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BOTH A AND ANOTHER v RICH NO AND OTHERS 2014 (4) SA 124 (CC)

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Citation	2014 (4) SA 124 (CC)
Case No	CCT 89/13 [2014] ZACC 11
Court	Constitutional Court
Judge	Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuzza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J and Zondo J
Heard	November 20, 2013
Judgment	April 17, 2014
Counsel	<i>D Potgieter SC</i> (with <i>G Potgieter</i>) for the applicants. <i>J van Niekerk SC</i> for the respondents.
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Land — Sale — Contract — Instalment sale agreement — Statutory right of purchaser to demand transfer upon payment of 50% of purchase price against registration of bond in seller's favour to secure balance and interest — Purchaser in arrears with instalments — May claim transfer against payment of arrears — Alienation of Land Act 68 of 1981, s 27(1) and (3).

Contract — Breach — Remedies — Cancellation — Cancellation clause — Enforceability — Clause providing for forfeiture of sums paid under instalment of sale of land — Penalty disproportionate, contrary to public policy and unconstitutional. **D**

Contract — Reciprocity of obligations — Principle of reciprocity to be relaxed where interests of justice and fairness demand it.

Headnote : Kopnota

The case illustrates the following rules:

- Buyers who have paid more than 50 % of the purchase price under an instalment sale of land may claim transfer under s 27(1) of the Alienation of Land Act 68 of 1981 by registering a bond in favour of the seller to secure the balance and interest due even if they are in arrears with the instalments. The buyer must, however, make good the arrears before or upon transfer.

- A cancellation clause that would entitle a seller to retain all amounts paid would entail a disproportionate penalty and be unconstitutional and unenforceable.

- The principle of reciprocity in contracts should be relaxed where its application would lead to injustice.

Botha had concluded an instalment sale agreement to buy immovable property from a trust. A cancellation clause stated that breach by Botha would entitle the trust to cancel the agreement and retain all payments made. When Botha, having paid three-quarters of the purchase price, began to default on the instalments, the trust successfully sued for cancellation and eviction. Botha, citing s 27(1), demanded the transfer of the property into her name.

The trust instituted high court proceedings for the cancellation of the agreement and Botha counter-applied for an order compelling the trust to transfer the property to her. The trust did not tender the payments it received from Botha but relied on the forfeiture provision in the cancellation clause. The high court found in favour of the trust. Following a successful petition, the SCA remitted the matter to a full bench of the high court, which dismissed the appeal. In a further application for leave to appeal to the Constitutional Court the issues were (1) whether the trust was obliged to register the property in Botha's name against registration of a mortgage bond in their favour; alternatively (2) whether enforcement of the forfeiture clause was unconstitutional, given that more than 50% of the purchase price was paid, and, if so, whether Botha was entitled to restitution of the money paid.

Held: As to whether Botha was entitled to specific performance despite being in arrears: Though s 27(3) mentioned only cancellation as a remedy for a

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seller's failure to transfer the property to the buyer after it had paid at least 50% of the purchase price, buyers retained their common-law remedy of specific performance. Even though the *exceptio non adimpleti contractus* was in theory available to the trust, the principle of reciprocity had to be relaxed where its application would be unfair. To block Botha from claiming transfer under s 27(1) — and thus curing her breach in regard to the arrears — would be disproportionate and unfair in light of the considerable portion of the purchase price she had already paid. It was similarly in the interests of fairness that the transfer be made conditional on payment of the arrears and the outstanding municipal rates, taxes and service fees. (Paragraphs [36] – [49] at 140C – 145G.)

As to the forfeiture clause and cancellation: Granting cancellation — and therefore forfeiture — when more than three-quarters of the purchase price had already been paid would amount to a disproportionate penalty for Botha's breach. In such circumstances the trust would not be entitled to cancellation. (Paragraphs [50] – [51] at 146A – E.)

Botha was accordingly entitled to transfer against registration of a bond in favour of the trust, provided all arrears were brought up to date at or before transfer. (Paragraph [53] at 147A – E.) **D**

Cases Considered**Annotations**

Case law

Barkhuizen v Napier 2007 (5) SA 323 (CC) (2007 (7) BCLR 691; [2007] ZACC 5): applied **E**

Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A): compared

BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A): applied

Botha and Another v Rich NO and Others (NCK case No 476/2009, 28 March 2013): reversed on appeal

Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics ^F1911 AD 13: dictum at 24 applied

Dongwe NO v Slater-Kinghorn NO and Another [2009] ZAKZPHC 71: referred to

Grand Mines (Pty) Ltd v Giddey NO 1999 (1) SA 960 (SCA) ([1998] ZASCA 99): dictum at 971C – D applied

Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A): compared ^G

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079; [2000] ZACC 12): dictum in para [21] applied

MAN Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products and Busaf ^H 2004 (5) SA 226 (SCA) ([2004] 2 All SA 113; [2004] ZASCA 8): applied

Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another 2012 (9) BCLR 951 (CC) ([2012] ZACC 9): referred to

Rich and Others v Lagerwey 1974 (4) SA 748 (A): dictum at 761E – 762A applied ^I

Rich NO and Others v Botha and Another [2009] ZANHC 79: overruled

SATAWU and Another v Garvas and Others 2013 (1) SA 83 (CC) (2012 (8) BCLR 840; [2012] ZACC 13): dictum in para [37] applied

Shaik v Minister of Justice and Constitutional Development and Others 2004 (3) SA 599 (CC) (2004 (1) SACR 105; 2004 (4) BCLR 333; [2003] ZACC 24): dictum in para [18] applied ^J

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^A *South African Police Service v Police and Prisons Civil Rights Union and Another* 2011 (6) SA 1 (CC) (2011 (9) BCLR 992; [2011] ZACC 21): dictum in para [30] applied

South African Police Service v Public Servants Association 2007 (3) SA 521 (CC) ([2007] 5 BLLR 383; [2006] ZACC 18): applied

^B *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A): dictum at 651E – 652G applied

Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) (2002 (2) SACR 222; 2002 (8) BCLR 810; [2002] ZACC 8): dictum in paras [181] – [182] applied

^C *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) (2005 (4) BCLR 347; [2004] ZACC 19): referred to.

Statutes Considered

Statutes

The Alienation of Land Act 68 of 1981, s 27(1) and (3): see ^D *Juta's Statutes of South Africa 2012/13* vol 2 at 1-733.

Case Information

D Potgieter SC (with *G Potgieter*) for the applicants.

J van Niekerk SC for the respondents.

Application for leave to appeal and appeal against a decision of a full ^E bench of the Northern Cape Division, Kimberley.

Order

1. The applications for condonation are granted.
2. Leave to appeal is granted.
- ^F 3. Leave to adduce further evidence is refused.
4. The appeal is upheld.
5. The orders of the Northern Cape High Court, Kimberley, and the full court of the Northern Cape High Court, Kimberley, are set aside.
- ^G 6. Mr Henry Robins Rich NO, Mr Johannes Jacobus Wiese Hendriks NO and Ms Martha Magrieta Hendriks NO (trustees) are ordered to sign all necessary documents to effect the registration and transfer of erf 4128, De Aar (the property), into the name of the first applicant, Ms Lorraine Sophie Botha (Ms Botha), against the ^H simultaneous:
 - (i) Payment of all arrears owing and outstanding amounts levied in respect of municipal rates, taxes and service fees, under the instalment sale agreement by Ms Botha to the JJW Hendriks Trust IT2151/1995 (the trust).
 - ^I (ii) Registration of a first mortgage bond over the property in favour of the trust to secure the balance of the purchase price and interest thereon in terms of the agreement.
7. The trustees are ordered to pay the applicants' costs in the high court, full court, Supreme Court of Appeal and in this court, ^J including, where applicable, the costs of two counsel.

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Judgment

Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, ^A Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring):

Introduction

[1] The applicants sought leave to appeal against a decision of the full ^B court of the Northern Cape High Court, Kimberley ¹ (the full court), dismissing the appeal with costs and effectively confirming the decision of the Northern Cape High Court, Kimberley ² (the high court), in favour of the respondents. ³ They also applied for leave to adduce further evidence on appeal. The applicants and respondents applied for condonation for their delayed written submissions and opposing papers, ^C respectively.

[2] This case concerns whether the respondents are obliged, in terms of s 27(1) of the Alienation of Land Act ⁴ (Act), to register the transfer of the property in the name of the first applicant after more than half of the ^D purchase price of the immovable property had been paid. A determination of this question requires us to interpret the section. In the alternative the matter concerns the constitutionality of an enforcement of a cancellation clause in a contract of sale of immovable property where more than 50% of the purchase price had been paid. The applicants contended ^E that in those circumstances cancellation would be contrary to public policy. The cancellation of the contract resulted in an order for the eviction of the applicants from the property. The declaration and order of eviction made by the high court, and confirmed by the full court, are the subject-matter of this application for leave to appeal.

Parties^F

[3] The first applicant, Ms Lorraine Sophie Botha (Ms Botha), is the sole member of the second applicant, Khululekani Laundry CC, a close corporation duly incorporated and registered in terms of the laws of the Republic (collectively referred to as the applicants). The laundry service is operated from the property which is the subject-matter of these proceedings. The respondents, all representing the JJW Hendriks Trust IT2151/1995 (the trust), are collectively referred to as the trustees.

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

A Factual and litigation background

[4] Central to the appreciation of the issues is the sequence of material events which I mention later. The facts are largely common cause. The trust and Ms Botha concluded an instalment sale agreement in terms of which —

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

- (a) immovable property, erf 4128, De Aar, was sold by the trust to Ms Botha for the sum of R240 000;
- (b) the purchase price was payable in monthly instalments of R4000;
- (c) Ms Botha would insure the property against all possible risks and would pay the premiums in respect thereof;
- (d) Ms Botha would not be entitled to lease the property without the trustees' prior written permission;
- (e) Ms Botha would be liable for payment of all amounts levied in respect of municipal rates, taxes and service fees;
- (f) transfer of the property would be effected as soon as possible after payment of the purchase price and after fulfilment by Ms Botha of all of her obligations;
- (g) in the event of Ms Botha neglecting to make any payment on the due date, she would be liable to pay interest on the arrears calculated according to the prescribed rate of interest;
- (h) Ms Botha would be entitled to claim transfer of the property in terms of s 27 of the Act, after half of the purchase price had been paid; and
- (i) in the event of breach of the agreement by Ms Botha, the trustees would be entitled to cancel the agreement, in which event Ms Botha would forfeit in favour of the trust all payments effected in terms of the agreement.

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

[5] The applicants took occupation of the property in November 2003. The first instalment was payable on 28 February 2004. Ms Botha paid her instalments until October 2007. She subsequently defaulted in respect of payments due for November and December 2007. At that stage she had paid more than half of the purchase price, a sum of approximately R180 000. Ms Botha's default prompted the trust to issue summons in the magistrates' court.

[6] The trust successfully instituted proceedings against the applicants in the magistrates' court for cancellation of the contract, their eviction from the property and for forfeiture of the amount paid by Ms Botha. The tools of trade of the second applicant were attached.

[7] On 6 June 2008 Ms Botha obtained an interdict with costs in the high court which enabled her to resume occupation of the premises on 10 June 2008, pending the finalisation of the appeal. The applicants noted the appeal against the decision of the magistrates' court but the trust abandoned the judgment on 11 November 2008, before the appeal was argued. The trust was ordered to pay the costs of the interdictory application and the appeal proceedings. On 11 February 2009 the costs of the abandoned appeal were taxed and allocated in the sum of R23 125,96. The parties' joint statement of facts reflects that Ms Botha failed to make payment of any further instalments, save in respect of January 2009, from November 2007.

[8] A convenient date to start the sequence I mentioned earlier is 21 May 2008, the date on which Ms Botha exercised her rights in a letter to the trust demanding transfer in terms of s 27(1) of the Act. It needs to be emphasised that as at that date, Ms Botha had already paid instalments in excess of half of the purchase price. The letter demanding transfer reads:

'We are acting on behalf of [Ms Botha] and refer to the above sale agreement. Our client hereby wishes to exercise her right in terms of para 8.4 [incorporating s 27(1)] of the sale agreement concluded

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

between herself and the [trust] on 19 November 2003. It is our instructions to demand from the [trust] transfer of the above erf on condition that simultaneously with the registration of transfer there shall be registered in favour of the trust a first mortgage bond over the land to secure the balance of the purchase price. We wish to advise that the terms of the bond shall not be more onerous than the conditions which applied in respect of the contract dated 19 November 2003.'

[9] This letter contains no expression of intent regarding the payment of the amounts in arrears, the interest payable thereon or the amounts outstanding in respect of municipal rates, taxes and service fees. The trust did not respond.

[10] After a lapse of more than three months from 21 May 2008, when the demand for transfer was made, the trustees responded by letter dated 9 September 2008 reminding Ms Botha of the terms of the contract and her breach thereof. The trustees demanded payment of the arrear instalments in the sum of R40 000. Ms Botha did not respond. Almost five months later the trustees addressed another letter to Ms Botha, dated 23 February 2009, notifying her of their intention to cancel the contract. They asked the applicants to vacate the property on an urgent basis and hand over the keys of the property to the trust's attorneys.

[11] The applicants responded by letter dated 3 March 2009 in which they tendered payment of the balance of the purchase price in the sum of R56 000 together with interest, as well as the outstanding amounts of municipal rates, taxes and service fees against transfer of the property into Ms Botha's name. The trust did not respond to this letter. Instead, it instituted motion proceedings in the high court on 17 March 2009 seeking an order, among other things, declaring the contract of sale cancelled, alternatively that the court cancel the contract and that the applicants be evicted from the property within seven days of the service of the order.

[12] The applicants opposed the application. They filed a counter-application for an order compelling the trustees to register the property

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and sign all documents necessary for transferring the property into Ms Botha's name, together with costs. They contended that they were entitled to demand transfer of the property in terms of s 27(1) because they had paid half of the purchase price. On 4 May 2009 the applicants obtained an order compelling the trust to provide security for costs in that application. These costs were taxed on 12 November 2009 in the sum of R7563,40.

[13] Issues for determination by the high court included whether the letter of 23 February 2009 constituted a proper cancellation notice and whether the cancellation clause in the contract is contrary to public policy and, as such, unconstitutional. The court also considered the effect

of the applicants' offer dated 3 March 2009. On 13 November 2009 the high court dismissed Ms Botha's counter-application. It declared the contract of sale cancelled and ordered the applicants to vacate the **D** property and pay costs. ¹⁶ The high court refused leave to appeal with costs. On 4 December 2009 the applicants lodged an application for leave to appeal directly to this court. The application was dismissed on the basis that it was not in the interests of justice to consider the application at that stage.

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

Supreme Court of Appeal^A

[14] The applicants then applied for leave to appeal in the Supreme Court of Appeal. In granting leave to appeal to the full court ¹⁷ the Supreme Court of Appeal set aside the order of the high court dismissing the application for leave to appeal. The Supreme Court of Appeal also **B** set aside the costs order of the high court in the application for leave to appeal. It ordered the costs of the applications for leave to appeal in that court and of the petition before it to be costs in the appeal. ¹⁸

Full court

[15] On appeal before the full court the applicants, contending that they **C** had paid more than 50% of the purchase price of the property, argued among other things that s 27(1) ¹⁹ applied and that they were entitled to transfer of the property. They argued that the high court erred in (a) finding that the letter dated 23 February 2009 constituted an unequivocal notice of cancellation; (b) adopting a narrow approach to

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

A the *Barkhuizen*²⁰ principle and thus failing to accept that the cancellation of the contract was so unreasonable that its unfairness is manifest; (c) failing to take into account the objective facts that the cancellation is a violation of the applicants' constitutional rights to equality ²¹ and to have their dignity respected and protected; ²² (d) not finding that the **B** cancellation is oppressive, unreasonable and falls foul of constitutional values; and (e) over-emphasising the right to freedom of contract and under-emphasising the apparent injustice that would prevail if the contract were cancelled. ²³

[16] On 28 March 2013 the full court dismissed the appeal with costs, **C** including the costs of the application for leave to appeal in the high court and the Supreme Court of Appeal. ²⁴ The full court correctly found that the high court laboured under the misapprehension that the applicants' demand for transfer of the property was made on 21 May 2009 instead of 21 May 2008. ²⁵ It held, among other things, that although the **D** argument supporting the counter-application was not considered by the high court, there was no merit in the counter-application. ²⁶ As to whether the applicants met the requirements for specific performance, the full court said that the ground of appeal was stillborn. ²⁷ It found against the applicants on their submissions that clause 8.4 of the deed of sale entitled them to specific performance. ²⁸ The court held they had **E** failed to prove that the enforcement of the cancellation clause was in bad faith, unreasonable or unfair, impossible to fulfil, in violation of any rights or was contrary to public policy. ²⁹

[17] The full court held that the only remedies available to the purchaser **F** are those enumerated in s 27(3) ³⁰ of the Act, and that no provision is made for a claim for specific performance whereby a seller can be directed to transfer the property sold to a purchaser upon demand in terms of s 27(1). ³¹ The court held:

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

'Once the purchaser has paid at least 50% of the purchase price, he or **A** she is furthermore entitled to demand from the seller transfer of the land, provided it is registrable, without tendering the balance of the purchase price, but, instead, against the registration of a first mortgage bond over the land to secure the balance of the purchase price and interest. However, should the seller be unable, fail or refuse to tender transfer within three months, a claim for specific performance does not **B** seem to be available to the purchaser. He or she may, however, elect to cancel the deed of alienation in which case he or she will be entitled to the relief provided for in s 28(1).'

And: **C**

'(S)ection 27(1) of the [Act] does not give an immediately enforceable right to transfer of the property when half the purchase price has been paid. The section enables the purchaser to demand transfer on condition that a bond is registered in favour of the seller to secure the balance of the purchase price. If the seller refuses to accept that, in terms of s 27(3), the purchaser's remedy is to cancel the sale.'

[18] The applicants' application for leave to appeal to the Supreme Court of Appeal was dismissed with costs on 18 June 2013. ³⁴

In this court^E

[19] The applicants seek leave to appeal the decision of the full court and to adduce further evidence on appeal. Their main contention is that the enforcement of the cancellation clause, where more than 50 % of the purchase price has been paid, and in **F** the face of a demand for a transfer pursuant to s 27, is contrary to public policy. In the alternative, and in the event of the court finding that the trust was entitled to cancel the contract, it was contended that cancellation without restitution of the amount paid towards the purchase price is contrary to public policy. The cancellation of the contract, so the argument continued, is inimical to the interests of the community, contrary to public policy and thus unenforceable. The applicants argued that their constitutional rights were violated as a result of the enforcement of the cancellation clause. **G**

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

A [20] In their opposition the trustees conceded that the matter raises a constitutional issue but argued that it is not in the interests of justice to grant leave to appeal because of lack of prospects of success.

Issues

B [21] The preliminary issues are whether (a) condonation for the delayed applicants' written submissions should be granted; (b) leave to appeal should be granted; and (c) leave to adduce further evidence should be granted. The primary issue is whether, under s 27(1), the trustees were obliged to register the property in Ms Botha's name against registration of a mortgage bond in their favour. In the alternative the question is **C** whether enforcement of the cancellation clause was unreasonable, unfair and unconstitutional; if so, whether Ms Botha was entitled to restitution of the money paid.

Condonation

D [22] The applicants sought condonation for the late filing of their written submissions. ³⁵ The explanation for the delay is that the applicants' attorneys were unable to brief counsel to prepare written submissions timeously, due to delays in securing funding. The trustees also sought condonation for their delay of 74 days in the filing of their notice of **E** intention to oppose. ³⁶ They explain that this was due to an administrative oversight in the office of their attorneys. The applications for condonation are unopposed. The delay in respect of the filing of the applicants' written submissions was not excessive. ³⁷ Although the delay in respect of the filing of the notice of intention to oppose is somewhat long, the applicants did not oppose the trustees' application for condonation. **F** Neither the trustees nor the applicants are prejudiced by the delays. It is thus in the interests of justice to grant the applications for condonation.

Leave to appeal

G [23] At the heart of the case is whether Ms Botha was entitled to transfer of the property in terms of s 27(1). The determination of the issue

depends on a proper interpretation of that section. The issue at stake entails the constitutionality of the enforcement of a cancellation clause in a contract of sale of immovable property in circumstances where more than half of the purchase price was paid, and demand for transfer of the **H** property in terms of s 27(1) was refused by the seller. Also at issue is the

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

question regarding restitution of the amounts paid if Ms Botha is not **A** entitled to transfer, in particular whether forfeiture of the amounts paid is contrary to public policy and thus unconstitutional. Public policy requires that parties should in general comply with contractual obligations that have been freely and voluntarily undertaken. ³⁸ There can be no doubt that the matter raises constitutional issues. **B**

[24] All law, including the common law of contract, derives its force from the Constitution and is thus subject to constitutional control. ³⁹ It is of public importance to determine whether cancellation of a contract, governed by the Act, and the resultant forfeiture of the payments — of more than half of the purchase price of the property — are fair and thus **C** constitutionally compliant. The prospects of success, albeit not decisive, are good. It is therefore in the interests of justice to grant leave to appeal.

Leave to adduce new evidence

[25] The additional evidence sought to be adduced related to the three costs orders in favour of the applicants. They amounted to the unpaid **D** sum of R80 680,27, emanating from the same set of facts between the parties. It is argued that the amount is due and payable. The applicants stated that when the opposing affidavit was drafted in the high court, they believed that there was no need specifically to include in the affidavit the fact that all three costs orders remained due and payable because the taxed and allocated costs orders formed part of the court file. That **E** amount allegedly exceeded R71 301,74, consisting of the balance of the purchase price in the sum of R48 000 ⁴⁰ plus municipal rates and taxes in the sum of R23 301,74.

[26] The applicants argued that the trustees in fact owed them a sum of **F** R9378,33 after set-off. They submitted that the full court erred in holding that the indebtedness in respect of legal fees was never raised in the form of a set-off defence. It is submitted that the full court misdirected itself in finding that the indebtedness of the respondents in the form of legal fees is of no consequence.

[27] In the statement of agreed factual findings the parties accepted that **G** the indebtedness of the trustees to Ms Botha in respect of legal fees is of no consequence and no reliance was placed on set-off as payment of the arrear instalments. In my view this rendered the introduction of new evidence moot. In any event, the applicants persisted neither with the application nor the set-off argument. As a result the application to tender further evidence should be dismissed. **H**

Interpretive approach

[28] The Constitution is located in a history which involves the transition from a society based on injustice and exclusion from the democratic **I**

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

A process to one founded on the supremacy of the Constitution, the rule of law and the values of human dignity and equality. ⁴¹ The guidance provided by s 39(2) of the Constitution to statutory interpretation under our constitutional order means that all statutes must be interpreted through the prism of the Bill of Rights. ⁴² Section 39(2) reads:

B 'When interpreting any legislation, and when developing the common-law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

It follows that when we interpret s 27(1) of the Act we must promote the spirit, purport and objects of the Bill of Rights.

C [29] The general rule of statutory construction is that courts will give unambiguous provisions of a statute their plain meaning unless that meaning creates a result that is contrary to the purpose of the statute itself or when it leads to an absurd result. ⁴³ The legislative history, as set out below, in addition to the plain language, is also helpful in interpreting **D** relevant provisions of a statute. Before one interprets this section it is important to highlight the purpose of the Act and set out, briefly, its background. ⁴⁴

[30] The 1970s in South Africa were marked by the collapse of large township-development companies that resulted in devastating financial **E** losses for many individuals. Then, as now, matters concerning alienation of land or immovable property on instalments were regulated by legislation. When the repealed Sale of Land on Instalments Act ⁴⁵ (1971 Act) was enacted, land sold on instalments was not registrable in the name of the purchaser at the date of sale. This resulted in purchasers **F** not obtaining a right to enforce transfer of the land into their names in circumstances where an unreasonably long time may have passed after the signing of the contract of sale. The 1971 Act was enacted to protect the interests, not only of the purchaser but also of the seller. However, the 1971 Act was problematic. ⁴⁶

G [31] A Commission of Inquiry was appointed to investigate and make recommendations regarding the efficacy of the 1971 Act and the succeeding Development Schemes Bill of 1977. ⁴⁷ Its recommendations were incorporated into the Alienation of Land Bill (Bill) and would

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

inform the current Act. The purpose of the Bill was to afford purchasers **A** of land sufficient protection. In order to carry the protection to its logical conclusion, purchasers became entitled to cancel the contract if, for whatever reason, the seller was unable to give transfer.

[32] A significant protection introduced by the Bill found its way into **B** s 20 of the Act, in terms of which the deed of alienation defined as a contract was to be recorded in the deeds office. This gave purchasers the preferent claim over any mortgagee whose mortgage bond was registered against the title of the seller if the latter were insolvent or if the land were sold in execution. Moreover, s 27 of the Bill (later retained as part of the **C** Act) afforded purchasers of land more protection when certain jurisdictional facts were met. The registration of transfer, in terms of s 27(1) of the Act, is conditional upon the registration of a first mortgage bond over the property to secure the balance of the purchase price, plus interest, in favour of the seller. I deal with this in more detail shortly when I interpret s 27(1) to determine whether Ms Botha is entitled to transfer of the **D** property.

Meaning of s 27(1)

[33] Section 27(1) provides for the rights of a purchaser who has paid to **E** the seller not less than half of the purchase price of the property in question. It reads:

'Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less **F** than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation.' **G**

[34] A plain reading of s 27(1) reveals that it seeks to protect the rights of a purchaser who has paid not less than half of the purchase price. The section states that a purchaser '*shall . . . be entitled to demand . . . transfer*' (emphasis added). Plainly, this section requires the presence of **H** the following jurisdictional facts before the purchaser can enjoy the protection under it. First, the purchaser must have undertaken to pay the purchase price in specified instalments. Second, the purchaser must have paid to the seller in such instalments not less than 50 % of the purchase price. Third, the property in question must be registrable. ⁴⁸ Section 27(1) itself does not state any other requirement.

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

A[35] Section 27(1) should not be read in isolation. ⁴⁹ An examination of s 27(3) reveals that it provides a further protection to a purchaser. The word 'may' in s 27(3) is used to give a purchaser power. ⁵⁰ This view is fortified by the words 'shall' and 'may', the use of which in the same section is not insignificant. It needs to be stressed, however, that courts B may, in appropriate circumstances, construe the word 'may' as mandatory even though it is permissive on the face of the section. ⁵¹

[36] It is thus correct that the purchaser is entitled to cancel the deed of alienation in terms of s 27(3) and in terms of s 28(1) to recover from the seller, among other things, that which C she has paid plus interest on any payment made, ⁵² as suggested in

2014 (4) SA p141

Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

Dongwe.⁵³ But the argument advanced by the trustees, relying on *Dongwe* A and academic authority, ⁵⁴ is that the purchaser's *only* remedy if the seller refuses to honour her demand for transfer is cancellation. This, they said, follows from the fact that the section only mentions cancellation. It does not mention specific performance. But specific performance is what Ms Botha sought in her counter-application. Essentially, she sought an B order compelling the trustees to register the property and sign all documents necessary for transferring the property into her name.

[37] The trustees' argument cannot be sustained. The starting point is that at common law a contracting party is entitled to specific performance in respect of any contractual right. ⁵⁵ Section 27(1) creates a C contractual right implied by law. The purchaser is therefore entitled to specific performance in respect of that right unless the legislation means to depart from the common-law position. The section indicates no meaning of this kind.

[38] It is true that s 27(3) expressly mentions cancellation only, and does D not itemise specific performance. But there is no reason to infer that the provision means to exhaust the purchaser's remedies. Cancellation is a remedy that exists at common law. The subsection clarifies and adds significant content to it. First, the subsection inserts a time period. It E prescribes that the purchaser's right to cancel arises three months after the receipt of the demand by the seller. This specific time period adds urgency to the seller's obligation to transfer. It is a legislative intervention designed to strengthen the purchaser's position beyond the common law. Second, s 27(3) provides that in case of cancellation, the parties are F entitled to the relief provided for in s 28(1). And indeed, finally, had s 27(3) not been enacted, it would not be obvious that cancellation arises in this context at all. This is because at common law cancellation is available as a remedy only where the breach is material. Whether a particular breach is material often proves to be a difficult and contested question. Section 27(3) answers it for us, to the plain benefit of the purchaser. G

2014 (4) SA p142

Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

A[39] It needs to be stressed that s 27(3) does not enumerate the only remedies available to a purchaser in the circumstances of Ms Botha. The section does provide a purchaser with additional optional protection: the purchaser 'may cancel' the contract of sale if the seller fails or refuses to tender transfer within three months of receipt of the demand referred to B in s 27(1). ⁵⁶ Section 27(3) therefore serves three important purposes relating to the concretisation of the purchaser's right to cancel. There is no reason to infer that the provision sought to limit the purchaser's remedies to cancellation, and to exclude specific performance. It is doing something else entirely: it adds to the purchaser's arsenal, without taking C anything out of it.

[40] The Act, in regulating the alienation of land in certain circumstances and providing for matters connected therewith, ⁵⁷ especially in s 27(1), exhibits a concern for the protection of the rights of a purchaser who has partially paid the purchase price of immovable property. The D construction above is consistent with the wording and purpose of the section for the protection of the rights of purchasers and does not defeat the clear purpose of the Act. ⁵⁸ Moreover, the interpretation is consistent with the object of our Constitution that contracting parties are treated with equal worth and concern. By contrast, the interpretation contended E for by the trustees defeats that purpose. It leaves a purchaser of immovable property, such as Ms Botha, who has paid most of the purchase price and whose lawful entitlement has been ignored by the seller, without the standard remedy afforded by our law of contract. This would be anomalous in a piece of legislation that has been enacted to protect precisely those in Ms Botha's position.

F[41] Ms Botha elected to invoke s 27(1) and indeed persisted with her demand for the transfer of the property. At no stage did she capitulate and rely on the further protection in terms of s 27(3). Instead she sought a remedy that would compel the trustees to register the property and sign all documents necessary for transferring that property into her name. The full court was incorrect in holding that s 27(1) does not afford her G that remedy. That conclusion is inconsistent with the constitutional

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

injunction for courts, when interpreting any legislation, to promote the A spirit, purport and objects of the Bill of Rights.

Is Ms Botha entitled to specific performance even though she is in arrears?

[42] But even though Ms Botha is in principle entitled to specific B performance, the trustees raised a defence. They contended that if it is accepted that the demand in terms of s 27(1) confers the right to transfer of the property, then in order to be a proper demand, the purchaser should have rectified her breach before the demand. They submitted further that the fact that payment was not made ⁵⁹ or even tendered simultaneously with the demand means that there was no proper C demand giving rise to any right for specific performance.

[43] It is true that Ms Botha was in arrears and had failed to rectify her breach. It is an accepted principle of our law that where a contract creates reciprocal obligations, own performance or tender of own D performance by a claimant is a requirement for the enforceability of her claim for counter-performance. ⁶⁰ This is an instance of the principle of reciprocity. The other side of the coin is that the party from whom performance is claimed may raise the failure of counter-performance as a defence. ⁶¹ This defence is well known as the exception of a non-performed contract (*exceptio non adimpleti contractus*). In bilateral E contracts the obligations of parties are prima facie reciprocal. ⁶² For the principle to operate the obligations of the parties must be reciprocal in the sense that performance of the one cannot be enforced without performance of the other. ⁶³ The question remains whether the purchaser's entitlement under s 27(1) is reciprocal to her obligation to pay the instalments timeously. In other words, could the trustees raise the F *exceptio non adimpleti contractus* as a defence to Ms Botha's demand for transfer? In my view they could.

[44] The Act is premised on an instalment sale agreement of immovable property between a purchaser and seller. Nothing in the Act suggests that the application of its provisions in relation to rights and entitlements of G

2014 (4) SA p144

Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

A either purchasers or sellers is based on anything other than proper performance of their respective obligations in terms of the contract of sale. As I have already explained, there is a presumption that obligations in bilateral contracts are reciprocal. The presumption is not rebutted here. If anything, s 27(1) indicates that the seller's obligation to give B transfer and the purchaser's obligation to pay instalments timeously are intimately interconnected. That is why the purchaser is entitled to transfer only 'on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price C and interest'. The section thus recognises that it would be unfair for the purchaser to maintain her rights in the property if she falls into arrears. It follows inexorably that the provision does not allow the purchaser to obtain rights in the property unless she first purges her arrears.

D[45] To the extent that the rigid application of the principle of reciprocity may in particular circumstances lead to injustice, our law of

contract, based as it is on the principle of good faith, ⁶⁴ contains the necessary flexibility to ensure fairness. In *Tuckers Land and Development Corporation*⁶⁵ it was pointed out that the concepts of justice, reasonableness and fairness historically constituted good faith in contract. The principle of ⁶⁶reciprocity originated in these notions. This accords with the requirements of good faith.

[46] The Act seeks to ensure fairness between sellers and purchasers. Its provisions are in accordance with the constitutional values of reciprocal recognition of the dignity, freedom and equal worth of others, in this ⁶⁷case those of the respective contracting parties. The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a ⁶⁸deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way. In this case good faith is given expression through the principle of reciprocity and the *exceptio non adimpleti contractus*.

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuzza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

[47] Ms Botha's demand in terms of s 27(1), dated 21 May 2008, was ⁶⁹made with the statutorily tendered condition that, simultaneously with the registration of the transfer, there would be registration in favour of the trust of a first mortgage bond over the land to secure the balance of the purchase price plus interest thereon. This would of course not constitute payment and would not cure the breaches of arrear payments, ⁷⁰but it would have appreciable ameliorative effects for the trust.

[48] It would serve as security for future instalment payments. ⁷¹To this end it bears mentioning that Ms Botha had made a written tender for payment of the balance of the purchase price together with interest. Notably, this tender was on condition that the balance and the 'municipal ⁷²balance', ⁷³that is to say, outstanding amounts levied in respect of municipal rates, taxes and service fees, would be paid on the date of registration of the property in her name. ⁷⁴The payment of the arrear instalment and 'municipal balance' is important, otherwise an order to transfer the property without more would still leave Ms Botha in ⁷⁵immediate breach and liable to immediate execution on the property by the trust for payment of what she still owes.

[49] In my view, to deprive Ms Botha of the opportunity to have the property transferred to her under s 27(1) and in the process cure her ⁷⁶breach in regard to the arrears, would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid, and would thus be unfair. The other side of the coin is, however, that it would be equally disproportionate to allow registration of transfer, without making that registration conditional upon payment of the arrears and the outstanding amounts levied in municipal rates, taxes and service ⁷⁷fees. Accordingly, an appropriate order in this regard will be made. The condition that Ms Botha must pay the arrears and all municipal balances, set out in our order, on top of the statutory requirement that a bond be registered, constitutes an equitable exercise of the discretion a court has ⁷⁸to avoid undue hardship to the trustees. ⁷⁹

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuzza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

Cancellation

⁸⁰[50] It is another manifestation of the principle of reciprocity that where a contract has been lawfully cancelled, mutual obligations arise to restore the respective performances. Relying on the forfeiture clause in the agreement, ⁸¹the trust made no tender of repayment of what it had ⁸²received. Ms Botha argued that the forfeiture clause is unfair and unconstitutional, alternatively that it is a disproportionate penalty that falls to be equitably reduced in terms of the Conventional Penalties Act ⁸³72 (CPA).

[51] For the same reasons mentioned above, granting cancellation — and ⁸⁴therefore, in this case, forfeiture — in circumstances where three-quarters of the purchase price has already been paid would be a disproportionate penalty for the breach. In their application for cancellation the trustees did not properly address the disproportionate burden their claim for relief would have on Ms Botha. They took the view that the question of ⁸⁵forfeiture and restitution was independent of, and logically anterior to, the question of cancellation. That was a fundamental error. The fairness of awarding cancellation is self-evidently linked to the consequences of doing so. The trustees' stance therefore meant that they could not justify this court's awarding the relief they sought. In view of the above the cancellation application must fail.

Costs

[52] The applicants have been successful in this court. I am of the view that the costs of this application should follow the result. The Supreme Court of Appeal set aside the costs order of the high court and ordered ⁸⁶the costs of the application for leave to appeal before it and in the high court to be costs in the appeal. ⁸⁷Accordingly, the trustees are to pay the costs of the application for leave to appeal in the high court and the Supreme Court of Appeal and the costs of the appeal before the full bench and this court, including, where applicable, the costs of two ⁸⁸counsel.

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Nkabinde J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuzza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ and Zondo J concurring)

Order⁸⁹

[53] The following order is made:

1. The applications for condonation are granted.
2. Leave to appeal is granted.
3. Leave to adduce further evidence is refused.
4. The appeal is upheld. ⁹⁰
5. The orders of the Northern Cape High Court, Kimberley, and the full court of the Northern Cape High Court, Kimberley, are set aside.
6. Mr Henry Robins Rich NO, Mr Johannes Jacobus Wiese Hendriks NO and Ms Martha Magrieta Hendriks NO (trustees) are ⁹¹ordered to sign all necessary documents to effect the registration and transfer of erf 4128, De Aar (the property), into the name of the first applicant, Ms Lorraine Sophie Botha (Ms Botha), against the simultaneous:
 - (i) Payment of all arrears owing and outstanding amounts levied ⁹²in respect of municipal rates, taxes and service fees, under the instalment sale agreement by Ms Botha to the JJW Hendriks Trust IT2151/1995 (the trust).
 - (ii) Registration of a first mortgage bond over the property in favour of the trust to secure the balance of the purchase price and interest thereon in terms of the agreement. ⁹³
7. The trustees are ordered to pay the applicants' costs in the high court, full court, Supreme Court of Appeal and in this court, including, where applicable, the costs of two counsel.

Applicants' Attorneys: *Towell & Groenewald*, Kimberley.

Respondents' Attorneys: *Haarhoffs Inc*, Kimberley.

¹ *Botha and Another v Rich NO and Others* (NCK case No 476/2009, 28 March 2013), as yet unreported (full court judgment).

² *Rich NO and Others v Botha and Another* [2009] ZANHC 79 (high court judgment).

³ The applicants had previously approached this court for leave to appeal against the decision of the high court. On 20 January 2010 this court dismissed the

application on the basis that it was not in the interests of justice to hear the matter at that stage. At that time the applicant had not exhausted the normal appeal processes.

⁴ 68 of 1981.

⁵ Messrs Henry Robins Rich and Johannes Jacobus Wiese Hendriks, as well as Ms Martha Magrieta Hendriks.

⁶ These facts appear from the agreed statement of facts of the high court's factual findings and are common cause on the papers.

⁷ The sale agreement, recorded in Afrikaans, was concluded on 19 November 2003. The relevant terms thereof read:

³ Koopsom en wyse van betaling

Die koopprys is die bedrag van R240 000, welke genoemde bedrag deur die Kopers van die Verkoper as volg betaalbaar sal wees. Die Kopers sal geen deposito betaal nie en die volle koopsom sal in die maandelikse paaiemente van R4000 per maand betaalbaar wees onderhewig aan die voorwaardes hierin vervat. Die eerste betaling sal geskied voor of op 28 Februarie 2004 en daarna voor of op 28 Februarie 2004 en daarna voor of op die laaste dag van iedere en elke daaropvolgende maand.

...

⁷ Oordrag van eiendom

Die Verkoper moet op tekening van hierdie ooreenkoms kragtens Artikel 20 van die wet bewerkstellig. Die Verkoper mag nie na datum van ondertekening van hierdie ooreenkoms die eiendom met 'n verband of 'n verdere verband beswaar nie. Oordrag van die eiendom word deur die Verkoper se aktebesorgers bewerkstellig so spoedig moontlik na betaling van die koopsom en teen nakoming deur die Kopers van al sy verpligtinge ingevolge hierdie ooreenkoms.

8 Betaling

Alle betalings kragtens hierdie ooreenkoms sal vry van bankkoste of kommissie en sonder enige ander afrekkings of verrekenings aan die Verkoper gemaak word in die rekening . . . by enige adres wat die Verkoper van tyd tot tyd skriftelik mag aandui. Alle betalings deur die Kopers gemaak sal eerstens, volgens die Verkoper se diskresie, aangewend word ter voldoening van die koste (anders as die koopsom) waarvoor die Kopers ingevolge hierdie ooreenkoms aanspreeklik is, tweedens ter voldoening van die koopsom. Die Kopers is ten alle tye geregtig:

1. Om 'n betaling te maak voor die datum waarop dit ingevolge hierdie ooreenkoms gemaak moet word;
2. Om groter betalings te maak as die waarvoor hierdie ooreenkoms voorsiening maak;
3. Om betaling van al die bedrae verskuldig ingevolge hierdie ooreenkoms aan te bied en te eis dat transport van die eiendom aan hom (die Kopers) teen sodanige betaling gegee word; of
4. Om transport van die eiendom ingevolge Artikel 27 van die Wet te eis wanneer hy ten minste een helfte van die koopprys betaal het.

...

10 Voor-oordrag van die eiendom op die naam van die koper

...

10.3 Mag die Kopers nie die eiendom sonder die voorafgaande skriftelike toestemming van die Verkoper verhuur nie.

10.4 Mag die Kopers nie in die geheel of gedeeltelik van die besit of okkupasie van die eiendom afstand doen sonder die voorafgaande skriftelike toestemming van die Verkoper nie. Geen toestemming wat die Verkoper kragtens die voorafgaande bepalings mag gee onthef die Kopers van enige van hulle verpligtinge kragtens hierdie ooreenkoms nie.

11 Risiko

11.1 Die risiko, wins en verlies van die eiendom gaan op die okkupasiedatum op die Kopers oor. Die Kopers is vanaf die okkupasiedatum verplig om te reël vir die behoorlike versekering van eiendom teen alle risiko's.

11.2 Vanaf die okkupasiedatum sal die Kopers aanspreeklik wees vir die betaling van alle erfbelastings, verdere munisipale heffings en rekeninge ten opsigte van dienste wat gelewer word.

...

13 Kontrakbreuk

...

13.2.1 Verbeur die Kopers die bedrag of bedrae wat reeds deur hulle betaal is aan die Verkoper.'

⁸ The applicants contended that the trust is precluded from recovering the instalments, amounting to R8000, for these two months pursuant to its abandonment of the magistrates' court judgment. The trust denied that the claim for the two months was abandoned and said that the argument was, in law, misconceived.

⁹ The R180 000 is reckoned from 28 February 2004, the date on which the first instalment was due, until October 2007.

¹⁰ The judgment was obtained on 3 April 2008.

¹¹ The parties' statement of agreed factual findings in para 3.7. This is also reflected in the trustees' letter addressed to Ms Botha dated 9 September 2008.

¹² Section 27 is set out at n19 below. It is incorporated in clause 8.4 of the contract, which reads:

'Die kopers is ten alle tye geregtig . . . [o]m transport van die eiendom ingevolge Artikel 27 van die Wet te eis wanneer hy ten minste een helfte van die koopprys betaal het.'

¹³ This letter was in compliance with s 19 of the Act, which requires the seller to do three things if termination of the contract is desired. The seller must (a) notify the purchaser of the breach; (b) demand rectification of the breach; and (c) prove that the purchaser has failed to comply with such demand.

¹⁴ The notice reads:

'Ons verwys u vriendelik na ons skrywe van 9 September 2008. In voormelde skrywe het ons u versoek om binne 30 dae die gebreke wat daarin vermeld was te herstel en het ons u ook verwittig dat ons voornemens is om u kontrak te kanselleer en skadevergoeding te vorder. Ondanks ons versoek en meer as vyf maande nou reeds verloop en steeds het u nie die gebreke herstel nie. Dit blyk ook dat u nog steeds die eiendom okkupeer. Ons versoek u dan nou op 'n dringende basis dat u die eiendom sal ontruim voor of op Vrydag 27 Februarie 2009 om 12h00 en dat u die sleutels by die kantore van Joseph & Van Rensburg te Kerkstraat 41, De Aar sal aflewer.'

¹⁵ The notice of motion reads:

Dat dit verklaar word dat die koopkontrak gesluit tussen die [respondent en eerste applikant] op 19 November 2003 gekanselleer is, alternatiewelik dat dit deur hierdie bevel gekanselleer word. Dat die eerste [applikant], en enige ander persoon wat Erf 4128, De Aar, deur haar okkupeer, gelas word om die perseel binne sewe dae na betekening van hierdie bevel te ontruim tesame met al hul besittings. Dat indien die [eerste applikant] sou versuim om gevolg te gee aan die bepalings hiervan, die balju vir die distrik De Aar gemagtig en gelas word om die [eerste applikant], en enige ander persoon wat deur haar die voormelde erf okkupeer, tesame met al hul besittings van die perseel te verwyder. Dat die [eerste applikant], asook die tweede [applikant] indien dit sou verkies om die aansoek te opponeer, gelas word om die koste van die aansoek te betaal.'

¹⁶ The order of the high court reads:

- 1 The contract of sale concluded between the [trust and Ms Botha] on 19 November 2003 is declared cancelled and is hereby cancelled.
2. [Ms Botha] and any other person that occupies Erf 4128, De Aar through her must vacate the premises together with their belongings, within one month of this order.
3. In the event of [Ms Botha's] failure to comply with this order within the stipulated period, the sheriff for the district of De Aar is hereby authorised and ordered to remove [Ms Botha] or any other person who occupies the premises through her together with their belongings, from the property.

4. The [applicants] jointly and severally pay the costs of this application.'

¹⁷ Petition order dated 20 August 2010.

¹⁸ The petition order reads:

'Leave to appeal is granted to the full court of the Northern Cape Division. The costs of the court a quo in dismissing the application for leave to appeal is set aside and the costs of the application for leave to appeal in this court and the court a quo are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is to pay these costs.'

¹⁹ Section 27, in relevant part, reads:

'(1) Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 per cent of the purchase price, shall, if the land is registrable, *be entitled to demand* from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation.

(2) The conditions as to the rate of interest and redemption as well as other conditions of the mortgage bond contemplated in subsection (1), shall not be more onerous than the conditions which applied in respect of the deed of alienation.

(3) If for whatever reason the seller is unable, fails or refuses to tender transfer within three months of the receipt of the demand referred to in subsection (1), the purchaser may cancel the relevant deed of alienation, in which case the parties are entitled to the relief provided for in section 28(1): Provided that nothing contained in this subsection shall detract from any additional claim for damages which the purchaser may have.' (Emphasis added.)

²⁰ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (2007 (7) BCLR 691; [2007] ZACC 5).

²¹ Section 9(1) of the Constitution reads:

'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

²² Section 10 of the Constitution reads:

Everyone has inherent dignity and the right to have their dignity respected and protected.'

²³ Notice of appeal before the full court.

²⁴ Full court judgment supra n1 at para 16.

²⁵ Id in para 5.

²⁶ Id in para 6.

²⁷ Id in para 9

²⁸ Id in para 8.

²⁹ Id in para 13.

³⁰ Supra n19.

³¹ Full court judgment supra n1 at para 7.1.

³² Id. See also Silberberg & Schoeman *The Law of Property* 4 ed (Butterworths, Durban 2006) at 242.

³³ Id. See also *Dongwe NO v Slater-Kinghorn NO and Another* [2009] ZAKZPHC 71 (*Dongwe*).

³⁴ In dismissing the application for leave to appeal the Supreme Court of Appeal said:

'This court does not give reasons for its order in dismissing applications for condonation or leave to appeal. This is in line with international practice and does not offend any constitutional principle. Dismissal of an application for leave to appeal signifies that this court is of the view that the intended appeal has no reasonable prospects of success and that there is no other compelling reason why it should be heard. An order such as this is, except for clerical errors, final and cannot be

reviewed by this court.'

³⁵ As per the directions dated 20 August 2013, the written submissions were due on 13 September 2013 but were only lodged on 26 September 2013.

³⁶ In terms of rule 19 of the rules of this court the opposing papers were due to be lodged on 24 July 2013, but were only filed on 8 November 2013. Although the trustees also sought condonation for the late filing of the notice of intention to oppose, their opposing affidavit was lodged within the period provided for in the rules. The question of condonation in respect of the filing of the notice of intention to oppose does not therefore arise.

³⁷ The delays in respect of the filing of written submissions and opposing papers were 8 and 74 days, respectively.

³⁸ This consideration, expressed in the maxim *pacta sunt servanda*, gives effect to the central constitutional values of freedom and dignity.

³⁹ *Barkhuizen* supra n20 at para 15.

⁴⁰ This calculation by the applicants is based on the abandoned judgment and the order of the magistrates' court.

⁴¹ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079; [2000] ZACC 12) para 21.

⁴² *Id.*

⁴³ *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) (2012 (8) BCLR 840; [2012] ZACC 13) para 37.

⁴⁴ See Van Rensburg & Treisman *The Practitioner's Guide to the Alienation of Land Act* 2 ed (Butterworths, Durban 1984).

⁴⁵ 72 of 1971.

⁴⁶ Van Rensburg & Treisman supra n44 at 1 – 2 and 7 – 9.

⁴⁷ *Id.* at 2.

⁴⁸ Section 1 of the Act defines 'registrable', in relation to land, to mean 'capable of being registered as the subject of a separate title deed in a deeds registry in that the requirements of any law relating to such registration have been complied with'.

⁴⁹ See *South African Police Service v Police and Prisons Civil Rights Union and Another* 2011 (6) SA 1 (CC) (2011 (9) BCLR 992; [2011] ZACC 21) para 30.

⁵⁰ See *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) ([2007] 5 BLLR 383; [2006] ZACC 18) (*SAPS v PSA*) paras 14 – 16; and *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) (2002 (2) SACR 222; 2002 (8) BCLR 810; [2002] ZACC 8) paras 181 – 182.

⁵¹ Wade & Forsyth *Administrative Law* 8 ed (Oxford University Press, Cape Town 2000) at 239:

'The hallmark of discretionary power is permissive language using words such as "may" or "it shall be lawful", as opposed to obligatory language such as "shall". But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case.'

See also the minority judgment in *SAPS v PSA* supra n50 at para 86.

⁵² Section 28(1) reads:

'Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or in contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and—

(a) the alienee may in addition recover from the alienator —

(i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;

(ii) a reasonable compensation for —

(aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or

(bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and

(b) the alienator may in addition recover from the alienee —

(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable.'

⁵³ See supra n33.

⁵⁴ *Silbergberg & Schoeman* supra n32 at 400.

⁵⁵ See *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782D; and *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A).

⁵⁶ Section 27(3) bears repetition. It reads:

'If for whatever reason the seller is unable, fails or refuses to tender transfer within three months of the receipt of the demand referred to in subsection (1), the purchaser may cancel the relevant deed of alienation, in which case the parties are entitled to the relief provided for in section 28(1): Provided that nothing contained in this subsection shall detract from any additional claim for damages which the purchaser may have.' [Emphasis added.]

⁵⁷ See the long title to the Act.

⁵⁸ See *Shaik v Minister of Justice and Constitutional Development and Others* 2004 (3) SA 599 (CC) (2004 (1) SACR 105; 2004 (4) BCLR 333; [2003] ZACC 24) para 18 where this court echoed the well-recognised rule of statutory construction formulated in *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 24.

⁵⁹ The payment related to arrear monthly instalments and interest on the arrear instalments and for the amounts levied in respect of municipal rates, taxes and service fees which should have been tendered simultaneously with the demand.

⁶⁰ *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) (*BK Tooling*) at 419H.

⁶¹ In *BK Tooling* supra at 415H Jansen JA made a convenient distinction between the principle of reciprocity (*wederkerigheidsbeginsel*) and its application as a defence (*weerhoudingsreg*) to a claim.

⁶² *MAN Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products and Busaf* 2004 (5) SA 226 (SCA) ([2004] 2 All SA 113; [2004] ZASCA 8) (*MAN Truck*); *Grand Mines (Pty) Ltd v Giddey NO* 1999 (1) SA 960 (SCA) ([1998] ZASCA 99) at 971C – D; and *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 761E – 762A.

⁶³ *MAN Truck* id in para 12.

⁶⁴ It has often been asserted by the courts that in our law all contracts are subject to good faith. Taken at face value that means that the requirement of good faith underlies and informs the South African law of contract. See Zimmermann 'Good Faith and Equity' in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Juta & Co Ltd, Cape Town 1996) from 217 – 60. See also *Barkhuizen* supra n20 and *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 651 – 652 (*Tuckers*). Considerations of good faith have shaped the content and development of existing legal concepts of contract in many ways. See Zimmermann id at 239 – 60.

⁶⁵ *Tuckers* supra at 651E – F and 652C – G.

⁶⁶ Section 27(1) speaks of the 'balance of the purchase price'. See also Van Rensburg & Treisman supra n44 at 184 – 5.

⁶⁷ Referring to outstanding amounts levied in respect of municipal rates, taxes and service fees in terms of the parties' agreement. In this regard see the terms of the instalment sale agreement at [4] read with [11] regarding the written demand and tender.

⁶⁸ Supra [4].

⁶⁹ Section 172(1) empowers a court, when deciding a constitutional matter within its powers, to make any order that is just and equitable. See in this regard *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* 2012 (9) BCLR 951 (CC) ([2012] ZACC 9); and *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) (2005 (4) BCLR 347; [2004] ZACC 19).

⁷⁰ See *Haynes* supra n55. Also see the discussion on the discretion of the courts in Hutchison *The Law of Contract in South Africa* (Oxford University Press, Cape Town 2009) at 321.

⁷¹ Clause 13.2.1 in the contract of sale provides that if Ms Botha breaches the agreement the trustees may cancel it, in which case she forfeits the amounts already paid by her to them.

⁷² 15 of 1962. Section 3 provides:

'If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such an extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.'

Section 4 states expressly that forfeiture clauses are penalty clauses for the purpose of the CPA.

⁷³ See the petition order supra n18.