

THE LAW OF PURCHASE AND SALE

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LEGISLATION

CONSUMER PROTECTION ACT 68 OF 2008

General

The Consumer Protection Act 68 of 2008 ('CPA'; 'the Act') is discussed in detail in the chapter on The General Principles of Contract. The discussion in the present chapter focuses mainly on the influence of the Act on the law of purchase and sale. In this discussion, liberal use has been made of Evert van Eeden's *A Guide to the Consumer Protection Act* (2009), NJ Melville's *The Consumer Protection Act Made Easy* (2010), and W Jacobs, P Stoop and R van Niekerk's 'Fundamental consumer rights under the Consumer Protection Act 68 of 2008: A critical overview and analysis' (2010) 13 *Potchefstroom Electronic Law Journal* 302 (available at <<http://www.nwu.ac.za>>).

Consumer protection legislation is not new to South African law. However, the CPA is a culmination of several decades of legal development resulting in an umbrella statute replacing all previous legislation in this field, such as the Merchandise Marks Act 17 of 1941 (ss 2–13 and 16–17), Business Names Act 27 of 1960, Price Control Act 25 of 1964 (now known as the Sale and Service Matters Act), Trade Practices Act 76 of 1976 and Consumer Affairs (Unfair Business Practices) Act 71 of 1988. (On the need for consumer protection legislation, see Tanya Woker 'Why the need for consumer protection legislation? A look at some reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' (2010) 31 *Obiter* 217.)

Most of the provisions of the CPA came into effect on 31 March 2011 (s 2(2) of sch 2 read with s 121(3)). However, section 61, which imposes strict liability on producers, importers, distributors and retailers of any goods for any harm caused by defective goods, applies to all goods supplied after 25 April 2010 (s 3(4) of

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sch 2). The date of commencement of section 7, which deals with the requirements of a franchise agreement, is also 25 April 2010.

In terms of section 3, the purposes of the CPA are the promotion, advancement and protection of the economic welfare and economic interests of consumers by establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible; reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by aggrieved consumers, such as low-income, isolated, young, elderly or illiterate persons; promoting fair business practices; protecting consumers from unconscionable, unfair, unreasonable, unjust or other improper trade practices and deceptive, misleading, unfair or fraudulent conduct; improving consumer awareness and information; enhancing informed consumer choice and behaviour; promoting consumer confidence, empowerment and responsibility through education; providing a system of consensual dispute resolution; and providing an efficient system of redress for consumers. The Act also protects consumers against discriminatory marketing (ss 8 and 9). It is evident that the purpose of the CPA is to regulate both market practices and contracts. A person must not, in any dealings with a consumer in the ordinary course of business, for consideration, engage in any conduct contrary to the purpose and policy of the Act (ss 4(5)(a) and 51(1)(a)(i)).

Contrary to the common law, which is not concerned with the 'fairness' of a contract, the CPA contains mechanisms to address unfairness in contracts between consumers and suppliers (see, inter alia, ss 2, 14–17, 20, 22, 26, 39, 44, 46, 48–51, 58 and 64). A supplier is no longer able to assert that a court is precluded from looking behind the consumer's signature or that the format or unfairness of a contract is irrelevant. However, the ground rules defining a contract are still contained mainly in the (common) law of contract as amplified by legislation. There are two generic forms of contractual abuse, namely procedural deficiencies (unfairness) and contractual terms per se (Eiselen DJ 'Die standaardbedingingsprobleem: Ekonomiese magmsmisbruik, verbruikersvraagstuk of probleem in eie reg?' (1988) 22 *De Jure* 251). In terms of the CPA, procedural fairness requires that suppliers make specific information available to consumers, refrain from making false or deceptive representations, and provide material notices in writing. With regard to fair contractual terms, the CPA embraces fair, reasonable and just contractual terms; requires

consumer agreements to be in writing; requires proper notification of certain contractual terms and conditions; prohibits certain agreements, terms and conditions; and empowers the courts to enforce the aforementioned.

Fundamental consumer rights protected by the CPA include the right to equality in the consumer market (ss 8–10); privacy (ss 11–12); choice (ss 13–21); disclosure and information (ss 22–28); fair and responsible marketing (s 29–39); fair and honest dealing (ss 40–47); fair, just and reasonable terms and conditions (ss 48–52); fair value, good quality and safety (ss 53–61); and the supplier's accountability to consumers (ss 62–67).

Outline of the CPA

The CPA consists of seven chapters. As is customary, chapter 1 deals with definitions and the interpretation, purpose and application of the Act. Fundamental consumer rights, such as the right to equality in the consumer market (Part A); privacy and choice (Parts B and C); disclosure and information (Part D); fair and responsible marketing (Part E); fair and honest dealing (Part F); fair, just and reasonable terms and conditions (Part G); fair value, good quality and safety (Part H); and the supplier's accountability to consumers (Part I) are addressed in chapter 2. The protection of the consumer's rights and voice is set out in chapter 3. Business names and the industries' codes of conduct are covered by chapter 4. The national consumer protection institutions, including the National Consumer Commission ('NCC') and National Consumer Tribunal ('NCT'), fall under chapter 5. Chapters 6 and 7, respectively, regulate the enforcement and general provisions of the Act.

Interpretation of the CPA

The CPA contains explicit indications regarding the interpretation of the Act (s 2) which, briefly, entail adherence to the spirit (ss 4(2)(b)(i) and 4(3)) and purpose of the Act (s 3), including the consideration of foreign and international law, conventions, declarations or protocols relating to consumer protection, and applicable decisions of consumer courts, ombuds or arbitrators (as far as the decisions have not been set aside by a higher court). The interpretation of certain documents, such as any standard form contract or other document relating to suppliers, is also prescribed by the Act (s 4(4)). Thus, in the event of any ambiguity or restriction, limitation, exclusion or deprivation of a

consumer's legal rights, such document must be interpreted and resolved to the benefit of the consumer. Tjachie Naudé ('The consumer's "right to fair, reasonable and just terms" under the new Consumer Protection Act in comparative perspective' (2009) 126 *SALJ* 505) is of the view that section 4(4)(b) should be deleted as this position is adequately addressed in sections 48 and 52.

If there is any inconsistency between chapter 5 of the CPA (national consumer protection institutions) and the Public Finance Management Act 1 of 1999 or the Public Service Act 103 of 1994, the provisions of the latter Acts prevail (s 2(8)). If there is any inconsistency between any other Act and the CPA, the provisions of both Acts apply concurrently to the extent that it is possible to apply and comply with one of them without contravening the other. If this is impossible, the provision that extends the greater protection to the consumer prevails (s 2(9)). In the case of hazardous products, only the provisions of the CPA apply.

No provision of the CPA is to be interpreted in a manner that precludes a consumer from exercising any common-law rights (s 2(10)), and the courts have a duty to develop the common law to improve the realization and enjoyment of consumer rights (s 4(2)(a)).

Application of the CPA

The CPA regulates the marketing of goods and services, and relationships, transactions and agreements between producers, suppliers, distributors, importers, retailers, service providers and intermediaries, on the one hand, and consumers, on the other hand, relating to goods and services provided by the aforementioned during the ordinary course of their business, to consumers, for consideration. RD Sharrock ('Judicial control of unfair contract terms: The implications of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 295) is of the opinion that the phrase 'ordinary course of business' is not intended to refer to 'the ordinary course of business' in a general sense, but rather to the 'ordinary course of business' of the particular supplier. In *Amalgamated Banks of South Africa Bpk v De Goede en Andere* 1997 (4) SA 66 (SCA), the test laid down for determining whether a contract falls within the ordinary course of a particular business was whether entering into the contract falls within the scope of that business and whether ordinary businesspersons would have concluded the contract, that is, whether the contract embodies

terms ordinary persons would have used. It is therefore irrelevant whether carrying on the business entails entering into that type of contract regularly. It follows that if a salaried person owns a house and lets it in order to increase his or her monthly income the lease is subject to the CPA. It is doubtful whether such a far-reaching test is in keeping with the intention of the legislator in enacting the CPA.

The CPA also regards the relationship between franchisors and franchisees and commercial interactions between consumers and trade unions, associations, voluntary associations and clubs as a 'transaction' (see, respectively, s 5(6)(b)–(e) and 5(6)(a)). See section 1 regarding the definitions of the above terminology.

The main commercial activities the CPA hinges on are 'transaction' and 'market'. 'Transactions' include only those transactions arising from the above entities' ordinary course of business, resulting in an agreement with any person or consumer for the supply (or potential supply) of any goods or services to such person or consumer (or at the direction of a consumer) in exchange for consideration (s 1). An 'agreement' means an arrangement between two or more parties that purports to establish a relationship in law between them (ibid). A 'transaction', therefore, has three components: The 'agreement' itself; the actual supply of goods; and the performance of services. Once-off transactions are therefore excluded from the CPA. 'Market', as a verb, connotes to promote or supply any goods or services (ibid).

In short, unless exempted, the CPA applies to all transactions for the supply (or potential supply) of goods or services in South Africa which are concluded in the ordinary course of business for consideration; the promotion of goods or services or the promotion of the supply of such goods or services in South Africa, including displaying or marketing the goods or services, expressing a willingness to supply the goods or services, or inducing a consumer to enter into a transaction; and the goods or services themselves.

In terms of sections 1 and 5(2) to (4), the CPA does not apply to the following transactions: (a) transactions for the supply or promotion of goods or services to the state; (b) transactions in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, exceeds or is equal to the threshold value determined by the Minister in terms of section 6 (currently, R2 million); (c) transactions which

have been exempted by the Minister in terms of section 5(3) and (4) (respectively, an industry-wide exemption granted at the request of a regulatory authority because of an overlap or duplicate regulatory scheme which already exists under any national legislation, treaty, international law, convention or protocol, and transactions exempted on the advice of the NCC); (d) a transaction which constitutes a credit agreement under the NCA, subject to the proviso that the goods and services subject to such credit agreement are not excluded from the application of the CPA (see Melville *The Consumer Protection Act Made Easy* 13 and Neville Melville & Robin Palmer 'The application of the Consumer Protection Act 2008 to credit agreements' (2010) 22 *SA Merc LJ* 272 for suggestions on which provisions of the CPA will effectively not apply to credit agreements); (e) transactions pertaining to services to be supplied under an employment contract; (f) transactions giving effect to a collective bargaining agreement in terms of the Labour Relations Act 66 of 1995 and section 23 of the Constitution of the Republic of South Africa, 1996, or a collective agreement in terms of section 213 of the Labour Relations Act; (g) transactions in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 relating to education, information, advice or intermediary banking or related financial service; (h) transactions in terms of the Long-term Insurance Act 52 of 1998 or the Short-term Insurance Act 53 of 1998 relating to the undertaking, underwriting or assumption of risk; and (i) transactions concluded before 25 October 2010.

However, section 5(5) stipulates that if goods are supplied in South Africa in terms of a transaction that is exempted from the application of the CPA or if a juristic person does not qualify as a consumer, such goods and the importer, producer, distributor, and retailer of those goods are still subject to the provisions of sections 60 and 61. The latter sections deal with unsafe goods, safety monitoring, recall and damage caused by such goods.

Purchase and sale within the legal framework of the CPA

General

The common law has not been replaced by the CPA, and any transaction which does not fall within the scope of the CPA is governed by the common law (s 2(10)). Further, the following provisions of the CPA explicitly preserve the common law: a consumer's right to cooling-off (s 16(2)); a consumer's right to

return goods (s 20(1)(b)); implied warranties of quality (s 56(4)(a)); and a court's power to enforce consumer rights (s 76(2)(a)). However, the law of contract has been fundamentally altered by Parts A to G of chapter 2 (fundamental consumer rights), while Part H of chapter 2 has drastically transformed the law of delict with regard to product liability.

Regulation of market practices

Market practices such as direct marketing (ss 11, 12, 28, 16, 20 and 21); catalogue marketing (ss 18, 23, 26, 33 and 79); auctions (s 45); negative-option marketing (s 31); bundling of goods and services (s 13); bait marketing (s 30(1)); referral selling (s 38); lay-by sales (ss 62 and 65); prepaid certificates, credits and vouchers (ss 63 and 64); promotional competitions, offers and trade coupons (s 34); customer loyalty programmes (s 35); and over-selling and over-booking (ss 45 and 47) are regulated in detail by the CPA.

Influence of the CPA on the general principles of purchase and sale

Res vendita

A *res vendita* sold by description or sample must in all material aspects and characteristics, as envisaged by an ordinary alert consumer (purchaser), correspond with the delivered *res vendita* (s 18(3)). Future things sold by sample and description must correspond with both (s 18(4)). It should also be taken into account that before accepting delivery of the *res vendita*, a consumer is entitled to examine it to make sure it is of the type and quality agreed upon or, if a special order was placed, reasonably conform to the material specifications (s 19(5)). If the consumer did not have an opportunity to examine the *res vendita*, or if it does not comply with the implied standard, a consumer may return the *res vendita* to a supplier (seller) and cancel the agreement within ten business days (s 20(4)). The risk and expense in respect of the return of the *res vendita* in this instance lie with the supplier. However, a supplier may recover certain costs for the use of such goods (s 20(6)). Goods may not be returned if return is prohibited by any law for public health or other reasons or if the goods have been tampered with (s 20(3)).

A consumer has the right to choose from goods openly displayed, and he or she cannot be held liable for loss or damage to such displayed goods, unless the loss was caused by the

consumer's unlawful conduct (s 18(1)). If goods are displayed in or sold from open stock, a consumer has the right to select or reject any particular item from such stock before completing the transaction (s 18(2)).

Trade descriptions that are likely to mislead a consumer are prohibited by the CPA (s 24). A trade description, *inter alia*, relates to the number, measure, weight, manufacturer, ingredients, material, country of origin, mode of manufacturing and applicable patents of the goods on sale (s 1). For the purpose of section 24 a trade description is applied to goods if it is displayed in any covering, label or reel in or on which the goods are packaged; displayed together with, or in proximity to, the goods in a manner that is likely to lead to the belief that the goods are designated or described by that description; or is contained in any sign, advertisement, catalogue, brochure, circular, wine list, invoice, business letter, business paper or other commercial communication on the basis of which a consumer may request or order the goods (s 24(1)). A person must not knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description, nor alter, deface, cover, remove or obscure a trade description in a manner calculated to mislead consumers (s 24(2)).

A retailer of goods, in contrast, must not display or supply any particular goods if he or she knows that the trade description of those goods is likely to mislead a consumer. A retailer is also obliged to take reasonable steps to prevent any other person from doing so regarding any goods within his or her control (s 24(3)). A producer or importer of any goods that have been prescribed by the Minister (s 24(4)(a)) must apply a trade description to those goods, disclosing their country of origin and including any other information required by the Minister (s 24(5)). The Minister may prescribe rules to be used in accordance with any international agreement for the purpose of determining the country of origin of any goods and the information that must be included in any trade description in accordance with the definition of 'trade description' in section 1 (s 24(4)(b) and (c)).

If genetically modified ingredients or components are present in goods, the producers, suppliers, importers or packagers must display a prescribed notice on such goods that discloses the presence of any genetically modified ingredients or components (s 24(6)).

Purchase price

A supplier (seller) is prohibited from entering into an agreement to supply (or market) any goods at a price that is unfair, unreasonable or unjust (s 48(1)(a)(i)). If a price is unfair, unreasonable or unjust, a court may make any order that it considers just and reasonable, such as the return of money or property, or an award of compensation to the consumer (purchaser) (s 52(3)). Hence, it seems that the abolished *laesio enormis* doctrine has been revived in respect of the price. Sharrock ((2010) 22 *SA Merc LJ* 295) correctly explains that the words 'unfair', 'unreasonable' and 'unjust' are not individually defined and overlap considerably in meaning. Thus, it would have been sufficient had the legislature merely used the term 'unfair'.

A retailer (seller) must adequately display the price of goods on sale and he or she is not entitled to charge a higher price than the displayed price (s 23). If more than one price is concurrently displayed, the supplier is bound by the lowest price (s 23(6)(b)). The term 'price' in this context includes any mark, notice or visual representation that may be reasonably inferred to indicate an association between the goods or services and the consideration for which the supplier is willing to sell or supply those goods or services (s 1). If a price that was once displayed has been fully covered and obscured by a second displayed price, that second price must be regarded as the displayed price (s 23(8)). However, a supplier is not bound by a displayed price if it contains an obvious error or has been tampered with (s 23(9) and (10)). A retailer is not required to display the price of goods that are displayed predominantly as a form of advertisement of the supplier, or of goods that are not ordinarily accessible to consumers (s 23(4)). A displayed price takes precedence over a bar-coded price (s 23(3)). Section 23(11) prescribes the format of display for price reductions. Section 23 does not apply if a supplier has provided an estimate or if a consumer has waived such estimate in terms of sections 15 or 43 of the Electronic Communications and Transactions Act 25 of 2002.

Formalities

The CPA does not require consumer agreements in general to be in writing, but the Minister may prescribe categories of consumer agreements that must be in writing (s 50(1)). If a consumer agreement is in writing as required by the CPA or voluntarily, the written agreement will apply, whether the con-

sumer has signed it or not (s 50(2)(a)). The written *and* signature formality requirements in terms of section 2(1) of the Alienation of Land Act 68 of 1981 appear to be in conflict with the CPA, which does not require agreements in general to be in writing and, if in writing, to be signed by a consumer (purchaser) (ss 50(1) and 50(2)(a)). To resolve this conflict, the provisions of section 2(9) of the CPA should be employed.

Such written agreement must satisfy the requirements of plain and understandable language (s 22; Morné Gouws 'Information: Comments on the plain language provisions of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 79) and set out an itemized break-down of the consumer's financial obligations (s 50(2)(b)). A notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation (s 22(1)). In deciding whether a consumer could do so, the following factors must be taken into consideration: the context, comprehensiveness and consistency of the notice, document or visual representation; the organization, form and style of the notice, document or visual representation; the vocabulary, usage and sentence structure of the notice, document or visual representation; and the use of any illustrations, examples, headings or other aids to reading and understanding (s 22(2)). Gouws ((2010) 22 *SA Merc LJ* 79) emphasizes that section 22 does more than merely require the use of plain and understandable language. According to Gouws, section 22 elevates the plain language requirement to a fundamental consumer right. This perspective is confirmed by the use of the word 'right' in the heading of section 22. The National Consumer Commission ('NCC') may publish guidelines for methods of assessing whether a notice, document or visual representation satisfies the requirements of section 22(1)), and it may develop voluntary codes of practice in respect of the use of plain language in documents (s 22(3)).

It is not required that the agreement should be provided in one of the official languages. A consumer is entitled to a free copy of or free electronic access to such agreement (*ibid*). If a consumer agreement is not in writing, the supplier must keep a record of transactions entered into over the telephone or in any other

recordable form as prescribed (s 50(3)). (This requirement will prove to be impractical.) A consumer is not entitled to access to such record. However, in the event of a complaint, the NCC may summon the supplier to furnish a copy of the record (s 102(1)(b)).

If a provision of the CPA requires a document to be signed or initialled, such signing or initialling may be effected in any manner recognized in law, including an electronic or advanced electronic signature as defined in the Electronic Communications and Transactions Act (s 2(3)), provided that the supplier takes reasonable precautions to ensure that an electronic signature is not used for any other purpose (s 2(4)).

However, Naudé ((2009) 126 *SALJ* 505) expresses the concern that section 50 is silent on the consequences of non-compliance. Naudé also mentions that since the signing of the agreement is not a requirement, a consumer or supplier will still be able to dispute having agreed to all the terms stipulated in the unsigned document. She is of the view that this scenario is obstructive and that section 50(2)(a) should be re-formulated. Gouws ((2010) 22 *SA Merc LJ* 79), in contrast, is of the opinion that if an agreement is not written in plain and understandable language as required by section 50(2)(b)(i), the agreement, provision, term or condition of the agreement is void in terms of section 51(3) to the extent that it contravenes either section 3(1)(b)(iv) read with section 51(1)(a)(i) or section 50(2)(b)(i) read with section 51(1)(b)(i).

A supplier of goods and services must provide a consumer with a written record of each transaction (s 26(2)), containing at least the following information: The supplier's full name or registered business name and VAT registration number (if any); the address of the premises from which the goods or services were supplied; the date on which the transaction occurred; a description, unit price and quantity of the goods or services supplied; and the total price of the transaction before and after any applicable taxes (s 26(3)). If an agreement is not in writing or is not required to be in writing, the supplier must nevertheless keep a record of the transaction in the prescribed form.

The Minister may exempt categories of goods or services or circumstances of trade from section 26(2) and (3) (s 26(4)). Section 26 does not apply to transactions that are subject to section 43 of the Electronic Communications and Transactions Act (s 26(1)).

Cooling-off

Notwithstanding any other right in law (for example, s 29A of the Alienation of Land Act), a consumer (purchaser) may return

goods to a supplier and cancel the agreement within ten business days if the goods were delivered as a result of direct marketing (s 16). The supplier must then return any payment received from the consumer within fifteen business days. Goods are returned in this instance at the consumer's risk and expense (s 20 (4)(a)). It is also a requirement in the case of direct marketing that a contract has to contain a provision informing a consumer of his or her right to rescind ('cool-off') from the contract (s 32). 'Direct marketing' means approaching a consumer, either in person, by mail or by electronic communication for the direct or indirect purpose of promoting or offering to supply any goods and services in the ordinary course of business or requesting a person to make a donation of any kind for any reason (s 1).

Influence of the CPA on the duties of the seller

Passing of risk and delivery

The CPA provides that in the absence of an express agreement to the contrary, goods to be delivered remain at the supplier's (seller's) risk until the consumer (purchaser) has accepted delivery (s 19(2)(c)).

Acceptance of delivery is deemed to have taken place when a consumer expressly or implicitly communicates to a supplier that he or she has accepted delivery of such goods, or if a consumer does anything in relation to the goods that is inconsistent with the supplier's ownership, or if a consumer keeps the goods for an unreasonable period without informing the supplier that he or she does not want them (s 19(4)).

Provided the parties did not expressly agree on the details of delivery, it is an implied term that the supplier (seller) is responsible for delivering the goods on the agreed date and time, if any, or otherwise within a reasonable time at the agreed place of delivery and at the cost of the supplier (s 19(2)(a)). The supplier may not require that the consumer (purchaser) accept delivery at an unreasonable time (s 19(3)). The presumed place of delivery is the supplier's place of business, if any, or residence (s 19(2)(b)).

Before accepting delivery of goods, a consumer is entitled to examine them to make sure they are of the type and quality agreed upon or, if a special order was placed, reasonably conform to the material specifications (s 19(5)). If a supplier

tenders the delivery of goods at a location, date or time other than as agreed, a consumer has the option of either agreeing to the change or insisting on delivery at the agreed location, date and time or cancelling the transaction without penalty, treating the delivered goods as unsolicited goods in accordance with section 21 (s 19(6)). If a supplier delivers a larger quantity of goods than was ordered, a consumer may reject all of the delivered goods, or accept and pay only for the agreed quantity and treat the rest as unsolicited goods (s 19(7)). If some of the goods delivered are as agreed, but others not, a consumer may accept those goods as agreed and reject the rest or reject all of the delivered goods (s 19(8)).

These provisions do not apply to franchise agreements or where the transaction is governed by section 46 of the Electronic Communications and Transactions Act.

Assumption of authority and quiet possession

Every consumer has the right to assume, and it is an implied term of every transaction or agreement, that a supplier of goods and services has the legal right and authority to supply, sell, provide ownership, or lease those goods or services (s 44(1)(b)). In the case of supply of goods per se, in other words if no transaction or agreement is involved, a consumer also has the right to assume that the supplier has the legal right and authority to supply those goods (s 44(1)(a)). In the latter instance, it is uncertain whether ownership must be passed to the purchaser by the supplier. A supplier is fully liable for any charge or encumbrance relating to the goods (for example, the outstanding debt on a car) as against a third party if it is not disclosed in writing before conclusion of the transaction, or if the supplier and consumer have colluded to defraud the third party (s 44(1)(c) read with s 44(2)). It is uncertain how the *huur gaat voor koop* rule is influenced by this provision.

The supplier also guarantees that consumers will have and enjoy quiet possession of the goods (s 44(1)(d)).

Quality of goods and warranty against defects

Section 55(2) of the CPA provides that all goods, except goods bought at an auction (s 55(1) read with s 45), must satisfy the following requirements: (a) they must reasonably suitable for the purposes for which they are generally intended. In addition, if a consumer (purchaser) has specifically informed a supplier

(seller) of the particular purpose for which he or she wishes to use or acquire the goods and the supplier ordinarily offers to supply such goods, or appears to be knowledgeable about the use of those goods, a consumer has a right to expect that such goods are reasonably suitable for the indicated purpose. This provision appears to be a confirmation of the *Pothier* rule; (b) the goods must be of good quality, in good working order and free of *any* (not only material) defects; (c) the goods must be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and (d) they must comply with any applicable standards set under the Standards Act 29 of 1993 or any other public regulation (s 55(2) and (3)).

In determining whether goods are in line with the above requirements, the circumstances surrounding the supply thereof must be considered, including the manner in which the goods were marketed, packaged and displayed; the use of any trade description or mark; any instructions for, or warnings about the use of the goods; the range of things that might reasonably be anticipated to be done with the goods; and the time when the goods were produced and supplied (s 55(4)).

It is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods (s 55(5)(a)). If an improved model of such goods becomes available from the same or any other supplier, it cannot be assumed that the improvement was because of a product failure or defect in the earlier model (s 55((5)(b))).

'Defect' in goods connotes any material imperfection in the manufacture of the goods or components that renders the goods less acceptable than persons generally would be reasonably entitled to expect in the circumstances, or any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances (s 53(1)(a)).

'Failure' connotes the inability of goods to perform in the intended manner or effect (s 53(1)(b)). It is, however, unclear whose ('consumers', 'suppliers', 'producers', 'importers' or 'retailers') 'intended manner or effect' is under consideration.

It is a defence if a consumer was informed of the specific condition of the goods and he or she expressly accepted the goods on that basis or knowingly acted in a way compatible with

accepting the goods in that condition (s 55(6)). The effect of this section is that the use of a voetstoets clause is drastically limited and that suppliers will generally have a duty to disclose all attributes of a *res vendita*. In this regard the *caveat emptor* rule (purchaser beware) seems to have been abolished. JM Otto ('Verborge gebreke, voetstoetsverkope, die Consumer Protection Act en die National Credit Act' (2011) 74 *THRHR* 525) correctly, concludes that the nature of the deed of sale will determine the applicability of voetstoets clauses and in so far as the CPA or National Credit Act 34 of 2005 is not relevant to such deed of sale, it is business as usual regarding latent defects and voetstoets clauses.

If the goods do not comply with the requirements and standards contemplated in section 55(2) (see above), a consumer may return the goods within six months after delivery to the supplier (without penalty) at the supplier's risk and expense (s 56(2)). This remedy may pose a practical problem where the goods consist of immovable property and transfer into the name of the consumer and registration of a bond over it has been effected. If the goods are returned, a supplier must, at the direction of the consumer, either repair or replace the defective goods, or refund the purchase price (s 56(2)), provided that if a supplier repairs any goods unsuccessfully he or she must, within three months of such failed repair, replace the goods or refund the purchase price (s 56(3)). It is uncertain whether this six-month limitation relates to the life span of the implied warranty (in which instance a voetstoets clause may become operational after six months from conclusion of an agreement), or to execution of the remedies (in which event the implied warranty will exist indefinitely and the normal prescription rules regarding the institution of a claim will prevail).

In terms of section 56(1), any transaction or agreement is subject to an implied warranty by a 'producer', 'importer', 'distributor' and 'retailer' (see s 1 of the CPA where these entities are defined) to the effect that any supplied goods comply with the quality requirements and standards contemplated in section 55(2). However, this implied warranty is not applicable if the goods fail to meet the necessary standard because they were tampered with in some way after leaving the control of the entity claimed against (s 56(1)), or if a consumer was informed of the specific condition of the goods and he or she expressly accepted the goods on that basis or knowingly acted in a way compatible

with accepting the goods in that condition (s 55(6)). Furthermore, this implied warranty operates in addition to any other implied (not tacit) warranty or provision imposed by the common law, the CPA, public regulation or express contractual warranty or condition (s 56(4)).

It is important to note that the implied warranty in terms of section 56(1) applies to both 'transactions' (which *excludes* once-off transactions) and 'agreements' (which *includes* once-off transactions) and its application is extended to 'producers', 'importers', 'distributors' and 'retailers', but not to 'suppliers'. However, the remedies available in terms of section 56(2) and (3) (the return, repair or replacement of defective goods, or the refund of the purchase price) are in relation to the 'consumer' and 'supplier'. Consequently the practical implementation of section 56 appears to be problematic.

A 'producer', 'importer', 'distributor' or 'retailer' (not a 'supplier' or 'service provider') of any goods is liable for any harm, without proof of negligence on his or her part, caused as a consequence of supplying any unsafe goods, or a product failure of whatever nature, or inadequate instructions or warnings provided to a consumer for the use of such goods (s 61(1)). (For a broad discussion on this topic, see MM Botha & EP Joubert 'Does the Consumer Protection Act 68 of 2008 provide for strict product liability? — A comparative analysis' (2011) 74 *THRHR* 305.)

The matters relating to delictual (product) liability are discussed in the chapter on The Law of Delict.

CASE LAW

PURCHASE AND SALE

Formalities

Compliance with section 2(1) of the Alienation of Land Act 68 of 1981

Chretien and Another v Bell 2011 (1) SA 54 (SCA) dealt with compliance with section 2(1) of the Alienation of Land Act in so far as the details regarding the payment of the purchase price were not specified in writing. Section 2(1) provides that '[n]o alienation of land . . . will be of any force and effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority'.

The deed of alienation in this matter provided that no deposit or loan was required and that the full purchase price, including all other disbursements for which the purchaser was liable, would be paid in cash before he would be entitled to take transfer of the property. It was further agreed that the details regarding the payment of the purchase price would be agreed on in writing not later than 30 April 2005. This never happened.

It was submitted that since the parties had stipulated that payment would be in cash, in the absence of any further agreement, the sellers could not have expected anything better than cash against transfer of the property into the purchaser's name. Tshiqi AJA recognized that this proposition echoes the common-law position, but held that it was an express contractual term that the purchase price had to be paid before transfer and an agreement on the time of payment had still to be reached (not later than 30 April 2005) (para [12]). The Supreme Court of Appeal referred, with approval, to *Dijkstra v Janowsky* 1985 (3) SA 560 (C) where it was observed that the requirements in respect of a deed of alienation of land in relation to section 2(1) of the Alienation of Land Act can be recapped as follows: all material terms must be in writing (*Johnston v Leal* 1980 (3) SA 927 (A)); a material term is not restricted to the *essentialia* of a contract (*Johnston v Leal* supra); the manner of payment is generally a material term (*Patel v Adam* 1977 (2) SA 653 (A)); there is no valid contract where a material term was left open for further negotiations and a final agreement thereon has not been reached (*Jammie v Lowrie* 1958 (2) SA 430 (T)); and a court must be able to ascertain with reasonable certainty the terms of the contract (*Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W); *Clements v Simpson* 1971 (3) SA 1 (A)) (paras [9]–[10]).

The Supreme Court of Appeal concluded that the *time* of payment, as substantiated by the deed of alienation itself, was a material term of the agreement. Consequently the deed of alienation did not comply with section 2(1) and was accordingly void. In order to decide whether a term is material, it is worth pointing out that the following questions, according to the test laid down in *Herselman v Orpen* 1989 (4) SA 1000 (SE) and *Jones v Wykland Properties* 1998 (1) SA 355 (C), have to be answered in the affirmative: (a) did the parties apply their minds to the term; and (b) did they agree, either expressly or implicitly, that the term should form part of their contract, and be binding on them?

Terms that are *naturalia* do not have to be in writing (*Botha v Swanepoel* 2002 (4) SA 577 (T)). In this regard the reasoning of Binns-Ward J in *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others and Van der Merwe NO and Others v Bosman and Others* 2010 (5) SA 555 (WCC) holds true:

'When law and equity cannot concur, it is the law that must prevail. . . . The formalities legislation, on which the result of these applications has ultimately turned, was evidently intended to promote certainty in regard to contracts in respect of the alienation of interests in land. The apparent legislative hope was that the imposition of formalities would lessen the scope for dispute and reduce the amount of litigation between parties to such contracts. Successive legislatures have persisted with the belief in that ideal, despite the observations by judges and academic writers over many years that the effect of the formalities has often been to bring about greater evils than those which it was hoped thereby to avoid. These evils include the resort by the dishonest and the unscrupulous to the formalities in order to avoid obligations seriously undertaken, which would otherwise be enforceable against them at common law, and a hampering of the ability of the courts to do justice' (paras [42]–[45]).

(See also DJ Lötz & CJ Nagel '*JR 209 Investments (Pty) Ltd and Another v Pine Villa Country Estate (Pty) Ltd* Case No 617/2007 (SCA) *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* Case No 2/2008 (SCA) Section 2(1) of the Alienation of Land Act, description of *res vendita*' (2010) 43 *De Jure* 169 at 174, where this precise inadequacy of formalities legislation was amplified.)

The question to be answered in *Janse van Rensburg and Another v Koekemoer* 2011 (1) SA 118 (GSJ) was whether an oral agreement (donation) granting a servitude of *habitatio* over immovable property infringes on the writing requirements of section 2(1) of the Alienation of Land Act. In this matter, the applicants relied on an oral agreement (donation) to register a *habitatio* against the title deed of immovable property.

Since a *habitatio* results in a subtraction from the *dominium* (*Erlax Properties (Pty) Ltd v Registrar of Deeds and Others* 1992 (1) SA 879 (A); *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA)), Claassen J held, in accordance with the finding of the trial court, that a *habitatio* is a real right which can only be enforced against the grantor once it is registered against the title deed of the immovable property (para [13]). It follows that an agreement to initiate a *habitatio*, although binding on the contractual parties, does not by itself

vest the legal title to the servitude in the beneficiary. For the latter to be achieved, registration of the servitude against the title deed of the immovable property is required (*Willoughby's Consolidated Co Ltd v Cophall Stores Ltd* 1918 AD 1). This principle is analogous to the conclusion of a deed of sale of land, which creates a personal right, and the subsequent transfer of the property into the purchaser's name, which will transform the personal contractual right into a real right of ownership.

Claassen J's conclusion, supported by *Felix and Another v Nortier NO and Others* [1996] 3 All SA 143 (SE) and *Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd* 1930 AD 169, was that any right resulting in the deprivation of an owner's *dominium* (title), such as a habitatio, usus, usufruct or mineral rights, is an 'interest in land' as contemplated by the definition of 'land' in section 1 of the Alienation of Land Act (paras [16]–[17]). For this reason any alienation, which includes a donation (see s 1 of the Alienation of Land Act on the definition of 'alienation'), like the case in point, of an 'interest in land, which falls within the scope of the definition of 'land', has to comply with the writing and signature requirements of section 2(1).

The court further held that in addition to the fact that the donation of the *habitatio* did not comply with section 2(1) of the Alienation of Land Act, it did not comply with section 5 of the General Law Amendment Act 50 of 1956 (para [20]) either. The latter Act provides that a donation of future entitlements must be in writing to be of any force and effect. The donation in the present matter did not meet this prerequisite and was void for this reason.

Compliance with section 2(1) of the Alienation of Land Act was again a bone of contention in *Exdev (Pty) Ltd and Another v Pekudei Investments (Pty) Ltd* 2011 (2) SA 282 (SCA). The gist of the dispute in this case was the purchase of a future office unit and an option to procure additional office space in the same future development.

The future office unit was described along the lines of an existing *res vendita* bought from the respondent and transferred to the appellant — '[A]n office unit (at the same price for which sections 21, 22 and 23 were sold to you) of the same size and with a similar number of parking bays (8)'. The *res vendita* in the option to purchase, in contrast, was described as 'a further 140 square meters at the market price prevailing when the new building is completed'. The sale of the future office unit and the option were embodied in the same document.

When the respondent claimed damages because of the appellants' repudiation of the above sale and option, the appellants raised the validity of the contract as a defence. They argued that both the sale and the option were part of a single unitary contract in which the *res vendita* and/or purchase price was not adequately described. As a result, the deed of alienation failed to comply with the requirements of section 2(1), rendering it void (s 28(1)). The reason advanced as to why the *res vendita* was inadequately described was the absence of a draft three-dimensional plan of the proposed development, which left the selection of the shape, floor position, precise dimensions and architectural style of the unit to the sole discretion of the respondent. The respondent challenged this contention and maintained that the option was separate and divisible from the sale and that the *res vendita* and purchase price were adequately described.

Leach JA explained that there is a distinction between the severance of a portion of a contract and the possibility that a contract may contain several distinct and separate agreements divisible from each other (para [10]). Relying on *Middleton v Carr* 1949 (2) SA 374 (A) and *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) the Supreme Court of Appeal held that the sale of the future office unit in this case created reciprocal rights and obligations which were entirely unrelated and separate from the option to purchase additional office space, which, on its own, also initiated a different and independent set of rights and obligations (paras [13]–[14]). It followed that although the sale of the future office unit and option to purchase additional office space were incorporated in the same document, two separate and independent contracts were concluded. That being so, Leach JA ruled that it was pointless to consider whether the option to purchase additional office space was invalid in order to determine the validity of the sale of the future office unit. Thus, the only problem to solve was whether the sale of the future office unit was invalid because of the alleged vagueness of the description of the *res vendita*.

Leach JA confirmed that the established test to determine whether the description of a *res vendita* complies with section 2(1) is whether it can be identified from the contract itself, without resorting to evidence from the parties about their negotiations and consensus (para [15]). Moreover, the Supreme Court of Appeal yet again endorsed the familiar principle that section 2(1) does not require 'a faultless description of the property sold

couched in meticulously accurate terms' (*Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989, cited with approval in *JR 209 Investments (Pty) Ltd and Another v Pine Villa Country Estate (Pty) Ltd*; *Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 (4) SA 302 (SCA)) (para [16]). Leach JA furthermore highlighted the well-established notion of dividing the possible property descriptions (such as in the present situation) into two broad categories. In the first instance, there are those where the document itself sufficiently describes the *res vendita* to enable identification of it per se; secondly, there are those where it appears from the contract that the parties intended that either the buyer or the seller should choose the *res vendita* from a genus or class (ibid). Confirmation of the acknowledgment of the latter category can be found in *Clements v Simpson* 1971 (3) SA 1 (A) and *JR 209 Investments* (supra), where it was held that the intention of the parties may be of such a nature that it is not necessary for the *res vendita* to be identified by reference to the exact description thereof in the deed of alienation, as long as it is identifiable after the seller (or purchaser) has decided on the lay-out and shape of the *res vendita* in conformity with their agreed specified requirements. It follows that the parties' consensus will thus be complete, and all that is still required for performance will be the intended physical and psychological unilateral act of the seller (or purchaser) individualizing the *res vendita*.

Leach JA concluded that the above principles effectively disposed of the appellants' argument, since the size of the future office unit (260m²) and its location in the new building that the respondents were constructing had been determined (para [19]). All that was left open was the discretionary and *bona fide* individualization, in accordance with the parties' contractual arrangement, of the *res vendita* by the seller. As a result, the consensus of the parties was complete and the appeal had to fail.

The Supreme Court of Appeal also remarked in passing that the comments made by DJ Lötz and CJ Nagel ((2010) 43 *De Jure* 169) to the effect that section 2(1) has failed to achieve its objectives and is often abused by unscrupulous sellers and purchasers to rescind a deed of alienation, although somewhat unfair, were not without substance (para [1]).

C-J Pretorius and R Ismail ('Reliance, formalities and the mode of acceptance of an offer *Pillay v Shaik* 2009 4 SA 74 (SCA)' (2011) 32 *Obiter* 453) are of the opinion that since there is a

growing number of cases where a party who regrets having entered into a sale grasps at some technical excuse to renege on the agreement, it should be disallowed and the reliance theory should be put into practice by the courts. They also submit that if the facts allow, the reliance theory should also be employed and developed by the courts to effect justice in these circumstances, even though a statutory formality has not been complied with, provided there is no overriding aspect of legal policy that dictates otherwise. (See also C-J Pretorius 'Reliance, waiver and tacit revival of contracts governed by the Alienation of Land Act 68 of 1981 *Sewpersadh v Dookie* 2008 2 SA 526 (D) and *Sewpersadh v Dookie* 2009 6 SA 611 (SCA)' (2011) 74 *THRHR* 482, where the same proposal was made.)

On this case, see also the chapters on The General Principles of Contract and The Law of Property (Including Real Security).

DUTIES OF SELLER

Obligation of seller to pay municipal rates and taxes

In *Msomi v Biyela and Others* 2011 (2) SA 311 (KZD), the respondents' immovable property was sold in execution to the applicant. In order to comply with the provisions of Uniform Rule 46 and section 92(1) of the Deeds Registries Act 47 of 1937 (obtaining a valid clearance certificate confirming that all taxes, duties, fees and quitrent had been paid to the relevant authority), the conditions of sale in execution instructed the purchaser to pay all arrear rates, levies and outstanding charges for electricity and water. To meet this contractual obligation, the applicant paid an amount of R70 246 to the eThekweni Municipality. Subsequently the applicant was informed that the respondents had received a refund in the amount of R158 637. The applicant then instituted legal action against the respondents, claiming the above R70 246 paid for the respondents' arrear rates, electricity and water charges.

Cele AJ held that if a purchaser of immovable property at a sale in execution has paid arrear rates, electricity and water charges owed by the judgment debtor in compliance with the conditions of sale, to enable him or her to obtain transfer of the property, the judgment debtor may possibly be liable to the purchaser for the debt arising from the payment of the outstanding rates, electricity and water charges (para [35]).

A similar query — whether the purchaser or the seller is responsible for the payment of arrear municipal rates and taxes in order to obtain a clearance certificate in terms of section 118(1) and (1A) of the Local Government: Municipal Systems Act 32 of 2000 — was broached in *Hoofar Investments (Pty) Ltd v Moodley* 2009 (6) SA 556 (KZP). With reference to *Lourenson v Swart* 1928 CPD 402; *Sauerlander v Townsend* 1930 CPD 55; *Abdullah v Long* 1931 CPD 305; *Mackeurtan on Sale* 5 ed (1984) 161–2 and Pothier's *Contract of Sale* ¶ 2.1.42 (Cushing's Translation 26), the court reaffirmed the common-law duty of a seller to provide a purchaser with *vacua possessio* of the *res vendita* (paras [11]–[12]). *Vacua possessio* not only entails undisturbed delivery in the sense that there is no immediate right of possession by a third party, but includes the condition that no person shall in future be able to vest a superior right to the *res vendita*. Consequently, a *res vendita* must be delivered free of any encumbrances such as mortgages, pledges, legatees, fideicommissaries, hypothecs, and the like. The court held that it is quite evident that section 118(1) and (1A) creates a statutory hypothec and that a seller therefore remains liable for all payments in order to obtain a clearance certificate (paras [15] and [17]).

On this case, see also the chapter on The Law of Property (Including Real Security).

Transfer of ownership

In *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA), immovable property was fraudulently transferred, first to the second respondent and thereafter, on 8 February 2007, to Pegma 178 Investments Trading CC, the first respondent, without the appellant's knowledge or authority. On 18 December 2006, the appellant discovered that it was no longer the registered owner of the immovable property. During January 2008 it instructed attorneys to recover the property. The appellant maintained that it was at all material times the lawful registered owner of the property. However, Pegma 178 Investments Trading CC contended that the appellant's failure to take immediate legal steps against the second respondent to rectify the state of affairs amounted to a negligent misrepresentation that the second respondent was the lawful registered owner of the property with a right to sell it. As a result the appellant was estopped from recovering its property.

The majority judgment, delivered by Harms DP, held that the actual issue in this instance was not the application of the *nemo*

plus iuris ad alium transferre potest quam ipse haberet principle (Ulpian *Digest* 50.17.54), on which the appellant attempted to found its submission that ownership of the property still vested in it, but the relevance of the two major principles linked to estoppel, namely, misrepresentation and negligence (paras [26]–[27]).

Harms DP held that although the public is entitled to rely on the correctness of the entries in the deeds registry, the fact of registration is not a guarantee of any right registered (para [28]). By knowingly allowing the deeds registry to reflect the incorrect position as to the ownership of the property, the appellant misled Pegma 178 Investments Trading CC. It follows that a person will not take transfer of immovable property if he or she has reason to suspect that the deeds register is flawed. Hence the appellant, by its omission to rectify the deeds registry timeously, indeed made a misrepresentation. Furthermore, if a person is aware that others could act on the assumption that the deeds register was correct, while in fact it was not, such a person would be considered negligent. As a result, the Supreme Court of Appeal concluded that both the above requirements for estoppel had been satisfied (para [30]).

The Supreme Court of Appeal conceded, in concurrence with the appellant's contention, that if it were established that Pegma 178 Investments Trading CC could rely on estoppel, the outcome would be that estoppel has become a method of acquisition of ownership, while it is understood to be an armour of defence and not a weapon of attack (para [31]). Harms DP questioned whether the above formalistic approach, that estoppel may be used only as a defence — founded in English law and received through the *exceptio doli* into Roman-Dutch law — could still be justified (para [31]). Nonetheless it was held that this concern did not have to be deliberated in this case and that even if this entailed 'that ownership passed by virtue of estoppel, so be it' (*ibid*). However, the better explanation in this matter would be that the underlying act of transfer was deemed to have been validly executed. (On this case, see also the chapter on The Law of Property (Including Real Security).)

Warranty against latent defects

The brief facts in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) were that the appellant, a manufacturer of spices, sold spices which were contaminated with the banned artificial colourant Sudan Red 1 to the respon-

dent (trading as Nando's), a fast-food retailer. These spices were unfit for human consumption. The appellant sued the respondent for payment of the purchase price of the spices. Although the respondent admitted the claim, it raised a defence by way of four counterclaims based on delictual damages suffered by the defendant as a result of the defect (the presence of Sudan Red 1) in the *res vendita*. The appellant's defence against the counterclaims was based on a comprehensive contractual indemnity signed by the defendant with the following qualification: 'std conditions not checked'.

Referring to *Dutch Reformed Church Council v Crocker* 1953 (4) SA 53 (C), *Naran and Another v Pillai* NO 1974 (1) SA (D) and *Ornelas v Andrew's Café and Another* 1980 (1) SA 378 (W), the trial court (*Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (1) SA 8 (GSJ)) held that a distinction should be drawn between cases where the *res vendita* was unfit for the purpose for which it had been bought owing to the absence of certain required attributes and cases where the *res vendita*, notwithstanding the lack of such required attributes, was still fit for the purpose for which it had been bought (para [41]). Thus, the problem in this case was not that there was a latent defect in the *res vendita*, but that the *res vendita* that was delivered was something that was different from that which had been purchased. Consequently the trial court concluded that the present case was not based on defects in the *res vendita*, but on the appellant's failure to perform in terms of the agreement. For this reason, the appellant was not entitled to rely on the voetstoets clause (*ibid*).

On appeal it was reaffirmed that one was not dealing with a defect in the *res vendita*, but rather with the delivery to a purchaser of a *res vendita* that was different from that which had been contracted for (para [20]). Chickenland was entitled to delivery of spices free of Sudan Red 1. Since the delivered *res vendita* was contaminated with Sudan Red 1 and thus different in substance from that purchased, Freddy Hirsch's failure to deliver spices free of this toxin was effectively a failure to perform in terms of the contract (*ibid*).

To motivate his conclusion, Ponnar JA referred to *Marais v Commercial General Agency Ltd* 1922 TPD 440, where it was held that it seems to be an exploitation of terms to say that to supply one article in lieu of another article which was ordered can be brought under the concept of 'latent defect' (para [21]). In the

latter case, a seed merchant inadvertently supplied a farmer with seeds of a character different from that purchased.

Ponnan JA consequently held that because one is dealing with non-performance, as opposed to defective performance, the voetstoots clause does not offer a defence to Freddy Hirsch (para [22]). Furthermore, if such a restriction against liability, as envisaged by the voetstoots clause in this case, were to be enforced, it would unavoidably result in an infringement of a statutory provision which not only prohibits the delivery of foodstuff that contains Sudan Red 1, but also makes it an offence to do so (*ibid*). To allow the protection of a voetstoots clause in these circumstances would be so unreasonably harsh and oppressive that public policy could not tolerate it (*ibid*). (On the issues relating to delictual (product) liability and the question whether the defendant was bound, owing to the *caveat subscriptor* rule, by the standard terms and conditions in this case, see the chapters on The General Principles of the Law of Contract and The Law of Delict.)

It is worth mentioning that in *Odendaal v Ferraris* [2008] 4 All SA 529 (SCA), it was held that, in the broad sense, any imperfection in a *res vendita* may be described as a defect, but that the exclusionary scope of a voetstoots clause in any particular case must be decided on its own facts. Hence, it was held, the operational sphere of a voetstoots sale is wide enough to cover both physical defects and defects in the title or area of the property (para [24]; cf *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A)). Any material imperfection preventing or hindering ordinary or common use of the *res vendita* is an aedilician defect (para [25]). As a result, the court held that a voetstoots clause covers the absence of statutory authorizations (para [26]). In coming to this conclusion, Cachalia JA effectively overruled *Van Nieuwkerk v McCrae* 2007 (5) SA 21 (W), thereby confirming the whole purpose of a voetstoots clause, namely, to exempt a seller from liability for defects of which he or she was unaware, including defects consisting of non-compliance with statutory requirements (para [27]). This case was discussed in 2008 *Annual Survey* 1067.

Double sales

In *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell* NO 2011 (4) SA 1 (SCA), a developer fraudulently allocated a large part of the common property in a sectional title scheme as

sectional title units to two corporate entities which he controlled. These sectional title units were not intended to be occupied by the two corporate entities. They were to be used as a hotel and the rentals earned were to be placed in a pool and distributed according to the individual participation quotas for the benefit of all sectional title unit owners. According to the draft sectional title plan annexed to the deeds of sale, the sectional title scheme would consist of 86 sectional title units with a total area of 5 886m² and the common property, which would include restaurants, kitchens, a parking basement, a squash court, service areas and much more. However, the sectional title plan eventually registered in the deeds registry provided for 120 sectional title units with a total area of 14 420m². The extra area was achieved, not by enlarging the building, but by the appropriation of a large part of the common property as sectional title units. This area was subtracted from the common property of the other sectional title unit owners. Of the 34 extra sectional title units, 22 were registered in the name of the two corporate entities (now in liquidation) controlled by the developer.

The order sought by the respondent was that the disputed sectional title units revert to the body corporate as common property and that the sectional title plan and deeds be rectified accordingly. The gist of this application was the fraudulent alteration of the initial draft sectional plan attached to the deeds of sale by converting the common property into sectional title units which were misappropriated by the developer. Consequently, certain portions of the common property ceased to exist without the knowledge of the purchasers, and they obtained a *res vendita* inconsistent with what they had bought and paid for. In short, it was the fraudulent act of registering a revised sectional title plan which founded the respondent's application.

Ponnan JA reaffirmed the trite principle that a real right generally prevails over a personal right, even if the personal right is prior in time, when they come into competition with each other (para [12]). However, in terms of the doctrine of notice, someone who acquires a *res vendita* with notice of a personal right to it which his or her predecessor in title has granted to another may be held bound to give effect thereto. Thus, a purchaser who knows that the *res vendita* has been sold to another may, in spite of having obtained transfer or delivery, be forced to hand it over to the prior purchaser (para [14]). To illustrate this principle and the complexity enfolding it, Ponnan JA used the following example:

'If A sells a thing — be it movable or immovable — to B and thereafter sells the same thing to C, ownership is acquired not by the first purchaser, but by the purchaser who first obtains transfer of the thing sold. If the first purchaser, B, is also the first transferee, his right of ownership is unassailable by C. The legal situation is more intricate if the second purchaser, C, is first to obtain delivery. In this case, the first distinction to be made is whether or not C, when contracting with A, had notice of the previous sale to B' (para [12]).

According to CJE Scholtens ('Double Sales' (1953) 70 *SALJ* 22), if C had notice of the first sale to B, C is not entitled to retain the *res vendita* as against B. G Lubbe ('A doctrine in search of a theory: Reflections on the so-called doctrine of notice in South African law' 1997 *Acta Juridica* 246) pointed out that the doctrine of notice appears to be inconsistent in so far as it allows the holder of a personal right to prevail over the holder of a real right to the extent of compelling the transferee of a *res vendita* with notice to give effect to the contractual undertakings of the predecessor in respect of the *res vendita*. AJ van der Walt ('Personal rights and limited real rights: An historical overview and analysis of contemporary problems related to the registrability of rights' (1992) 55 *THRHR* 170) also pointed out that the distinction between real and personal rights has acquired a mystical nature and is often presented as a problem without a solution. As long ago as 1935, however, RG McKerron ('Purchaser with notice' (1935) 4 *SA Law Times* 178) observed that the doctrine of notice is simply an equitable doctrine running counter to the strict rule that a real right takes preference over a personal right.

Ponnan JA reminded us that for many years our courts had sought to invoke *mala fides* or 'a species of fraud' as the inherent justification for the doctrine (paras [15]–[16]; see, for example, *De Jager v Sisana* 1930 AD 71 and *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A)). However, the *mala fide* or fraud construction as the foundation for the doctrine of notice was questioned in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A), where the Supreme Court of Appeal held that references to 'a species of fraud' or *mala fides* on the part of the acquirer with knowledge in the earlier cases was nothing but a fiction to provide the doctrine of notice with theoretical support. In *Associated South African Bakeries*, Van Heerden AJA ruled that any reference to fraud or *mala fides* in the context of the doctrine of notice should be avoided because it only gives rise to confusion.

She concluded that the only requirement for the operation of the doctrine is actual knowledge (or perhaps *dolus eventualis*) on the part of the acquirer as to the prior personal right. Once this prerequisite has been met, the holder of the personal right is afforded what is effectively a limited real right against the acquirer. The reference to *dolus eventualis* by Van Heerden AJA endorsed what was said by Ogilvie Thomson JA in *Grant and Another v Stonestreet and Others* (supra).

Thus, according to Ponnán JA, C (the acquirer of the real right in the above example) does not need to have actual knowledge of B's prior right (para [18]). It suffices that C subjectively foresaw the possibility of the existence of B's personal right and nevertheless continued with the acquisition of his real right regardless of the consequences to B's prior personal right (ibid).

Despite the attempts to pinpoint the doctrine of notice within the general conceptual framework of the law of obligations, property law or law of delict (see Lubbe 1997 *Acta Juridica* 246), Ponnán JA held that we simply have to accept that the doctrine of notice is a doctrinal anomaly which does not fit precisely into the principles of either the law of delict or property law (para [19]). Ponnán JA referred to FDJ Brand ('Knowledge and wrongfulness as elements of the doctrine of notice' 23–4 (unpublished paper)) (ibid), who argued that although the doctrine of notice shares the element of wrongfulness with delictual liability, it is not founded in delict. However, in determining wrongfulness for the purposes of the doctrine, Brand maintained that we should be directed by delictual principles. In this regard wrongfulness depends on the existence of a legal duty which is based on judicial determination involving the criteria of public and legal policy. In the context of the doctrine of notice, this entails that an infringement of a prior personal right through the acquisition of a real right will only be recognized as 'wrongful' if the courts are convinced on the basis of public and legal policy that such infringement should trigger the consequences of the doctrine.

In *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA), it was held that the holder of a personal right cannot rely on mere knowledge on the part of the creditor who had acquired a real right through a *pignus judiciale* to set aside the real right acquired by him or her. Brand submitted that, for reasons of public and legal policy, an attachment in execution is not wrongful in the context of the doctrine of notice (para [26]). Ponnán JA agreed with this contention and held that,

for this reason, *Dream Supreme* was distinguishable from the present case (para [22]).

The doctrine of knowledge was also considered in *Cussons en Andere v Kroon* 2001 (4) SA 833 (SCA). In this case, Streicher JA held that the personal right relied upon was so closely analogous to a right of pre-emption that it should be protected in the same manner as a pre-emptive right. The reason for this conclusion was that the conduct of the purchaser who acquired the property knowing that it was in conflict with an existing pre-emptive right, was wrongful and mere knowledge of the existence of the personal right suffices. Actual fraud is not required (see also *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T)).

Ponnan JA held that the present case resembles the classic double sale scenario where the seller knowingly and deliberately registered a sectional title plan at odds with the prior sale agreements and appropriated the new sectional title units to corporate entities under his control (para [25]). All of this occurred without the knowledge of the purchasers. Ponnan JA observed that the key question is whether the doctrine of notice avails the purchasers' personal rights in relation to the subsequent real rights of the aforementioned corporate entities (para [26]). He accepted that the extension of the doctrine of notice should incrementally be within the framework of public and legal policy (ibid). Thus, the doctrine of notice had to apply in the present case in order that the fraudulent reconfiguration of the common property into sectional title units should not be placed beyond the reach of the prior purchasers (ibid). For this rationale, Ponnan JA referred to *Wimbledon Lodge (Pty) Ltd v Gore NO* (2003 (5) SA 315 (SCA) para [10]), where it was held that 'no one is allowed to improve his own condition by his own wrongdoing' (ibid; see also *Principal Immigration Officer v Bhula* 1931 AD 323; *Parity Insurance Co Ltd v Marescia and Others* 1965 (3) SA 430 (A)).

It follows that the corporate entities (in liquidation) could not acquire greater rights than those which the insolvent entity ever had (*Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA)); nor could the liquidators, according to the Roman law maxim *nemo plus iuris ad alium transferre potest quam ipse habet*, transfer more rights than they themselves had (para [26]).

On the authority of *Associated South African Bakeries v Oryx and Vereinigte Bäckereien* (supra), the Supreme Court of Appeal

again confirmed that the only requirement for the operation of the doctrine of notice is actual knowledge (or perhaps *dolus eventualis*) of the prior personal right of the first purchaser on the part of the second purchaser (para [27]). Ponnán JA concluded that the requirement of notice posed no difficulty in this case and that the conduct of the developer was wrongful (para [28]).

He endorsed the remarks of Scholtens (op cit), who submitted that the only question to be determined should be whether the first contract of sale would have entitled the first purchaser to an order for specific performance had the second not been concluded. If the answer is yes, the first purchaser has an indefeasible right and should be entitled to a legal remedy without any further regard to the equities of the second sale (para [29]). Since the developer and the corporate entities that subsequently acquired the sectional title units were in liquidation, the remaining question in the present case was against whom that right could be asserted. With reference to RG McKerron ('Purchaser with notice' (1935) 4 *SA Law Times* 178), Voet 6.1.20 and *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA), Ponnán JA held that the absence of contractual privity between the successive and the prior purchasers was no bar to allowing the latter the right to claim directly from the former (para [30]). According to Ponnán JA, such an order, notwithstanding the liquidation of the developer and the corporate entities that subsequently acquired the sectional title units, would be equitable to all concerned parties in the circumstances of the present case (para [31]).

It is significant that in *Barnard v Thelander* 1977 (3) SA 932 (C) the court, in deciding which of the purchasers' personal rights to registration of transfer were to enjoy preference, held that the balance of equity should be taken into account when determining whether the personal right of the first purchaser ranked in preference to that of the second purchaser. The court also held that a right of pre-emption and the rights of the holder of an option in circumstances of a double sale are not inferior to a personal right in terms of a contract of sale.

It was also held in *Kazazis v Georghiades* (supra) that fraud or *mala fides* was not a prerequisite, but in the case of double sales the mere knowledge of the first sale could constitute fraud on the part of the second purchaser. However, fraud and *mala fides* do not have to be alleged and proved before the first purchaser's rights can be enforced against the second purchaser. The court's

approach to a double sale in this case was: (a) did an earlier personal right exist; (b) was the second purchaser aware of the earlier personal right; and (c) did the second purchaser infringe upon the first purchaser's rights? If the answer to each of these questions is in the affirmative, an inference of fraud can be drawn and preference afforded to the rights of the first purchaser. If the second purchaser is under the impression that the first sale has come to an end, there is no fraud on his or her part and the first purchaser's rights will not necessarily be preferred to those of the second purchaser. (On this case, see also the chapters on The General Principles of the Law of Contract and The Law of Property (Including Real Security).)

A double sale was again under consideration in *Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction and Others* 2011 (6) SA 331 (GSJ). In June 2005 a local authority, the third respondent, sold land to Lubbe Construction, the first respondent. Lubbe Construction then sold it to Cosira Developments (Pty) Ltd, the applicant, in August 2005. The land was never transferred and remained registered in the name of the local authority. This situation prompted Cosira Developments (Pty) Ltd to apply for specific performance against the local authority and Lubbe Construction in order to enforce the aforesaid sale agreements and to effect registration of the land in their name. The question to be resolved was whether the August 2005 agreement for the purchase of the subject-matter of the June 2005 agreement offered the applicant, as a successive purchaser, a legal interest or *locus standi* to enforce such agreement against the original seller.

Without deliberating the principles that regulate double sales, Van Oosten J at the very outset emphasized the general rule that a person who applies for relief should first prove that he or she has an interest in that matter in order to confirm his or her *locus standi* (para [12]). This interest should be direct, not too remote, actual and existing (*Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A)). The court then touched on some practical contractual relationship guidelines to determine a direct interest or *locus standi* in situations analogous to successive sales (para [13]). For example, in contracts for the benefit of a third person, it is only the acceptance of the offer by the third person that will bring the new contract between the offeror and third person into being (ibid; see AJ Kerr *The Principles of the Law of Contract* 6 ed (2002) 88).

Likewise, a non-contractual party becomes a party to the rights in terms of the contract only by way of cession; or it is only by negotiation of a negotiable instrument that a third party acquires rights to it; or, since the interest of the purchaser of immovable property is commercial or financial and not legal, he or she has no *locus standi* in the owner's application for the rezoning of the property (see *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape and Others* 2000 (4) SA 681 (C)); or, because a sub-tenant has no legal interest in and is not a party to the contract between landlord and tenant, a landlord may evict his or her tenant's sub-tenant without joining that sub-tenant in the proceedings (see *Ntai and Others v Vereeniging Town Council and Another* 1953 (4) SA 579 (A)) (ibid).

Consequently Van Oosten J held that in the case of successive sales it is a well-established principle that the implied warranty against eviction in each sale is only enforceable between the immediate parties to each successive sale (para [13]; see *Louis Botha Motors v James & Slabbert Motors (Pty) Ltd* 1983 (3) SA 793 (A)).

Thus, in conclusion it was ruled that in the absence of a tripartite agreement, which would have set up a contractual relationship between the local authority and the applicant, no contractual relationship existed between them (para [14]). For this reason, the applicant had no *locus standi* to launch the present application (ibid).

Van Oosten J also confirmed the well-developed principle that the grant or refusal of specific performance is a matter for the discretion of the court (para [15]; see *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A)). An order for specific performance in these circumstances would have thwarted the local authority's black empowerment guidelines, in violation of public policy and statutory prerequisites, since the June 2005 agreement recognized Lubbe as an irreplaceable person (*delectus personae*). For these reasons an order for specific performance would be inconsistent with *Benson* (ibid). It followed that the August 2005 agreement could not have been concluded without the local authority's approval (ibid). (On this case, see also the chapter on The Law of Property (Including Real Security).)

Res litigiosa

Questions concerning the doctrine of *res litigiosa* and the fulfilment of a suspensive condition were raised in *Kootbodien*

and Another v Mitchell's Plain Electrical Plumbing and Building CC and Others 2011 (4) SA 624 (WCC). In this matter, the applicants purchased a stand from the first respondent (a close corporation) and the second respondent (the sole member of same) on 3 August 2006, subject to the procurement of a bank loan in the amount of R1.8 million. On 24 August 2006, the bank notified the applicants in writing that it had in principle approved a mortgage loan of R1 440 000. The applicants conveyed this information to the second respondent on the same day and tendered payment of a deposit of R180 000. On 14 September 2006, the second respondent informed the applicants that the first respondent no longer intended to sell the stand to them and cancelled the deed of sale on 2 September 2006. The same stand was then sold and transferred to the third respondent. As a result, the applicants approached the court for an order for specific performance of the 3 August 2006 sale and an order compelling the third respondent to transfer the stand to them. The basis of the latter relief was that when the stand was sold and transferred to the third respondent it was the subject of litigation (*res litigiosa*). However, the application was opposed by the first and second respondents since the applicants, according to them, had failed to fulfil the suspensive conditions successfully. The third respondent also resisted the application on the grounds that it had bought and taken transfer of the stand while it was unaware of the earlier sale to the applicants.

Besides the dilemma linked to the fulfilment of the suspensive condition (see the chapter on The General Principles of the Law of Contract), another core issue was what the legal consequences of the subsequent sale and transfer of the stand by the first respondent to the third respondent implied, pending an application to enforce specific performance of the 3 August 2006 sale. For the sake of completeness it should be mentioned that the court found that the aforesaid suspensive condition was inserted for the benefit of the applicants and that they were allowed to waive it before the fulfilment date, which they did (paras [40]–[52]). Therefore the first respondent was barred from cancelling the 3 August 2006 sale and the applicants were in principle entitled to the transfer of the stand against payment of the purchase price (para [53]).

The applicants submitted that since they had already brought an application to enforce the 3 August 2006 sale, the sale and transfer of the property by the first respondent to the third

respondent constituted the alienation of a *res litigiosa*, which rendered it void or unenforceable.

The court referred to Voet (6.1.20), A Matthaeus (*Paroemiae* 7.6) and Sande (*Restraints on Alienation* Part 1 Ch 9 § 2 n 19) and explained that the *res litigiosa* doctrine is to the effect that where a second sale occurs *pendente lite*, the rights of the first purchaser must prevail and are consequently enforceable against the second purchaser, irrespective of whether the second purchaser acted in good or bad faith (para [62]).

A core question still to be resolved by the court was: when does a *res vendita* become a *res litigiosa*? Zondi J cited *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town City Council* 1986 (2) SA 656 (C) with approval. In *Opera House*, it was held (at 661C) that in an action *in rem*, the *res vendita* in dispute becomes a *res litigiosa* when summons is served on the possessor thereof (paras [65]–[68]). The court further held, in the context of Voet 6.1.20 and *McGregor v Jordaan and Another* 1921 CPD 301, that it is immaterial whether the second purchaser took transfer of a *res litigiosa* with or without knowledge of the pending litigation (para [70]).

Applying the above principles to the present matter, Zondi J concluded that the stand became a *res litigiosa* at the close of the pleadings when the *answering* affidavit by the first and second respondents was filed (para [72]). The reality that the *replying* affidavit was filed after the close of pleadings had no bearing on the fact that the pleadings were already closed (ibid; see *Potgieter v Sustain (Edms) Bpk* 1990 (2) SA 15 (T)). It followed that *litis contestatio* took place before transfer of the property to the third respondent was effected and it is irrelevant whether the third respondent acted in good or bad faith, or had knowledge or was ignorant of the pending litigation (para [74]). Once the *res vendita* had been transferred to the second purchaser after the first purchaser had commenced litigation, the first purchaser would have obtained a personal *actio in factum* against the second purchaser (ibid; see Matthaeus *Paroemiae* 7.6).

Council for the third respondent raised the argument that since the transfer of real rights (ownership) in our legal system is founded on an abstract theory of transfer, the third respondent's ownership of the stand became unassailable after transfer of it into his name, regardless of a flawed *causa*. Consequently, the applicants were not allowed to claim transfer of the stand from the third respondent. The court was not convinced by this

contention and held that the abstract theory of transfer offers no foundation for resisting the right of the first purchaser in circumstances where the second purchaser had bought and taken transfer of immovable property which is a *res litigiosa* (para [83]). As a result, the first purchaser was entitled to follow the property and vindicate it (ibid). To sum up the doctrine of *res litigiosa*, Zondi J held that:

'[T]here is no doubt . . . that the doctrine of *res litigiosa* is part of our law. . . . But the fact that the property is *res litigiosa* is no bar to its transfer. It may be alienated, provided that the rights of third parties are not affected thereby. In other words, a party wishing to assert his right to a property which is the subject-matter of litigation can, notwithstanding transfer, continue to assert those rights, and to look to a vindication of those rights in due course. The *bona fides* of the person who takes transfer of the *res litigiosa* is irrelevant in determining the rights which the first purchaser may seek to assert' (para [88]).

In a final onslaught against the applicants' claim, the respondents invited the court to exercise its discretion in terms of section 173 of the Constitution of the Republic of South Africa, 1996 not to employ the common-law *res litigiosa* doctrine meticulously and to diverge from it in the present case, given that this doctrine is obsolete in the modern commercial environment and that it causes unnecessary financial injustice which is incompatible with the spirit underlying the objects of the Bill of Rights.

With reference to *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), where the question of the development of the common law was deliberated, Zondi J, in accordance with the latter authority, held that law reform remains predominantly the function of the legislature and not the judiciary, who should be cautious in any event about developing the common law (para [92]). Given that the court was not asked to decide on the constitutionality of the *res litigiosa* doctrine on the basis that it deviates from the spirit, purport and objects of the Bill of Rights, Zondi J found it unnecessary to determine whether this doctrine is unconstitutional (para [93]).

In conclusion the court held that although the applicants are entitled in principle to an order for setting aside the sale and transfer of the stand to the third respondent and to receive transfer thereof, such an order would cause substantial injustice to the third respondent in the present situation (paras [94]–[95]). For this reason, and in accordance with the guidelines articulated in *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) and *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776

(A), the court held that an order for specific performance in the present matter would be inappropriate and that an order for damages would suffice (para [99]). (On this case, see also the chapters on The General Principles of the Law of Contract and The Law of Property (Including Real Security).)

CREDIT AGREEMENTS IN TERMS OF THE ALIENATION OF LAND ACT

There was no legislation, nor were there any reported cases, affecting this branch of the law during 2011.