed the application and filed a common affidavit wherein they denied having breached the contract or that the contract was lawfully cancelled. The application was heard during August 2005.On 25 August 2005, the magistrate handed down his written reasons for judgment in terms of Rule 51(1) of the Magistrates' Courts Act No. 32 of 1944. The magistrate concluded as follows:

> "2.5 Respondents failed to disclose a valid defence or any circumstances relevant to the eviction order. As a result the court found that the applicants were entitled to the eviction order. The respondents were ordered to vacate the property within thirty (30) days of the order, that is, on or before the 3rd of October 2005, failing which the eviction order shall be carried out by the sheriff of the court thereafter.
>
> 2.6 The costs of the application was awarded to the applicants."

[3] The appellant noted an appeal. The notice of appeal advanced three grounds:

1. The question whether or not the appellants were in breach of the written contract.

2. If so, whether the letters of demand and cancellation written and sent by the respondents' attorney complied with the statutory requirements of section 19 of Alienation of Land Act No. 68 of 1981 ("the Act").

3. If so, whether the respondent complied with the procedural requirements for eviction as set out in section 4 of the Prevention of Illegal Eviction

from and Unlawful Occupation of Land Act No. 19 of 1998 ("the PIE Act").

[4] I shall now deal with each of these aspects in turn.

BREACH OF CONTRACT

[5] The immovable property forming the subject matter of the written agreement of sale, is "Erf 55, Drie Riviere Oos, geleë te Egretstraat 3, Drie Riviere Oos, Vereeniging". The aforesaid address was nominated by the appellants according to the provisions of clause 5 of the agreeement, as their *domicilium citandi et executandi*.

[6] The agreement stipulated the purchase price of R300 000-00 to be paid by way of a deposit in the amount of R5000-00 upon signature of the agreement and thereafter in equal monthly instalments of R2500-00 as from 1 January 2001. Payments were to be effected by the appellants into the respondents' bank account held at Standard Bank, Vereeniging, in the name of M.E. Favel, account No. 022324739.[1]

[7] The other relevant clauses of the written agreement are as follows:

> "6. **KENNISGEWING**
>
> 'n Kennisgewing aan 'n party moet op skrif wees en afgelewer word en 'n ontvangserkenning verkry word, of per aangetekende pos gestuur word na sy *domicilium* en na sy laasbekende posadres. 'n Kennisgewing word geag ontvang te wees binne 3 (drie) dae nadat dit gepos is.
>
> ……
>
> 8. **VERSEKERING**
>
> 8.1 Die koper sal verplig wees om die eiendom te verseker tot die tevredenheid van die verkoper.

[1] See clauses 4.1.1, 4.1.2 and 4.2 of the agreement of sale, Annexure "A" to the summons issued by the respondents.

8.2 Die koper sal ‘n Lewenspolis op sy lewe sedeer om die verkoper vir die termyn wat verskuldig mag wees ten opsigte van koopprys. (*sic*)

8.3 As die vergoeding wat uit die versekering ontvang word onvoldoende is om die skade te herstel, mag die verkoper die verskil van die koper eis.

…….

17. **AFSTANDDOENING VAN REGTE**

As die verkoper uitstel verleen vir enige afbetalings of nakoming van enige van die koper se pligte, word dit nie geag ‘n afstanddoening van die verkoper se regte te wees nie, en kan hy steeds stiptelik nakoming vereis.

…….

24. **WYSIGINGS**

Alle wysigings tot hierdie kontrak moet skriftelik wees en deur alle partye onderteken word.

……

26. **KONTRAKBREUK**

26.1. As die verkoper versuim om enige verpligtinge kragtens hierdie kontrak na te kom mag die verkoper:

26.1.1 van die koper eis dat hy die saldo van die koopprys vroeër betaal en enige ander verpligting vroeër nakom as wat die kontrak bepaal; of

26.1.2 die kontrak beëindig en eis dat die koper enige verpligting wat op datum van beëindiging agterstallig was nakom, en dat die koper enige reg op herstel van wat hy reeds gepresteer het, verbeur; of

26.1.3 die kontrak beëindig en skadevergoeding eis, en die verkoper mag enige bedrag wat deur die koper betaal is behou tot die bedrag skadevergoeding vasgestel is sodat die bedrae teen mekaar verreken kan word; of

26.1.4 enige ander stappe neem wat hy regtens mag neem.”

[8] In a registered letter dated 18 January 2005 addressed to the appellants' *domicilium* address, the respondents' attorney made the following demand:[2]

> "i/s: **KLIëNT: MNR M.E. & MEV C.P. FAVEL / KONTRAK AANKOOP ERF 55, DRIE RIVIERE OOS**
>
> Ons verwys u na ons skrywes van 17 September 2004 en 2 November 2004. U het ons kantore besoek op 14 Januarie 2005 met bewyse van onder andere betalings van R2500-00 elk vir 11 Junie 2004 en 5 Julie 2004. Hierdie betalings is nie deur kliënt ontvang nie en ontken kliënt ontvangs daarvan.
>
> U moes, sonder rente op agterstallige betalings, reeds aan kliënt R127 500-00 betaal het ten opsigte van die koopprys. Die betaling deur u gemaak is egter slegs R120 700-00 tot datum en is u gevolglik R6 800-00 agterstallig.
>
> ……
>
> Paragraaf 8.1 vereis dat u die eiendom verseker waarvan kliënt nog nie bewys van u ontvang het nie.
>
> Paragraaf 8.2 vereis dat u 'n lewenspolis op u lewe aan kliënt sedeer as sekuriteit van koopprys. Hiervan het kliënt ook nog geen bewys van u ontvang nie.
>
> Paragraaf 6 van die ooreenkoms bepaal dat u ontvangs erken van enige kennisgewings drie (3) dae na afsending per aangetekende pos.
>
> U word ingevolge paragraaf 26 van die ooreenkoms dertig (30) dae geleentheid gegee vanaf ontvangs van hierdie kennisgewing om die versuime soos hierbo te herstel by gebreke waarvan kliënt sy keuse sal uitoefen wat hy regtens mag hê. Die nodige bewyse van herstel kan direk aan kliënt of aan ons kantore gelewer word binne die gemelde dertig (30) dae."

Attached to this letter of demand is a Post Office notification indicating that the letter was registered and addressed to the appellant at their *domicilium* address. It also contains a Post Office date stamp indicating that it was sent on 19 January 2005.

[9] Thereafter respondents' attorney addressed and sent a registered letter dated 22 February 2005, once again, to the appellant's *domicilium* address, wherein the appellants were notified that the contract was cancelled and

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[2] See Annexure "B" to the summons issued by the respondents.

demand was made to vacate the property on or before 31 March 2005. Similarly attached to this letter, is a Post Office notification that the letter was sent to the appellants' *domicilium* address also bearing a Post Office stamp that it was sent on 23 February 2005.[3]

[10] In the application for eviction, the respondents rely on the aforesaid two letters as constituting a valid cancellation of the agreement. In response to this allegation, the appellants in their common answering affidavit made the following allegations:

> "4. Ons ontken dat ons enigsins agterstallig is met ons betalings soos beweer en ons is inderdaad vooruit met ons betalings ten bedrae van R700-00. Ons heg hierby aan 'n lys van betalings gemaak (aanhangsel "A"), welke lys by verskeie geleenthede aan die eisers se prokureur oorhandig is vir bespreking met die eisers en die enigste betalings wat die eisers betwis, is die betalings op 11/5/2004 en 11/6/2004. Ek heg hierby aan afskrifte van die bewyse van betalings vir 11/5/2004 en 11/6/2004 (aanhangsels "B" en "C").
>
> …..
>
> 6. Die eiendom is verseker en die bewys van versekering is aan die eisers oorhandig.
>
> 7. Wat betref die lewensversekering het die eisers daarvan afstand gedoen."

The list of payments referred to in "Annexure A" contains two columns, one for dates and one for amounts. Opposite the dates 11/05/04 and 11/06/04, the amounts of R2500 have been deleted and two question marks appear after each amount. Annexures "B" and "C" referred to in the letters are copies of two "Auto Plus transaction records" issued by Standard Bank. Annexure "B" is dated 2005-05-11 and Annexure "C" is dated 11-06. The documents do not indicate any payment into account No. 022324739 at Standard Bank Vereeniging as described in clause 4.2 of the agreement. There is no affidavit by a Standard Bank official confirming the correctness of Annexures "B" and

[3] See Annexure "C" attached to the respondents' summons.

"C" or that payment was effected into any particular account. It would have been a simple matter to obtain the necessary affidavit as aforesaid. In my view Annexures "B" and "C" do not constitute "bewyse van betaling" as contended for by the appellants. The documents constitute inadmissable hearsay evidence and bear no evidential value.

[11] The appellants raised payment as their defence to the allegation that they were in arrears as far as payment of the instalments were concerned. It is trite law that a debtor who relies on payment of an admitted debt, as a defence to a claim by his creditor, carries the onus of proof on a balance of probabilities.[4] The reason for this is to be found in the general rule that a person is not usually required to prove a negative. If the creditor claims an amount of money which is admitted by the debtor to have been due originally and the debtor alleges that he has paid it, it is then extremely difficult for the creditor, save by his own evidence, to establish the fact of non-payment. On the other hand, the debtor could have demanded a receipt when he paid, the efficacy of which, would be exceptionally great. As previously stated, in the present circumstances the appellants' bank manager could have stated on oath that the amounts in dispute were indeed transferred from their account into the account of the respondents as stipulated in clause 4.2 of the written agreement. Thus, deciding the matter on the appellants' own version, it must be concluded that they have failed to prove payment of the two intalments which they say, were in dispute. In my view the magistrate was correct in finding that the appellants were in arrears with payment of the monthly instalments.

[12] Being in arrears with the monthly instalments was not, however, the only breach relied upon by the respondents. In terms of clause 8.1 of the agreement the appellants were obliged to insure the property "tot die tevredenheid van die verkoper". The letter of demand dated 18 January 2005 alleged a lack of compliance with this contractual stipulation. On 21 April 2005 respondents

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[4] See **Pillay v Krishna and Another** 1946 AD 946 at 955/6; Schmidt "*Law of Evidence*", page 2/20

issued summons against the appellants where this averment was repeated. In their answering affidavit filed on 29 July 2005, six months after the first demand to comply with this contractual obligation, the appellants for the first time raised a defence to the effect that "die bewys van versekering is aan die eisers oorhandig". This is a bald statement if ever there was one. No details whatsoever are supplied as to the date, place, manner and persons involved when proof of insurance was allegedly handed to the respondents. In my view the allegation in paragraph 6 of the appellants' answering affidavit amounts to an unsubstantiated denial of having breached clause 8.1 of the agreement. It is trite law that a bare denial is not regarded as sufficient to defeat an applicant's right to secure relief by motion proceedings. In this regard it was stated in the *locus classicus* case of **Room Hire Co. (Pty.) Ltd. v Jeppe Mansions (Pty.) Ltd.** 1949 3 SA 115 (T) at 1165 as follows:

> "…… a bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court….. to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious, intended merely to delay the hearing. The respondent's affidavits must at least disclose that there are material issues in which there is a *bona fide* dispute of fact capable of being decided only after *viva voce* evidence has been heard."

Relevant to the present dispute is also the following statement by Price JP in **Soffiantini v Mould** 1956 4 SA 150 (EDLD) at 154 F-H:

> "If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device.
>
> It is necessary to make a robust, common-sense aproach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stategem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavit."[5]

[5] See also **Plascon–Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd.** 1984 3 SA 623 (AD) at 634 I; **Tijmstra NO v Blunt-MacKenzie NO and Others** 2002 1 SA 459 (T) at 468 E-G; **Terblanche NO v Damji** 2003 5 SA 489 (C) at 497 I.

[13] In my view the appellants failed to raise a genuine and *bona fide* dispute of fact regarding their alleged compliance with clause 8.1 of the contract. The magistrate was therefore entitled to reject their version in this regard.

[14] The next breach of contract relied upon by the respondents is the appellants' lack of compliance with clause 8.2 of the agreement. It was stated in the letter of demand dated 18 January 2005 and again in the summons issued on 21 April 2005 that the appellants failed to cede to the respondents a life insurance policy taken out on the lives of the appellants. The appellants alleged in pargraph 7 of their answering affidavit that the respondents had waived compliance with this particular obligation. Once again no details are given as to where and how the respondents allegedly waived their right to insist upon compliance of this contractual obligation. For this reason alone the magistrate was also entitled to find that no genuine dispute of fact was raised as to whether or not appellants had complied with clause 8.2. However, there are additional reasons for coming to this conclusion. It is trite law that a presumption exists against the waiver of rights.[6] In view of the existence of such presumption, the appellants were duty bound to supply sufficient information from which waiver by the respondents could have been deduced. The onus of proof to establish waiver by clear evidence lies upon the party alleging such waiver.[7] The appellants altogether failed to do so. Furthermore, the alleged waiver conflicts with the express terms contained in clauses 17 and 24 of the written agreement referred to earlier. Clause 17 expressly states that any extensions of time to comply with contractual obligations, will not be regarded as a waiver of the right to demand prompt compliance. Clause 24 requires any amendment to the contract to be in writing and signed by both parties. The alleged defence of waiver would constitute an amendment to clause 17 and in the absence of any written agreement, signed by the parties as required by clause 24, such defence as raised by the appellants will be contrary

[6] See **Kannemeyer v Gloriosa** 1953 1 SA 580 (W) at 585/6; **Alfred McAlpine & Son (Pty) Ltd. v Transval Provincial Administration** 1977 4 SA 310 (T) at 324 A – 325 A.

[7] See **Feinstein v Niggli and Another** 1981 2 SA 684 (AD) at 698 F – H; **Financial Mail (Pty) Ltd. v Sage Holdings Ltd** 1993 2 SA 451 (AD) at 468 J – 469 E.

to the parole evidence rule. In effect there is, therefore, no defence in the answering affidavits filed by the appellants, to the respondents' allegation that they failed to comply with the provisions of clause 8.2.

[15] For the reasons set out above I have concluded that the respondents succeeded in proving on a balance of probabilities that the appellants were indeed in breach of their obligations contained in the written agreement in several respects. The respondents were thus entitled to demand rectification of these breaches in the letter dated 18 January 2005.

COMPLIANCE WITH THE PROVISIONS OF SECTION 19 OF THE ACT

The relevant provisions of clause 19 read as follows:

> "(1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled –
>
> (a) to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract;
>
> (b) to terminate the contract; or
>
> (c) to institute an action for damages,
>
> unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.
>
> (2) A notice referred to in subsection (1) shall be handed to the purchaser or shall be sent to him by registered post to his address referred to in section 23 and shall contain –
>
> (a) a description of the purchaser's alleged breach of contract;
>
> (b) a demand that the purchaser rectify the alleged breach within a stated period, which, subject to the provisions of subsection (3), shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post, as the case may be; and

> (c) an indication of the steps the seller intends to take if the alleged breach of contract is not rectified.
>
> ……
>
> (4) Subsection (1) shall not be construed in such a manner as to prevent the seller from taking steps to protect the land and improvements thereon or, without or after notice as required by the said subsection, from claiming specific performance."

[17] In argument before us Mr. Mills on behalf of the appellants, raised two arguments:

1. He submitted that there was no evidence to indicate that the 30 day period had lapsed as there was no evidence supplied by the respondents indicating when the letter of 18 January 2005 was received by the appellants. In the absence thereof, it was submitted, cancellation took place prior to the lapse of 30 days.

2. Mr. Mills further submitted that the letter of 18 January 2005 did not comply with the provisions of section 19(2)(c) as it contained no indication of the steps which the respondents intended to take if the alleged breach of contract was not rectified.

The 30 day period

[18] In my view the appellants failed to raise in their answering affidavit, the allegation that the 30 day period had not lapsed prior to the alleged cancellation by the respondents. The only allegations made by the appellants in this regard, appear from paragraph 8 of their affidavit:

> "8. Die brief van die eisers wat gedateer is 18 Januarie 2005 en wat eers gestuur is op 19 Januarie 2005 voldoen nie naastenby aan die bepalings van artikel 19 van Wet 68 van 1981 en is gevolglik nietig. Die eisers is nie geregtig om ons uit die woning te laat uitsit nie, tensy die eisers regmatig die kontrak gekanselleer het, wat nie gedoen is nie."

[19] It will be noted from the above allegations in paragraph 8, that no mention whatsoever is made that cancellation took place prior to the lapsing of the 30 day period. In fact, no indication is given whatsoever as to why the provisions of section 19 of the Act had not been complied with. This, once again, in my view, is a bald denial which does not raise a genuine and *bona fide* dispute as to the lapsing of the 30 day period. If indeed the appellants wanted to rely on a lack of 30 days lapsing before cancellation, one would have expected them to state the date upon which they received the letter of demand in order for the court to conduct a preliminary examination whether or not a sufficient period had lapsed. During argument Mr. Mills conceded that the appellants did in fact receive the letter of demand "at some or other stage". Nowhere in the papers do the appellants indicate when the letter of demand was received, nor do they deny receipt thereof. In these circumstances, appellants' bald denial, unsubstantiated by any facts, requires a court to adopt a robust approach. In my view such approach would result in the conclusion that the appellants duly received the letter of demand and that the period of 30 days mentioned therein, had lapsed without them rectifying the breaches of contract. I am fortified in this conclusion by the remarks of J.P. Vorster[8] where the learned author states:

> "In *Noordvaal Konstruksie Maatskappy (Edms) Bpk v Booysen* 1979 2 SA (T) 196F wat oor artikel 13(1) van die herroepe Wet op die Verkoop van Grond op Afbetaling gehandel het, is beslis dat die verkoper "clear evidence" voor die hof moet plaas dat die vereistes van die artikel nagekom is. Indien die verkoper dan wel "clear evidence" (bv in die vorm van 'n strokie van die poskantoor wat aandui dat die brief per aangetekende pos aan die adres wat die koper verstrek het, gestuur is, tesame met 'n ware afskrif van die kennisgewing (om die inhoud van die kennisgewing te bewys)) voor die hof plaas, behoort daar 'n las op die koper te rus om die afleiding dat hy die kennisgewing inderdaad ontvang het, of dat hy vir nie-ontvangs van die kennisgewing verantwoordelik was, te weerlê. So 'n benadering sou meebring dat die kennisgewing nie noodwendig oneffektief is indien dit die koper nie bereik nie en dit sou in ooreenstemming wees met die volgende *caveat* wat regter Grosskopf in *Oakley v Bestconstructo (Pty) Ltd*[9] (316H) opper oor die vertolking van artikel 19:

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[8] "*Die Beperking van die Verkoper se regte in die geval van kontrakbreuk deur die Koper by die verkoop van grond op afbetaling*", Tydskrif vir Hedendaagse Romeins-Hollandse Reg ("THRHR") Vol. XLVIII (1985) 88 at p 93.

[9] 1983 4 SA 312 (T).

> "Daar moet…. gewaak word…. dat daar nie 'n swaarder las op die skouers van die verkoper gelaai word as wat die wetgewer beoog het nie. Die bepalings van art 19 is immers beswarend van aard en moet dus streng uitgelê word."

[20] However, if I am incorrect in the aforesaid conclusion and appellants are justified in merely denying compliance with section 19 of the Act, thereby raising the issue to be argued as a point of law, it becomes necessary to investigate whether or not the point is good. In support of the contention that proof is lacking of a 30 day period having lapsed after the posting of the letter of demand dated 18 January, Mr. Mills relied heavily on the decision in **Maharaj v Tongaat Development Corporation (Pty) Ltd.** 1976 4 SA 994 (AD). That case concerned the interpretation and application of the predecessor to section 19, i.e. section 13(1) of the Sale of Land on Instalments Act No. 72 of 1971, which read as follows:

> "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 acknowledgment of receipt has been obtained, or sent by 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, being not less than 30 days, and the purchaser has failed to comply with such demand."

[21] At 1001 H, Wessels JA held that in terms of section 13(1) the period of 30 days begins to run from the date on which the letter of demand is **received** by the purchaser (the "Maharaj principle"). Mr. Mills contended that a similar intepretation should be given to section 19(2)(b) of the Alienation of Land Act. If this is the correct interpretation of section 19(2)(b), it follows that the respondents, due to an inability to show when the letter was received by the appellants, failed to establish compliance with the latter subsection. If, however, the correct interpretation is to calculate the 30 days from the date of

posting the registered letter, respondents would have complied with the provisions of section 19(2)(b).

[22] Since the passing of the Act in 1981, there has, to my surprise, been very little discussion of the **Maharaj** principle. In **Miller v Hall** 1984 1 SA 355 (DCLD), Page J was called upon to interpret section 19(2)(c) of the new Act. In so doing he found, at 361 E – G, that the overall intention of the Legislature had the same purpose in mind as was the case with section 13(1), i.e. to afford reasonable protection to the purchaser, in enacting section 19 of the new Act. The court was not, however, called upon to give a precise interpretation of section 19(2)(b) of the Act. In **Holme v Bardsley** 1984 1 SA 429 (WLD) Flemming J (as he then was) came to the conclusion, despite the differences between section 13(1) of the previous Act and section 19 of the current Act, that a seller had not complied with section 19 where letters of demand sent to the *domicilium* address by prepaid registered post returned marked "unclaimed".

[23] In order to establish whether the **Maharaj** principle still holds good as the appropriate interpretation of section 19(2)(b) of the current Act, it is necessary to point to various differences in the wording of this section and its precursor, section 13(1):

1. Section 19(1) requires the defaulting purchaser to be "notified", whereas section 13(1) required such purchaser to be "informed" of the breach of contract.

2. In section 13(1) the option of handing the letter of demand to the purchaser was qualified by an obligation to obtain "an acknowledgment of receipt" from the purchaser. In section 19(2), such qualification has been deleted.

3. In section 13(1) the option of sending a demand by registered post is qualified by the requirement that it be sent to the purchaser's "last known residential or business address." In section 19(2), compliance with the second option requires the letter to be sent by registered post to the purchaser's *domicilium* address as referred to in section 23 of the Act.[10] This reference to section 23 entails sending the letter of demand to the purchaser's chosen *domicilium* address as may be varied by the purchaser at his option in writing.

4. Section 13(1) required the registered letter to include a demand that the obligation be complied with within a period "being not less than 30 days" without stating when this period will commence running. Section 19(2)(b) requires such compliance to occur within a period which shall not be less than 30 days "calculated from the date on which the notice was ….. sent to him by registered post….."

[24] Section 19 still contemplates two methods of demanding compliance with the alleged breach of contract.[11] However, the differences set out above clearly signal a change of intention on the part of the Legislature in regard to the communication duties of a seller who wishes to exercise his/her contractual rights. I say this for the following reasons:

1. When interpreting section 13(1), Wessels JA relied on the requirement that the first option is complied with only once an acknowledgement of receipt is obtained from the purchaser. This requirement, it was concluded, "points to an intention on the part of the Legislature to ensure that the purchaser himself should be notified of his alleged

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[10] Section 23 reads as follows: "The addresses stated in any contract in terms of section 6(1)(a) shall serve as *domicilium citandi et executandi* of the parties for all purposes of the contract, and notice of a change of such an address shall be given in writing and shall be delivered or sent by registered post by one party to the other, in which case such changed address shall serve as such *domicilium citandi executandi* of the party who has given such notice."

[11] See **Maharaj** *supra* at 1000 A.

failure to fulfil an obligation under the contract and the time within which he is required to remedy it. The period of grace may not be less than 30 days….."[12] In section 19(2)(b), however, the Legislature has expressly deleted the requirement to obtain an acknowledgment of receipt, if the first option is resorted to. The consequential reasoning of Wessels JA, that a similar measure of protection was intended when resorting to the second option of demanding compliance by registered post[13], is therefore not applicable to section 19(2)(b). In my view the Legislature recognized the possibility that purchasers may refuse or evade signing an acknowledgement of receipt when a demand is handed over.[14] In so doing the Legislature did not seek to protect wilful and obstructive purchasers and thereby lightened the seller's burden of communicating with a purchaser when a seller wished to exercise his/her lawful contractual rights. In saying this I am not to be understood to undermine the overall intention of both sections 13(1) and 19(2) of affording reasonable protection to the purchaser.[15] The emphasis, however, should be on "reasonable" protection. Such protection must be balanced by a "reasonable" right afforded the seller to enforce his contractual rights against the purchaser.

2. In concluding that the Legislature intended the 30 day period to run from the date of receipt by the purchaser of the letter of demand, Wessels JA *inter alia* reasoned as follows at 1001 C-D:

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[12] See **Maharaj** *supra* at 1000 D – E.

[13] See **Maharaj**, *supra* at1000 G-H.

[14] See J.M. Otto, "*Kennisgewings van Ontbinding by Kredietooreenkomste en Afbetalingskope van Grond"*. Tydskrif vir die SA Reg, ("TSAR") 2001 p 169 op 175 where the learned author says the following: "Dit verhoed ook dat 'n kredietopnemer kat-en-muis met sy teenparty speel. Laasgenoemde kan maklik gebeur waar die skuldenaar wee thy verkeer in versuim en dan briewe ontduik deur geregistreerde stukke nie af te haal nie. 'n Oormatig verbruikersbeskermende uitleg van artikel 11 sal dit ook dikwels baie moeilik (indien nie onmoontlik nie) maak vir skuldeisers om die brief aan die skuldenaar persoonlik te oorhandig waar die skuldenaar fisies nie in die hande gekry kan word nie, of per pos te besorg indien die adres wat hy verstrek het van geen waarde blyk te wees vir die aflewering van posstukke nie."

[15] See **Maharaj** 1001 A.

> "Section 13(1) requires that the letter be sent to the purchaser 'at his last known residential or business address', which would not necessarily be the same as the address which, in terms of the contract, serves as *domicilium citandi et executandi* for all purposes of the contract. This, in my opinion, is an indication that the Legislature intended, as in the case of the first-mentioned method, that the letter should reach the purchaser or, at least, be made available to him at an address where he is likely to be placed in possession thereof."

Section 19(2) does away with the obligation to send the letter to the purchaser's last known residential or business address and instead substitutes thereafter a requirement to send it to the *domicilium* address. In my view this constitutes an express intention by the Legislature to accommodate the possibility that a purchaser may not receive a letter of demand posted by registered post. Where a purchaser is statutorily permitted to nominate a *domicilium* address which at his/her choice may be changed in writing, such purchaser assumes the duty to ensure that communications sent to such *domicilium* address would come to his/her attention. The Legislature therefore has relieved the seller of the duty to ensure delivery of such communication to the purchaser. In my view that is the crucial difference between stipulating for communications to be sent to a residential or last-known address as opposed to it being sent to a *domicilium* address. The intention of the Legislature in section 19 is therefore substantially different to that evinced in section 13(1). I find support for this conclusion in the reasoning of Cloete J (as he then was) in **Marques v Unibank Ltd** 2001 1 SA 145(WLD) at 153 F – 154 G where the learned judge dealt with a similar provision contained in section 11 of the Credit Agreements Act No. 75 of 1980.[16] After an

[16] Section 11 of Act No. 75 of 1980 reads as follows: "No credit grantor shall, by reason of the failure of the credit receiver to comply with any obligation in terms of any credit agreement, be entitled to claim the return of the goods to which the credit agreement relates unless the credit grantor by letter, handed over to the credit receiver and for which an acknowledgement of receipt has been obtained or posted by prepaid registered mail to the credit receiver at his address stated in the credit agreement in terms of s 5(1)(b) or the address changed in accordance with s 5(4), has notified the credit receiver that he had so failed and has required him to comply with the obligation in question within such period, being not less than 30 days after the date of such handing over or such posting, as may be stated in the letter, and the credit receiver has failed to comply with such requirement …."

instructive comparison with the reasoning in the **Maharaj** case the learned judge concluded at 154 C-G as follows:

> "The requirements of registered post and of posting to a *domicilium* are obviously aimed at minimising the risk of the notice not coming to the attention of the credit receiver. Assuming that there is a postal service to the *domicilium* and that there is no reason to believe that the Post Office lost the letter embodying the notice, the requirements prescribed are, to my mind, entirely consistent with an intention on the part of the Legislature to place such risk as remains on the credit receiver.
>
> I fully appreciate that the section was enacted for the protection of the credit receiver and that what in the idiom of today would be categorised as a 'purposive' approach would require the notice to come to his attention….
>
> But the credit receiver is *ex hypothesi* in breach. The common law requires him to be aware of his obligations and puts the onus of fulfilling them timeously on him. If the one method prescribed for the giving of notice fails despite the precautions which the Act prescribes, and again assuming (as in the present case) that there is no reason to believe that any irregularity occurred in the way in which the Post Office dealt with the notice, I find nothing unfair in visiting the consequences on the credit receiver."

The aforesaid conclusion differs with that reached by Flemming J in **Holme v Bardsley** *supra* at 432 E-F where the learned judge concluded as follows:

> What remains is predominantly an area of similarity, in particular in regard to the pattern of the legislation and of s 19 itself; the object of a provision such as s 19 and the policy underlying the creation of such a limitation on the rights of the seller; and a similarity in the crucial question of whether a lesser measure of protection for the purchaser was intended in regard to a letter sent by post than in regard to a letter handed over to the purchaser (which concededly he does not now have to acknowledge). Having regard to such considerations and the reasons stated in the said *Maharaj* case, I am of the view that a similar conclusion must be reached in regard to s 19."

Flemming J concluded that a notice sent by registered post in terms of section 19(2)(b) had to be received by the purchaser in order to be effective. In my view the aforesaid conclusion is, with respect,

clearly wrong. Flemming J did not take into account all the differences between the wording of section 13(1) and section 19 of the current Act. I am fortified in this view by Cloete J in the **Marques** case, who similarly concluded as follows at 155 I – J:

> "….I believe that this Court should grasp the nettle and state, with respect but nevertheless unequivocally, that **Holme v Bardsley** (*supra*) was wrongly decided."

I am persuaded that the weight of authority is in favour of the conclusion reached by Cloete J and against that reached by Flemming J.[17]

3. In **Maharaj**'s case Wessels JA also founded his conclusion on the following hypothesis at 1001 E – G:

> "If, as respondent's counsel contended, the period of 30 days begins to run from the date of posting, an element of uncertainty, affecting the purchaser's protection, is introduced. The date of the letter would not necessarily be a reliable guide as to the date of posting. This difficulty arose in the present case. It was suggested that the postmark would proclaim the date of posting…. It is obviously important for a defaulting purchaser to know with certainty within what time the default is to be remedied by him. He would ordinarily have certainty if the period mentioned in the letter begins to run from the date of delivery thereof to him."

This reasoning, with respect, is not apposite to the proper interpretation of section 19(2)(b) for the reason that the latter subsection expressly provides that the 30-day period shall run from the date of handing over or **posting** of the letter of demand. More particularly, it expressly states

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[17] See De Jager *Kredietooreenkomste en Finansieringskoste* (1981) at 72: "It would therefore seem that the credit grantor need not allege and prove that notification in fact reached the credit receiver"; Grovè and Jacobs *Basic principles of consumer Credit Law* (1993) at 37, note 124 supports the view of De Jager in view "of the clear wording of the Act"; Harms, *Amler's Precedents of Pleadings* 3rd Edition (1989) at 86: Otto, writing in Joubert, *The Law of South Africa*, first re-issue (1994) Volume 5 Part 1 para 29 at 51; J.P. Vorster *TSAR* 1984 p 309; J.P. Vorster *THRHR* 1985 *supra* at 92/3; J.M. Otto *TSAR* 2001 *supra* at 172/3.

that the 30-day period will be "**calculated from** the date on which the notice was handed to the purchaser or **sent** to him by registered post.'[18] I agree, with respect, with the remarks of Cloete J in **Marques** *supra* at 152 E – G where the following was said:

> "The reasoning in the **Maharaj** case to which I have just referred is therefore not applicable. The reasoning which does apply, in my view, is that in **Muller v Mulbarton Gardens (Pty) Ltd.** 1972 1 SA 328 (W). In that matter Boshoff J (as he then was) interpreted a clause in a contract which provided that the seller would be entitled to cancel the contract should the purchaser fail to pay an instalment timeously and further fail 'to make such payment… within seven days of the posting of a written notice sent to the purchaser by registered post requiring the purchaser to do so'. The learned judge reasoned at 33 D:
>
> > 'It is important to note that the period of seven days is to be calculated from the date of posting and not from the day when the applicant receives the notice, which seems to indicate that the parties did not intend to burden the respondent with having to show that the applicant received the notice.'"

4. The intention of the Legislature in drafting clause 19 of the current Act is also evinced from the usage of the word "notify" in section 19(1). The letter of demand no longer has to "inform" the purchaser as was required by section 13(1). The word "inform" connotes an intention that the buyer actually has to receive the notice.[19] The conclusion reached by Wessels JA in **Maharaj** was not based on any consideration of the true meaning of the word "inform" as used in section 13(1) of the previous Act.[20] By the use of the word "notify" the Legislature intended to make it clear that the contents of a notice may not actually come to the attention of a purchaser. Furthermore, section 19(1) of the Act was amended by section 8 of the Alienation of Land Amendment Act, No. 51 of 1983 which took effect on 21 April 1983. The English

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[18] Contrary to the ultimate conclusion, Flemming J in the **Holme** case at 432 D postulated the possibility that this subsection now requires the 30 day period to be calculated from "the date of forwarding the letter instead of the date of receipt thereof."

[19] See **Maron v Mulbarton Gardens (Pty) Ltd.** 1975 4 SA 123 (W) at 125 D.

[20] See Van Rensburg and Treisman, *The Practitioner's Guide to the Alienation of Land Act* 2nd Edition (1984) at 206; **Marques** *supra* at 156 D – E.

version of section 19(1) was amended by removing the word "informed" and substituting the word "notify" in its place. I agree, with respect, with the reasoning of Cloete J that the Legislature's express amendment of the word cannot be equated with an intention to substitute a synonym.[21] I respectfully agree with the conclusion reached by Cloete J as to the reason for the amendment. It is stated at 156 J – 157 E:

> "There must have been a reason for the amendment. In my view, the reason lies in the subtle distinction that whereas to 'inform' necessarily implies that the information reaches the mind of the person informed, to 'notify' does not. As appears from the passages I have just quoted from *The Oxford English Dictionary*, 'inform' in the prevailing modern sense means 'to impart knowledge', which necessarily connotes that the knowledge has passed; and one cannot 'tell' someone something without its coming to his attention. The same applies to 'acquaint' and 'apprise'. On the other hand, whilst 'notify' can mean 'to inform', it can also mean 'to give notice to'; and the giving of a notice does not necessarily mean that the contents of the notice were received or came to the attention of the person to whom the notice was addressed. I find a similar difference in nuance in *Webster's Third International Dictionary* (1993) which has the following entry under 'inform':
>
> 'Inform implies the *imparting of knowledge*, esp of facts or events necessary to the understanding of a pertinent matter … To notify is to *send a notice* or make a *usu.* (note: *usu* denotes a term of usage) formal communication generally about something requiring or worthy of attention.' (My emphasis).
>
> In my view, the Legislature intended by the amendment to the Alienation of Land Act, to give effect to the distinction between an obligation to 'inform' and an obligation to 'notify' and by the substitution of the latter, intended to make it clear that the contents of a notice did not actually have to come to the attention of a purchaser. (Although I take responsibility for the reasoning, this conclusion accords with the views of *Otto (loc cit)* and *Van Rensburg and Treisman (op cit* at 202))."

[25] For the aforesaid reasons I have come to the conclusion that upon a proper construction of section 19(1) and (2)(b), the 30 day period is to be calculated from the date upon which the letter of demand was posted. It was common cause in this case that the letter of 18 January 2005 was posted on 19 January 2005. The 30 day period would therefore have lapsed on 19 February

[21] See **Marques** *supra* at 156 G – 157 F; **Durban City Council v Malloy and Another** 1977 1 SA 61 (D) at 64 B – C.

2005. It was common cause that the letter of cancellation was dated 22 February 2005 and posted on 23 February 2005. Thus the 30 day period had been complied with and Mr. Mills' contention to the contrary must be rejected.

Compliance with section 19(2)(c)

[26] Section 19(2)(c) constitutes an innovation which the current Act introduced. A similar provision was not part of section 13(1) of the previous Act. Subsection (2)(c) has been the subject of only 2 judicial pronouncements, namely **Oakley v Bestconstructo (Pty) Ltd.** 1983 4 SA 312 (T), a judgment by Grosskopf J and **Miller v Hall** 1984 1 355 (DCLD), a judgment by Page J. In **Oakley** *supra* at 319 G – 320 C, Grossskopf J held that a letter notifying the purchaser that the seller "will in its sole and absolute discretion act against you in terms of para 9 of the deed of sale" did not comply with the requirements of section 19(2)(c). His conclusion was, however, prefaced by a *caveat* that he did not intend to give a precise interpretation of the subsection. In **Miller** *supra*, Page J at 360 G – 361 B, concluded that a letter of demand referring to clause 9 of the agreement of sale and "the relevant clause in the agreement of sale" which would be envoked if the breach is not rectified, did not comply with the provisions of section 19(2)(c). At 361 B the learned judge concluded that this subsection, like its predecessor, is peremptory in its terms. Reliance for this conclusion was placed on **Noordvaal Konstruksie Maatskappy (Edms) Bpk v Booysen** 1979 2 SA 193 (T) at 196 D – F. With respect, it has to be mentioned that the latter case is no authority for finding that subsection 19(2)(c) is peremptory in its terms. The authorities dealt with in the **Noordvaal** case all refer to section 13(1) of the previous Act, which, of course, did not contain provisions such as those in section 19(2)(c). No reason was advanced why this subsection should be regarded as peremptory. It is also contrary to the finding in **Phone-A-copy Worldwide (Pty) Ltd. v Orkin and Another** 1986 1 729 (AD) at 749 E – 750 C where it was held that section 13(1) was part peremptory and part directory only, i.e. the stipulation that the

letter had to be sent to "the last known residential or business address" was regarded as directory. It is trite law that statutory provisions can be directory in part and peremptory in part.[22]

[27] Page J in **Miller** at 361 G and further held that the purpose of the subsection is to enable the defaulting purchaser, should he fail to remedy the breach, to regulate his future conduct in the light of the seller's indicated future conduct. It was held that the requirement to "indicate" means "to make known", "to state", "to express".[23] It was also held at 363 E – G as follows:

> "What the subsection requires is an indication of the sellers intention to elect a particular course. That intention may be expressed in such a way as to manifest and convey not merely the seller's state of mind but also simultaneously the overt act of actually making the election…. This was the interpretation placed (rightly or wrongly) on the notice in **Walker v Minier et Cie (Pty) Ltd.** *supra.* It is, however, equally possible to express no more than an intention to make a specified overt act of election in the future: which is, in my view, all that the subsection requires."

It was held that the seller must give a clear expression in the notice which of the steps enumerated in subsection (1) of section 19 he intends to take. It is, however, always open to the seller not to carry out that expressed intention and give a fresh notice if he wished to take any other step mentioned in subsection 1.[24] I must confess that I find the reasoning of Page J somewhat confusing. I will, therefore, embark upon an interpretation of the subsection as best I can.

Interpretation of ss 19(2)(c)

[28] It has now become settled law that statutory interpretation should accord with that which promotes the general legislative purpose underlying a statutory provision. In ascertaining the purpose of the statutory provision, wider

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[22] See **Maharaj and Others v Rampersad** 1964 4 SA 638 (A) at 645 E – F; **Nkisimane and Others v Santam Insurance Co. Ltd.** 1978 2 SA 430 (A) at 433 H – 434 B; **Phone-A-copy** *supra* at 749 F – G; **Weenen Transitional Local Council v Van Dyk** 2002 4 SA 653 (SCA) in paragraph [13]; **Unlawful Occupiers, School Site v City of Johannesburg** 2005 4 SA 199 (SCA) at 209 G – I.

[23] See **Miller** *supra* page 362 A – B.

[24] See **Miller** *supra* at 364 E – G.

contextual considerations may be envoked, even where the language is unambiguous – the so-called "purposive construction" of statutes. Applying a purposive construction to a statute does not, however, imply a neglect of the language used[25]. The words used must be understood in their popular sense as used in ordianary parlance, yet balanced by the context in which they are used, i.e. a "context-based, purposive approach".[26] I must now apply this approach in ascertaining the true meaning of the words "an indication of the steps the seller intends to take….", as used in subsection (2)(c).

[29] I commence this discussion by reiterating that the overall intention of the Legislature was to afford the purchaser reasonable protection. This intention has, however, been somewhat tempered by the Legislature in enacting the provisions in section 19. When compared with the provisions in the old subsection 13(1), it is clear that a measure of leniency towards the seller is noticeable.[27] The Legislature must have recognised that commerce and the flow of business could be hampered if sellers found the statutory provisions regarding the enforcement of contractual rights too onerous. Experience showed that obstructive purchasers were able to abuse the onerous comunicative duties imposed upon the sellers in the previous section 13(1) to the detriment of honest sellers seeking their contractual dues. The overall intention to afford protection to purchasers is now balanced by an intention not too overburden sellers. Hence the relaxation of the seller's communication duties as set out in subsection 19(2)(b) as referred to earlier. An interpretation of subsection 19(2)(c) which amounts to an over-protectiveness in favour of the purchaser would, therefore, fall foul of this changed attitude evinced by the Legislature. In line with this manifest intent, it would be wrong to interpret subsection 19(2)(c) as reintroducing onerous duties on the seller, only in a

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[25] See **S v Zuma** 1995 2 SA 642 (CC) at 652 I. See G E Devenish, "Interpretation of Statutes" (1992), chapter 2 where all the different interpretive theories are discussed. At page 37, discussing the purposive theory, the learned author refers to Driedger, "Construction of Statutes" 83 where the latter states: "First it was the spirit and not the letter, then the letter and not the spirit and now the spirit and the letter."

[26] Per Sachs J in **S v Mhlungu & Others** 1995 3 SA 867 (CC) at 916 C.

[27] See paragraph [24] 1 *supra*.

different guise. It seems incongruous that the Legislature would, on the one hand, relax the strict requirement placed on the seller to allege and prove receipt of a letter of demand, and on the other legislate for strict compliance with an onerous duty to set out in the letter of demand with exactitude the specific nature of steps intended by the seller. In the former instance the Legislature relaxed the duties resting on the seller because it must have accepted that circumstances exist where a recalcitrant purchaser cannot and should not be protected against the rightful exercise by sellers of their lawful contractual rights. Such circumstances would exist where a defaulting purchaser did not enjoy the respite period of 30 days to rectify his breach due to his own fault (e.g. failure to give a correct address, not uplifting registered post, avoiding service of demand etc.). It makes little sense to assume that the Legislature *non constat* intended to protect such a purchaser by affording him a clear and precise exposition of all the contractual remedies available to the seller in a letter of demand. A clear and exact exposition of the seller's intention would only be relevant and beneficial in circumstances where the letter of demand is in fact received and read by the defaulting purchaser. However, the Legislature has acknowledged that this latter scenario will not always be the case. As indicated earlier, letters of demand posted to *domicilium* adresses may in fact result in contractual remedies being exercised by sellers even though the purchaser had not received such letters of demand. What then is the point of demanding in all cases that a seller set out in precise detail his future intentions when in many circumstances such detail would be totally irrelevant? If subsection 19(2)(c) is to be construed as demanding strict compliance with its terms in all instances, it would result in obstructive purchasers being unduly protected at the expense of sellers. Notionally an obstructive puchaser may avoid the consequences of his breach of contract by envoking lack of compliance with subsection 19(2)(c) as a defence when he had no intention in any event of remedying his default. This kind of stalling tactic by purchasers have been eliminated in the new subsection 19(2)(b). It would be strange to assume that the Legislature took the trouble of closing a

loophole for obstructive purchasers in subsection 19(2)(b) and simultaneously opening another in subsection 19(2)(c). If this were to be the Legislature's intention it would, to my mind, constitute an absurdity. It is trite law that a statute should not be interpreted in such a way that it would have absurd consequences.

[30] I respectfully agree with Grosskopf J[28] that section 19 is an onerous clause and should, therefore, be restrictively interpreted. In my view a strict interpretation of subsection 19(2)(c) would result in it being held to be peremptory, i.e. to be complied with in all instances. For the reasons set out above, that would lead to absurd consequences. If on the other hand it is merely directory then the strict interpretation of its terms favoured by Page J is unnecessary. In my view the subsection should be construed as directory. If it was intended to be peremptory one would have expected stronger language to be used to describe the seller's duties, i.e. such as, "sufficiently indicate" or "clearly set out" or "stipulate" or "clearly elect" the steps intended to be taken. The language which was chosen by the Legislature, is, however, of wide import. "Indicate" has been given various meanings of exactitude in the past. At the one extreme, in **Nathan & Co v Sheonandan** 1963 1 SA 179 (NPD) the word as used in section 8(b) of the Insolvency Act No 24 of 1936 was held to mean that the debtor was bound to indicate "with sufficient particularity" to the officer executing a writ what the property is and where it is to enable it to be attached and sold. On the other hand, the dictionary meanings of the word ascribe a lesser measure of exactitude. In **Websters' Third New International Dictionary** (1993), page 1150, the word is defined as meaning "to point out or point to or toward with **more or less** exactness: to show the **probable** presence or existence or nature or **course of**: give **fair** evidence of." The **Concise Oxford Dictionary,** Tenth Edition, page 720 renders it thus: "Be a sign or symptom of, **strongly imply**, state **briefly or indirectly**". Therefore the word "indication" by itself does not express the exactitude

[28] See **Oakley** *supra* at 316 H.

which is intended by the Legislature. The word is, furthermore, used in conjunction with another word of wide import namely "steps". What is significant is that the Legislature does not stipulate exactly what kind of steps are referred to. It does not expressly link the intended "steps" to, for example, the remedies mentioned in subsection 19(1)(a), (b) or (c). It could very easily have stated that the demand should record which of the remedies in subsection 19(1) will be resorted to. In my view, if the Legislature intended to restrict the contents of the letter of demand to specifics, it could easily have done so by using stronger language alternatively demanded an express election of the remedies mentioned in subsection 19(1) to be stated categorically in the letter. This it did not do. In my view, the statutory requirement to give an "indication" of the seller's future conduct, must be given a broad interpretation, more in line with the meaning of a "hint" or "suggestion".[29] If indeed the subsection requires "no more than to express an intention to make a specified overt act of election in the future", as Page J suggests, then in my view, the Legislature did not intend to bind the notice giver to a specific remedy when demanding the breach to be rectified. In my view, the Legislature intended to oblige the seller merely to inform the purchaser that he has **elected to act** upon any failure by the purchaser to rectify the breach. He is in effect saying to the purchaser: "I have elected not to abide your breach any longer. Should you fail to remedy it, I will take steps against you. So beware!" In my view the Legislature requires a seller to warn the purchaser, not only that he is in default, but that his continued default could lead to the seller taking certain steps. In order to protect the purchaser against such consequences, the Legislature obliges the seller to indicate that he is serious about acting upon the default. Such serious intent will be demonstrated by setting out some indication of what his intentions are without specifying details. This will place the purchaser sufficiently on guard. If this is done by a seller in a letter of demand, the purpose of the Legislature in protecting the interests of the purchaser as far as possible without being over- protective, will be complied with.

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[29] This argument was rejected by Page J in **Miller v Hall** *supra* at 364 G.

[31] I am fortified in the aforesaid conclusion by the following considerations:

1. The Legislature protected the interests of the purchaser by ensuring that he/she is in possession of a copy of the contract of sale. The scheme of the Act is to ensure that the seller places the purchaser in possession of a copy of the contract upon pain of being denied any interest on the contract price[30]. It would, therefore, be a simple matter for a defaulting purchaser to read the clause dealing with the consequences of any breach and verify for himself the seriousness of his continued breach.

2. It must have been within the contemplation of the Legislature that purchasers of immoveable property in residential areas are sufficiently commercially sophisticated to read and understand written contracts of sale. This intention of the Legislature is manifest from the provisions of section 5 of the Act which allows a purchaser to choose the official language in which the contract is to be drawn up. It must have been contemplated by the Legislature that a defaulting purchaser will understand the clauses dealing with the consequences of any breach as he could read it in the language of his choice! A similar supposition underpins the legislative requirement for letters of demand to be sent to defaulting purchasers. In order for the protection to purchasers contemplated in section 19 to become

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[30] Section 13of the 1981 Act provides:

"13 **Copy of contract to purchaser and default of seller to furnish copy**

(1) Within 30 days after the conclusion of a contract, the seller shall hand to the purchaser or send to him by registered post to his address referred to in section 23, a copy thereof and the seller is not entitled to make any charge for the making of such Copy or for complying with the provisions of this subsection.

(2) If the seller fails to comply with the provisions of subsection (1) and if he remains in default for more than 14 days to furnish the purchaser with a copy of the contract after the purchaser has requested him therefore in a letter sent to him by registered post to his address referred to in section 23, the purchaser is not liable for the payment of interest in terms of the contract from the date of the conclusion thereof to the date upon which the purchaser receives a copy of the contract from the seller."

Similar provisions were contained in the previous act – see section 5 of the 1971 Act.

effective, the Legislature assumed that a purchaser is able to and will read and understand letters of demand.

[32] In the light of these provisions, I see no intention on the part of the Legislature to spoon-feed a purchaser with regard to the consequences of his breach of contract. I disagree, with respect, with the rationale of Page J[31] that the subsection was designed to enable a defaulting purchaser "realistically to appraise the consequences of the various courses open to him". It is not for the seller to make it easy for the purchaser to decide whether the latter could get away with his breach or not. If the purchaser is in breach, he should remedy it! *Pacta servanda sunt* -- Contracts are to be observed. A purchaser is presumed to know the law[32]. This doctrine still holds good of a person who, in a modern state, wherein many facets of the acts and omissions of legal subjects are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere[33]. A defaulting purchaser who does not want to purge his breach can be expected to appreciate the dire consequences of his persistence in such course of action. If he does not, he should seek legal advice, alternatively suffer the consequences of his own wrong doing. It seems to me quite contrary to the intention of the Legislature that a seller should be obliged to spoon-feed a purchaser, who is *ex hypothesi* in breach, as to the consequences of his breach.

[33] Subsection (2)(c) requires an indication of the "steps" which a seller intends to take. It is contemplated that a plurality of steps may be taken by the seller. The use of the word "steps" in the plural connotes that the seller need not elect to take one single step. In my view this confirms an intention on the part of the Legislature that a seller need not be specific but can indicate an

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[31] See **Miller** supra at 362 D – E.
[32] See **Marques** supra at 154 F.
[33] See **S v De Blom** 1977 3 SA 513 (AD).

intention of taking several of alternative remedies. Page J in **Miller v Hall** *supra* at 364 H – 365 A, came to a different conclusion. The learned judge stated as follows:

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

No reasons are supplied as to why the contention advanced would run "counter to the intention of the provision". In my view there exists none.

[34] I respectfully have to disagree with the conclusions of Page J. In my view his interpretation of subsection 19(2)(c) is clearly wrong. I am fortified in this conclusion by the views expressed by JP Vorster, "Die beperking van die verkoper se regte in die geval van kontrakbreuk deur die koper by die verkoop van grond op afbetaling", THRHR 1985 p 88, where the learned author states at 96/7 the following:

> "Die algehele oogmerk om redelike beskerming te verleen, kan myns insiens ook verwesenlik word indien artikel 19(2)(c) bloot sou verseker dat die koper, wat in die gewone loop van sake nie op hoogte is van die presiese inhoud van die kontrak nie, herinner word aan die **potensiële erns van 'n volgehoue versuim om sy kontrakbreuk te herstel**. Om buite-om die woorde van artikel 19(2) streng vereistes vir die geldigheid van die kennisgewing te stel, sou myns insiens verder gaan as wat nodig is vir die redelike beskerming van die koper. Sodanige bykomstige streng vereistes kan tot gevolg hê dat verkopers wat reeds baie geduld aan die dag gelê het weens kopers se kontrakbreuk, se **regmatige aansprake verydel word**. (In die Oakley-saak was die koper reeds byna drie maande *in mora* voordat die koper die kontrak probeer kanselleer het; in *Miller v Hall* is die kennisgewing eers gestuur na versuim om twee paaiemente te betaal; in *Holme v Bardsley* het die verkoper eers twee kennisgewings gestuur voor hy die kontrak wou kanselleer**.) So 'n gevolg sou private onderneming in die algemeen net ten kwade kon strek**.
>
> Tweedens is dit te betwyfel of the vertolking wat regter Page aan die woord "stappe" ("steps") in artikel 19(2)(c) heg, korrek is. Regter Page meen dat 'n

> "stap" nie dui op 'n remedie genoem in artikel 19(1)(a), (b) of (c) nie, maar eerder dat elke remedie in subartikel 1(a)(b) of (c) uit meerdere "stappe" kan bestaan (365 A). Vroeër in die uitspraak (362 A – B, 364 G) verwerp regter Page die verkoper se betoog dat "aanduiding" ('indication") in subartikel 2(c) ook 'n "hint" of "suggestion" kan beteken. Die regter aanvaar die koper se betoog dat die woord "aanduiding" beteken dat die verkoper "what he has in mind as a fixed purpose" aan die koper moet bekend maak. Indien "aanduiding" en "stappe" dan verstaan word in die sin wat regter Page daaraan heg, sou die gevolge absurd wees….. aangesien die verkoper, indien 'n remedie uit meerdere "stappe" sou betaan in die kennisgewing 'n aanduiding van elk van daardie "stappe" sou moes gee. ….
>
> In die lig hiervan kan geargumenteer word dat "stappe" wel as remedies verstaan moet word en dat die gebruik van die meervoud "stappe" die sienswyse dat die beskikbare remedies in die alternatief genoem mag word, versterk". (Emphasis added)

I am respectfully in agreement with the conclusions of the learned author above.

Application to the facts of this case.

[35] In the present instance the cancellation clause 26 provides in the alternative for a right to claim acceleration (26.1.1), or termination and forfeiture (26.1.2), or termination plus damages (26.1.3). It does not provide for specific performance expressly. In the present instance the letter of 18 January 2005 expressly indicated the step which the respondents intended taking: they elected to invoke clause 26 of the contract should the appellants fail to remedy their breach. In my view that was sufficient compliance with the provisions of section 19(2)(c) within the parameters of the facts of this case. The appellants, as purchasers in this case, were sophisticated people capable of understanding the consequences of their breach. In the papers no case was made that they did not appreciate this. In addition, cognisance should be taken of the conduct of the appellants in this case. No attempt was made to rectify their breaches of contract. In fact, no response to the letter of demand received by them on 19 January was forthcoming until 6 months later when in their answering affidavit they, for the first time raised various technical defences. Such defences were furthermore sketchy and bald which left one with the distinct impression that

they were clutching at straws when the shoe began to pinch. Their conduct in this regard causes them to be categorised as "obstructive purchasers", the very group which should not be allowed to abuse or benefit from the protective measures in the Act. The reference in the demand to an intention to act in terms of clause 26 was, in my view, a clear indication by the respondents that they had elected to act upon the appellants' breach. In these circumstances, the respondents' letter of demand, in referring to clause 26, complied with the intention of the Legislature in section 19(2)(c) to place the appellants on guard as to the respondents' serious intention of exercising one or more of those remedies. The appellants were adequately protected by such notice. In my view there was therefore substantial compliance with the directory provisions of subsection (2)(c).

[36] However, even if I am incorrect and it is held that subsection (2)(c) is peremptory, substantial compliance with the goal of the enactment would still be sufficient. In this regard it was said by Brandt JA in **Unlawful Occupiers** *supra* at 209 H as follows:

> "Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved."

In my view, the letter of 18 January 2005 achieved the goal of subsection 19(2)(c) by indicating to the purchaser that the seller intended to take one or more of the steps mentioned in clause 26 of the contract, and was not intending to claim specific performance.

COMPLIANCE WITH SECTION 4 OF THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT NO. 19 OF 1998

[37] The relevant provisions of section 4 read as follows:

"4(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

(4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be affected in the manner provided in the rules of the court, service must be affected in the manner directed by the court. Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5) The notice of proceedings contemplated in subsection (2) must –

(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonable be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[38] Mr. Mills argued that there was no compliance with section 4(2) It requires a **court** to serve written and effective notice of the proceedings on the unlawful occupiers and the municipality having jurisdiction, at least 14 days before the hearing of the proceedings. It is correct that the court *a quo* itself did not issue the necessary notice on the appellants and the local municipality. However, such service was affected by the deputy sheriff[34]. In addition the notice of motion makes reference to s 4(1) of the Pie Act, and then continues to state the following:

> "Geliewe verder kennis te neem dat die gronde vir die versoek van uitsetting gedoen word omrede die eerste en tweede respondente in onregmatige okkupasie van die eiendom is en genoegsame geleentheid gegun is om die eiendom te ontruim soos uitgeengesit in die beëdigde verklaring van M.E. Favel hierby aangeheg.
>
> Geliewe verder kennis te neem dat die plaaslike munisipaliteit in kennis gestel word van die aansoek.
>
> Geliewe verder kennis te neem dat die eerste en tweede respondente geregtig is om voor die agbare hof te verskyn en die aansoek te opponeer en indien van toepassing die reg het om aansoek te doen vir regshulp."

In my view this notice complied with the requirements of s 4(5) of the Pie Act.

[39] As was held in the **Unlawful Occupiers, School Site** case *supra*, not every deviation from a literal prescription is fatal. It is common cause in the present instance that the court did not cause the notices to be served on the relevant parties. This, however, is not fatal as was held by Streicher JA in **Moela v Shoniwe** 2005 4 SA 357 (SCA) at 3602:

> "[9] Here the documents and manner of service of the notice had not been authorised and directed by an order of court. However, the object of s 4(2) is clearly to ensure that the unlawful occupier and municipality are fully aware of the proceedings and that the unlawful occupier is aware of his rights referred to in s 4(5)(d). It may well be that that object, in appropriate circumstances, may be achieved notwithstanding the fact that service of the notice required by s 4(2) had not been authorised by the court. That may, for

[34] See the returns of service at pages 17, 18 and 27 of the record.

> example, be the case if at the hearing it is clear that written and effective notice of the proceedings containing the information required in terms of s 4(5) had in fact been served on the unlawful occupier and municipality 14 days before the hearing."

[40] It is common cause that service of the notice of motion and supporting affidavit were served on the appellants and the Emfuleni local authority on 26 and 24 June 2005 respectively. The hearing only took place during August 2005, i.e. more than 14 days after service of the documents. In my view, section 4(2) had been complied with.

[41] Mr. Mills also criticised the return of service regarding service on the local authority. This document states the following:

> "Between complainant M.E. (1) and C.P. Favel (2)
>
> And defendant Van Niekerk Adriaan Adam (1)
>
> Emfuleni Plaaslike Munisipaliteit.
>
> On 26/06/2005 at 14:15 at h/v Beaconsfield and Lesley Streets Vereeniging,
>
> H Roos dealt with this process as follows:
>
> Deur 'n afskrif van die kennisgewing van mosie behoorlik te beteken op mev Nortje (bestuurder) die verweerder se gevolmagtigde te h/v Beaconsfield and Lesley str Vereeniging nadat die aard en inhoud daarvan aan die genoemde persoon verduidelik is."

[42] Mr. Mills submitted that the document did not indicate what the relationship was between Mrs. Nortje and the municipality and whether she had authority to receive such document on behalf of the municipality. The latter circumstances caused Streicher JA in the **Moela v Shoniwa** decision to reject the service. However, the facts in the present matter are distinguishable for the following reasons:

1. The local authority is indicated as a defendant. In this return of service the "verweerder" can only have reference to the local authority as the address indicates that service was affected on such defendant.

2. Service took place at the address which is indicated to be that of the local authority in the notice of motion.

3. The capacity of Mrs. Nortje as a manager is indicated. She is stated to be authorised by the local authority as its "gevolmagtigde".

[43] It is trite law that the contents of a return of service is *prima facie* proof of the truth of its contents. No facts were placed before the court by the appellants indicating that the return of service was inadequate or incorrect. In any event, subsection 4(6) applied in the present case. It can safely be assumed that affluent people such as the appellants would not have been interested to be relocated to vacant land which the local authority may have had available. The role to be played by the local authority in this case was therefore negligible.[35]

[44] Under these circumstances, I have come to the conclusion that the requirements of s 4 of the Pie Act had been complied with and that Mr. Mills' arguments to the contrary fall to be rejected. I am therefore of the view that the court *a quo* was entitled to find that it was just and equitable to evict the appellants as the appellants provided no reasons to the contrary.

The appeal is dismissed with costs.

DATED AT JOHANNESBURG ON THIS ……. DAY OF MARCH 2006

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[35] See **Ndlovu v Ngcobo** 2003 1 SA 113 (SCA) at 123 [17]

C.J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree:

_____

M. JAJBHAY
JUDGE OF THE HIGH COURT

For the appellant: Mr. Mills of Mills & Groenewald

Counsel for the respondents: Adv. M.H. Christie
Attorneys for the respondents: Riaan Mostert Attorneys

The case was argued on 21/02/06