THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case number: **627/06**

In the matter between:

ADRIAAN ADAM VAN NIEKERK First Appellant

ALETTA MAGDALENA VAN NIEKERK Second Appellant

and

MAX EDWARD FAVEL First Respondent

CATHARINA PETRONELLA FAVEL Second Respondent

CORAM: **SCOTT, NAVSA, CLOETE JJA, HURT et KGOMO AJJA**

HEARD: **17 SEPTEMBER 2007**

DELIVERED: **27 SEPTEMBER 2007**

Summary: Alienation of Land Act 68 of 1981 – Notice in terms of s 19(2) to purchaser to remedy breach – Interpretation of s 19(1)(c) – Seller required, under s 19(2)(c), to refer in the notice to the remedies in s 19(1) he intends to invoke if breach not remedied – Such reference may be in the alternative – Mere reference to clause in contract not adequate.

Neutral citation: This judgment may be referred to as *Van Niekerk v Favel* [2007] SCA 124 (RSA)

HURT AJA:

[1] During November 2000 the parties entered into a written contract in terms of which the respondents sold immovable property to the appellants. The appellants agreed to pay the purchase price in instalments and, since the property was a residential one, the contract fell within the purview of the Alienation of Land Act, 68 of 1981 ('the Act'). On 18 January 2005, four years after the appellants had taken occupation of the property, the respondents' attorney addressed a letter to them by registered post, alleging that the appellants were in breach of various obligations under the contract and demanding that the breaches be remedied within 30 days. On 22 February 2005 the respondents' attorney addressed a second letter to the appellants declaring the contract cancelled and claiming forfeiture of the payments thus far made by the appellants in terms of the contract. There followed (in June 2005) an application in the Magistrates' Court, Vereeniging, for the eviction of the appellants from the property. This the appellants opposed, but without success. The magistrate granted an order for their eviction. An appeal was lodged to the Johannesburg High Court but this, too, failed. While an appeal was pending from that court, this court heard, and delivered judgment in, *Merry Hill v Engelbrecht* [2007] SCA 60 (RSA), which involved the interpretation of s 19 of the Act. The judgment in *Merry Hill* (per Brand JA) dealt particularly with the meaning and effect of s 19(2)(c) of the Act. Counsel in the course of arguing the present appeal before us were agreed that, if the letter of 18 January failed to meet with the requirements of s 19(2)(c), that would dispose of the appeal, and argument was effectively limited to that issue.

[2] Subsecs 19(1) and (2) of the Act read as follows:

'19. Limitation of right of seller to take action

(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),[1] shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post, as the case may be; and

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

[3] It will be convenient, before discussing the judgment in the court *a quo,*[2] to deal with the decision in *Merry Hill.* The seller in that case had sent a letter to the purchaser in terms of s 19(2), the relevant portion of which read as follows:

' In accordance with clause 9.1 of the Deed of Sale we have been instructed by the Seller to demand from you, as we hereby do, payment of the [arrear instalments in the] sum of R 22 534, 00 at our offices . . . within 32 days of the date of this letter.

Should payment not be made as aforesaid then and in that event, the Seller shall be entitled to claim immediate payment of the full balance of the purchase price and interest as due by you, as well as all costs and collection commission; or *alternatively* shall be entitled to cancel this contract.'

[4] The contention on behalf of the purchaser was that this letter failed to pass muster insofar as compliance with s 19 was concerned for two reasons. First, s 19(2)(c)

[1] Which are not relevant to the issues in this matter.
[2] Now reported as *Van Niekerk v Favel* 2006 (4) SA 548 (W).

peremptorily required the seller to state the precise contractual remedy which he intended to invoke in the event of the purchaser failing to comply with the notice. Secondly, the use of the word 'entitled' was inappropriate for the purpose of 'indicating' to the purchaser what 'steps' would be taken in response to any non-compliance by him with the notice. Brand JA, after referring to various earlier decisions[3] concerning s 19, came to the following conclusions:

(a) Subsec (2)(c) should not be construed as affecting the seller's contractual right to make his election whether to enforce the contract or terminate it only after the purchaser has failed to respond adequately to the notice;

(b) Accordingly it is open to the seller, in the notice contemplated in s 19, to list, in the alternative, those of the steps referred to in s 19(1) he intends to take if the breach is not remedied[4];

(c) The provisions of subsec 19(2)(c) are peremptory in the sense that a notice complying with them is an essential prerequisite to a valid exercise of any of the remedies referred to in subsec 19(1). However, insofar as the question of what constitutes such compliance is concerned, the court is required to decide, in each case, whether the notice complies 'substantially' with the requirements of the statute.[5]

[5] Applying these considerations to the facts before him, the learned Judge concluded that listing of the alternative contractual options in clause 9 of the relevant contract of sale (payment of the full balance of the purchase price or cancellation of the contract) was sufficient compliance with s 19(2)(c). Insofar as the use of the words 'shall be entitled' instead of 'intends' was concerned, Brand JA held that, on a sensible interpretation of the letter, it clearly conveyed the message that, if the purchaser failed to comply with the demand, he would be in jeopardy of one of the remedies, set out in the letter, which were both remedies listed in s 19(1), being exercised by the seller. He

[3] Including the judgment of Claassen J in the court *a quo*.
[4] Para 21.
[5] Para 23.

therefore held that the letter as drafted constituted substantial compliance with the statute.

[6] In certain passages in his judgment, Brand JA expressed agreement with some of the views expressed by Claassen J in the court *a quo*. However, in para 23, Brand JA expressly disagreed with the suggestion by Claassen J[6] that the provisions of s 19(2)(c) should be treated as merely directory. Furthermore, in coming to the conclusion that a seller is entitled to list his possible remedies in the alternative, Brand JA indicated that he should not be understood to be endorsing everything said by Claassen J. It is appropriate to consider two significant aspects of the reasoning of the learned judge in the court *a quo*.

[7] The first relates to the general approach to the interpretation of the statute. Claassen J purported to apply what has generally been described as a 'purposive construction' in interpreting s 19 (2). Accepting that 'the overall intention of the Legislature was to afford the purchaser reasonable protection', he took the view[7] that a comparison between s 19 and its precursor, s 13(1) of the Sale of Land in Instalments Act, 72 of 1971, demonstrated that the Legislature intended to afford the seller 'a measure of leniency'. Elaborating on this, he said[8]:

'The Legislature must have recognized 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 communicative 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 to 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

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[6] In para 26 of the judgment of the court *a quo.*
[7] Para 29 of the judgment of the court *a quo.*
[8] *Loc.cit.*

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 different guise.'

[8] This led him to apply a wide interpretation to s 19. Thus, he interpreted the word 'indication' in subsec (2)(c) as being 'in line with the meaning of "hint" or "suggestion"'[9], and concluded that

'. . . the Legislature intended to oblige the seller merely to inform the purchaser that he has *elected to act*[10] 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.'

[9] The second aspect of the judgment in the court *a quo* concerns the type of purchaser whom the Legislature intended to protect by the statute and, more particularly, the capabilities of such purchaser to deal with the exigencies which might arise in the event of alleged breaches by him of his contractual obligations. In this regard, Claassen J said[11]:

'It must have been within the contemplation of the Legislature that purchasers of immovable 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 allow 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 (them) 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 effective, the Legislature assumed that a purchaser is able to and will read and understand letters of demand.'

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[9] Para 30.
[10] Emphasis in the original.
[11] Para 31.

And later, in para 32,

'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. 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.'

[10] I do not think that the reasoning in these passages is correct. As to the view that the Act evinces an intention to ameliorate the burdens which it places on the seller compared with those imposed by Act 72 of 1971, it is not without relevance to note that, of the twenty-two sections in Chapter 2 of the Act, no less than eleven[12] either impose burdens on the seller or restrict the seller's ordinary contractual rights. So, in Chapter 3, do ss 27, 28, 29 and 29A. On that basis alone, there seems to be little justification to attribute, to the Legislature, the type of seller-oriented intention postulated by Claassen J. But, of substantially more importance, is the fact that Claassen J's approach to the contextual setting and interpretation of the Act is diametrically opposed to that of this court in *Merry Hill.* In para 13 of the judgment in that case, Brand JA said:

'Let me start with a proposition which appears to be beyond contention, namely, that the purpose of chapter 2 of the Act, which includes s 19, is to afford protection, in addition to what the contract may provide, to a particular type of purchaser -- a purchaser who pays by instalments -- of a particular type of land -- land used or intended to be used mainly for residential purposes. In this sense, Chapter 2, like its predecessor, the Sale of Land on Instalments Act 72 of 1971, can be described as a typical piece of consumer protection legislation . . .. 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 . . . .'

[11] Moreover, it was not on the basis of any perception that the Act reflected a more lenient attitude toward the seller than did Act 72 of 1971, that Brand JA concluded that

[12] Sections 2,5,6,7,9,10,12,13,16,19 and 24.

s 19 did not impose upon the seller a duty to make an election at the time of sending the s 19(2) notice. On the contrary, he arrived at that interpretation by applying the well-established presumption that legislation intends to alter the existing law only so far as is necessary to achieve the objects of the Legislature. In para [14], following immediately upon the passage quoted above from para [13], he said:

' In this light, the purpose of s 19 was clearly to afford additional protection to purchasers in this category who, by reason of their default, are exposed to a claim by the seller of the kind contemplated in s 19(1). By its very nature, the corollary of this additional protection must, however, involve the imposition of limitations on the contractual rights of the seller. And, in accordance with the general approach to statutory interpretation, legislative limitations on common-law contractual rights will be confined to those that appear from the express wording or by necessary implication from the statutory provision concerned . . . .'

These *dicta* are inconsistent with the approach outlined by Claassen J and the latter must be taken to be incorrect.

[12] As indicated earlier, the resolution of the issue in this appeal depends upon the meaning of s 19(2)(c) and, in particular, of the words 'an indication of the steps the seller intends to take'. Before turning to that issue, it will be convenient to make a further comment about the hypothetical 'average purchaser' to whom the Legislature may be taken to have intended to afford protection by its enactment. Apart from being 'vulnerable' and possibly 'uninformed', I think that he should be considered unlikely to be acquainted with the law, or to have an attorney at his beck and call. He would presumably also be reluctant to incur the expense of retaining an attorney for the purpose of obtaining advice concerning the contract, except perhaps at a later stage. On this basis, there is plainly no room, in interpreting the subsection, for the application of the general presumption that 'the purchaser must know the law' when it comes to deciding precisely what the Legislature intended in the Act. What is of paramount importance here is that the remedies mentioned in s 19(1), which the seller will become entitled to exercise (always assuming that they are reserved to the seller in the contract) if he complies with s 19, are all drastic remedies which will no doubt have serious repercussions as far as the purchaser is concerned. Considering the attributes of the

'average purchaser', it becomes clear that what is intended is that the purchaser must be put in a position where the extent of his jeopardy becomes clear to him by a reading of the letter alone and without recourse either to the Act or the contract itself or to legal advice. Thus the requirement that a purchaser be informed of the 'steps' open to the seller if he fails to purge his default. Furthermore, the 'steps' to which s 19(2)(c) refers are plainly one or more of the drastic steps listed in s 19(1) and not the remedies reserved to the seller in the contract. Having said that I can now turn to the issue in this appeal.

[13] The remedies reserved to the respondents in the event of default by the appellants were set out in clause 26 of the contract of sale, which was to the following effect:

'26.1 As die koper versuim om enige verpligting 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 (of) 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 presteer 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

21.1.4 enige ander stappe neem wat hy regtens mag neem."

It will be noted that only the remedies in sub-clauses 1, 2 and 3 fall within the ambit of s 19(1).

[14] The relevant paragraph of the letter of 18 January 2005, read as follows:

'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.'

The court *a quo* held that, since the letter made explicit reference to clause 26 of the contract, the appellants could have been under no misconception as to its import.[13] But that is not the point. The notice required in terms of s 19(1) is necessary only when the seller intends to enforce one or more of the remedies referred to in that section, ie acceleration of the payment of any instalment, the enforcement of any penalty stipulation, termination of the contract or payment of damages. If some other relief is sought, eg payment of the outstanding arrears or performance of what otherwise might be due under the contract, no notice in terms of s 19(1) is required. Section 19(2)(c) must be construed in this light. The 'steps' referred to must accordingly be understood as referring to one or more of the four remedies referred to in s 19(1). The respondents' letter in this case is to be contrasted with the express reference, in the letter in *Merry Hill*, to the contractual options (which were equivalent to two of the drastic remedies referred to in s 19(1)) available to the seller in the event of the purchaser's default not being purged. Here,[14] the mere reference to a clause of the contract and the warning that 'kliënt sy keuse sal uitoefen wat hy regtens mag hê' is quite consistent with an intention on the part of the seller to do no more than sue for the outstanding instalments or rates. It fails to achieve the very purpose of s 19(2)(c) which is to warn the purchaser – not simply that the continuing breach will not be tolerated – but that the seller proposes taking one or more of the drastic steps enumerated in s 19(1).

[16] It is no doubt true that an astute purchaser armed with a copy of the Act may reason that the seller proposes taking one or other of the steps referred to in s 19(1) because otherwise the notice would be unnecessary. But the whole purpose of s

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[13] Para 35. The learned judge said: '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 in this case.'

[14] Indeed, it may be not without significance that clause 26.1.4 reserved the right to take 'any other(unspecified) steps which may be available to the seller', presumably of a less drastic nature than those in sub-clauses 1, 2 and 3. However, in view of the conclusion to which I have come, it is not necessary to consider this aspect.

19(2)(c) is specifically to alert the purchaser to the serious of the consequences of his or her breach and that must be made clear in the notice itself. If this were not the case s 19(2)(c) would serve no purpose.

[17] It follows that the letter of 18 January 2005 does not comply with the requirements of s 19 and the appeal must succeed.

[16] The appeal is accordingly upheld with costs. The order of the court *a quo* is set aside and the following order is substituted in its place:

'(1) The appeal is upheld with costs.

(2) The order of the magistrate is set aside and the following order is substituted therefor:

"The application is dismissed with costs".'

N V HURT

ACTING JUDGE OF APPEAL

Concur:

SCOTT JA

NAVSA JA

CLOETE JA

KGOMO AJA