THE LAW OF PURCHASE AND SALE

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Formalities

Alienation of Land

Acceptance of uncompleted offer

Compliance with section 2(1) of the Alienation of Land Act 68 of 1981 was an issue before the court in *Fraser & another v Viljoen* 2008 (4) SA 106 (SCA). The relevant deed of alienation was an uncompleted standard printed form offer, sent by post to the seller. On returning the signed and dated document to the purchasers, their names and signatures, and the description of the property had been left blank. After receipt, the purchasers filled in their names and the property description, signed the offer, but failed to record the date of their signatures. The seller then refused to effect transfer, which forced the purchasers to seek a declaratory order as to the validity of the deed of alienation.

The Durban High Court dismissed the application on two grounds. In the first instance, as the date of the conclusion of the agreement had a vital impact on other contractual terms, it was material. Hence, its omission was fatal to the validity of the agreement. Secondly, following *Sayers v Khan* 2002 (5) SA 688 (C), non-compliance with section 2(2A) of the Alienation of Land Act (the contractual exclusion of a reference to the cooling-off period in section 29A) rendered the deed of alienation null and void. (Note that after this judgment was handed down the Supreme Court of Appeal held in *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC & Another* 2007 (3) SA 100 (SCA) that *Sayers* was wrongly decided: non-compliance with section 2(2A) does not result in nullity but rather in voidability at the instance of the purchaser.) Both these issues were not raised on appeal. (For a recent discussion, see Philip N Stoop 'Artikel 29A van die Wet op Vervreemding van Grond' 2008 *TSAR* 744. He points out, correctly, that there are still major unresolved issues regarding section 29A, such as the unsatisfactory position

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of purchasers who buy 'off plan'; confusion about *who* should be protected and *when*; and limiting the protection afforded to first-time buyers of low-cost housing, if the purpose of the Act is to protect them.)

The appellants argued that the respondent had appointed them as her agent for the purpose of completing the offer by inserting their names and the property description. Once they had carried out this mandate, section 2(1) was complied with, which resulted in a valid and binding agreement. Combrinck JA accepted, without deciding, that the respondent authorized the appellants to fill in their names and the property description, but stressed that the crucial question was whether section 2(1) was satisfied by such completion after the respondent had already signed the document (para [6]).

This question was previously debated in *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) and *Jurgens & others v Volkskas Bank Ltd* 1993 (1) SA 214 (A).

Fourlamel dealt with a deed of suretyship, which was incomplete in that the names of the co-surety, creditor, and principal debtor did not appear on the document when it was signed by the surety. These details were inserted after signature. In terms of section 6 of the General Law Amendment Act 50 of 1956, all terms of the suretyship must be embodied in a written document signed by or on behalf of the surety. It was held that in order to comply with these prescribed statutory formalities, all material terms had to be contained in the document at the time of signature. If they were not, the deed of suretyship would be null and void.

Jurgens also dealt with a deed of suretyship. The sureties had signed a blank suretyship. The blank spaces were then completed by Jurgens' secretary who delivered the document to the bank for signature. It was held that it was immaterial whether the blank spaces (missing terms) were filled in before or after the document was signed by the first party (surety), as long as all material terms had been inserted in the document when it was presented to the other party (the bank). Thus, the time of delivery to the other party for signature, and not the time of signature by the first party, is crucial.

In *Fraser*, Combrinck JA held that *Fourlamel* and *Jurgens* apply with equal force to an incomplete deed of alienation of immovable property (para [4], with reference to *Just Names Properties 11 CC & another v Fourie & others* 2008 (1) SA 343 (SCA)). He agreed with the reasoning in *Fourlamel* that it was untenable for one party

to act in a dual capacity — as a contracting party, and the agent of the other contracting party. In these circumstances the agent should be a third person, not the other contracting party (para [6]). This is also the position in English Law (*Farebrother v Simmons* (1822) 5 B & Ald 333; *Wilson & Sons v Pike* [1949] 1 KB 176). The court confirmed that the reason for this approach is to obviate disputes about the terms of the agreement, to exclude the possibility of fraud and perjury, and to avoid unnecessary litigation — the very mischief these types of statutes are aimed at (para [6]; cf *Johnston v Leal* 1980 (3) SA 927 (A)). If one contracting party is allowed to act as the agent of the other contracting party, the object of the legislation would be nullified (*Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A)).

In *Just Names*, the court came to the same conclusion — an offer had to be complete when the offeree accepted and signed it, or, at least, it had to be in a completed form when released to the offeror (para [21]; *Standard Bank of SA v Jaap de Villiers Beleggings (Edms) Bpk* 1978 (3) SA 955 (W)). The fact that two pages of the agreement before the court were signed in blank was fatal to the whole deed of alienation. What was signed was not an agreement but a piece of paper (*Van Rooyen v Hume Melville Motors (Edms) Bpk* 1964 (2) SA 68 (W)). In these circumstances, the offeree's signature does not perform the function intended by the Act — to signify that the written offer to which the signature pertains meets with the offeree's agreement (para [22]).

Amendments

Amendments to a deed of sale of land were before the court in *Waterval Joint Venture Property Co (Pty) Ltd v City of Johannesburg Metropolitan Municipality* [2008] 2 All SA 700 (W). Here, the willingness to amend a written sale agreement was expressed orally. However, on presentation of the written addendum to reflect the amendment, one of the parties refused to proceed with the amendment and contended that the oral attempt invalidated the original written agreement in that the 'in principle consensus' reflected in that agreement did not exist any longer. Sutherland AJ held that the oral agreement did not undo the written agreement, as it was ineffective for not complying with section 2(1) of the Alienation of Land Act, and so was never in competition with the terms of the written agreement (para [10]; *Johnston v Leal* (supra)).

Revival of cancelled contract

In *Fairoaks Investment Holdings (Pty) Ltd & another v Oliver & others* 2008 (4) SA 302 (SCA), the key issue was whether an agreement for the sale of land could informally be revived where such agreement had lapsed by reason of the non-fulfilment of a suspensive condition.

Streicher JA emphasized that each transaction has to be investigated to determine its true nature. If the intention is to proceed with the initial transaction by way of withdrawing the cancellation and entering into a new contract on the same terms as the cancelled contract, such an agreement has to comply with section 2(1) of the Alienation of Land Act (para [19]). The same principle applies where the parties, after a contract of sale of land has lapsed for non-fulfilment of a suspensive condition, agree to revive the lapsed contract with amendments. Such an agreement results in a new deed of alienation of land. Hence, compliance with section 2(1) is compulsory (para [21]). (See *Neethling v Klopper & others* 1967 (4) SA 459 (A), where it was held that a contract for the sale of land which had been cancelled could be revived by waiver of the rights created by the cancellation (the withdrawal of the cancellation as such), and that an agreement to do so did not constitute a new contract which had to comply with the statutory formalities. All that the parties intend to do in this scenario is to continue with the existing written agreement of sale.)

That an agreement to which section 2(1) applies may be informally revived, was confirmed in *Sewpersadh & another v Dookie* [2008] 1 All SA 286 (D). Such informal revival is possible only if it does not involve the alteration of any of the material terms of the original written agreement (para [32]) and so can be effected by conduct (paras [30] and [32], with reference to *Cronje v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (1) SA 256 (W)). (On the nature of the test to determine whether an inference may be drawn from the conduct of the parties, see *Muller v Pam Snyman Eiendomskonsultante (Edms) Bpk* [2000] 4 All SA 412 (C); RH Christie *The Law of Contract in South Africa* 5 ed (2006) 85.)

The above principles were endorsed by Boruchowitz J in *Spheris v Flamingo Sweet (Pty) Ltd & Another* [2008] 1 All SA 304 (W) at 309–10, with the caveat that once an agreement is cancelled, it cannot be revived unilaterally (*Thomas v Henry & another* 1985 (3) SA 889 (A)). Accordingly, whereas the cancella-

tion of a contract is a unilateral act, the withdrawal of a cancellation and the concomitant revival of a contract are not. It has to be consensual (*Van Schalkwyk v Griesel* 1948 (1) SA 460 (A); *TG Bradfield Coastal Properties (Pty) Ltd & another v Toogood* 1977 (2) SA 724 (E); *Absa Bank Ltd v Cooper NO & others* 2001 (4) SA 876 (T)). A distinction must also be drawn between the waiver of the right to cancel and the waiver of the rights obtained after the lawful cancellation of a contract. In the latter instance, the concurrence of the party affected is a prerequisite for such waiver (*United Bioscope Cafes Ltd v Moseley Buildings Ltd* 1924 AD 60; *Desai v Mohamed* 1976 (2) SA 709 (N)). Where tacit revival is relied on, there must be a positive and unequivocal intimation or inference to be drawn from the conduct of the parties that the contract was indeed reinstated (*Spheris v Flamingo Sweet* at 311). Boruchowitz J further held that it is trite that an election to cancel necessarily involves an abandonment of the right to enforcement. A party cannot approbate and reprobate (*Feinstein v Niggli & another* 1981 (2) SA 684 (A)).

Tacit material term

In *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd & another* 2008 (1) SA 654 (SCA), the appeal was based on two grounds. In the first instance, the deed of alienation fell short of the requirements of section 2(1) of the Alienation of Land Act in that a suspensive condition (the approval by the relevant authorities of a rezoning and subdivision application), as a material term expressly agreed upon by the parties, was not reduced to writing. Secondly, the transaction contravened section 3*(a)* and 3*(e)*(i) of the Subdivision of Agricultural Land Act 70 of 1970, which prohibits the subdivision of agricultural land and the sale of a portion of it, unless the written consent of the Minister of Agriculture had been obtained prior to the conclusion of the sale. (The second aspect is discussed under Subdivision and Status of Agricultural Land below.)

The court below held that the agreement complied with section 2(1). However, it concluded that the merx constituted 'agricultural land' as defined in section 1*(a)* of the Subdivision of Agricultural Land Act, and that the absence of ministerial consent rendered the agreement null and void.

The relevant part of the agreement provided as follows: 'Sale from Wary Holdings to Stalwo (Pty) Ltd of plots 5, 6, 7 & 8 of proposed subdivision portion 54 of the farm No 8 Port Eliza-

beth. . .' (quoted in para [2]). On the facts, the Supreme Court of Appeal found that both parties had intended that the success of the agreement would depend wholly on the proposed subdivision, which was a tacit term of their agreement (para [12], with reference to *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A); *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A); *Wilkens NO v Voges* 1994 (3) SA 130 (A)). Accordingly, once such intention is established, it is irrelevant whether it was expressly agreed or specifically stated that the agreement was subject to such a suspensive condition. The court referred to *Wilkens v Voges* (supra) at 144C–D:

> '*A tacit term in a written contract, be it actual or imputed, can be the corollary of the express terms — reading, as it were, between the lines — or it can be the product of the express terms read in conjunction with evidence of admissible surrounding circumstances.* Either way, a tacit term, once found to exist, is simply read or blended into the contract: as such it is ''contained'' in the written deed. Not being an adjunct to but an integrated part of the contract, a tacit term does not in my opinion fall foul of either the clause in question or the [Alienation of Land] Act' (original emphasis).

The court concluded that the agreement complied with section 2(1) of the Alienation of Land Act.

It is clear that the Supreme Court of Appeal's approach is one of substance over form. It would be the exception rather than the rule that a deed of alienation will be deemed null and void on technical grounds (see, for example, *Herselman*; *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W); *Scheepers v Strydom* 1994 (3) SA 101 (A); *Ten Brink NO v Motala* 2001 (1) SA 1011 (D); DJ Lötz '*Ten Brink NO v Motala* 2001 (1) SA 1011 (D) — Koopkontrak van Grond — Kontrakspartye en Formaliteite waar 'n Verteenwoordiger Namens die Koper Optree' (2002) 35 *De Jure* 361). However, it remains open to question whether the approach in *Stalwo* promotes Parliament's aims when it comes to formalities.

Description of Future Sectional Title Unit

The problems regarding the description of a future unit in a proposed sectional title scheme development were again addressed in *Rasmussen & another v Clear Mandate Properties CC & others* 2008 (3) SA 147 (W) (see also *Kendrick v Community Development Board* 1983 (4) SA 532 (W); *Den Dunnen v Kreder* 1985 (3) SA 616 (T); *Erf 441 Robertsville Property CC v New*

Market Developments (Pty) Ltd 2007 (2) SA 179 (W)). The test for compliance, Schwartman J held, is whether the merx can be identified by reference to the parties' agreement, without reference to their negotiations (para [6]). A meticulously accurate description of the unit is thus not required (*Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A); cf *Clements v Simpson* 1971 (3) SA 1 (A)).

However, in *Botes & others v Toti Development Co (Pty) Ltd* 1978 (1) SA 205 (T), *Richtown Development (Pty) Ltd v Dusterwald* 1981 (3) SA 691 (W), and *Naude v Schutte* 1983 (4) SA 74 (T), the courts held that the description of a unit should include a reference to its length, breadth, and height, and that this could be done only after the particulars of the proposed sectional plan were fully known. The agreement must also contain a description of the undivided share in the common property as part of the merx.

It is worth noting that a sale of a sectional title unit does not encompass the sale of the participation quota which is 'to accompany' the unit. What is sold, as a unit, is a section plus the section's undivided share in the common property, apportioned to the section in accordance with the participation quota of the section. The participation quota is merely the formula to calculate the size of a section's undivided share in the common property (Henk Delport 'Description of a Sectional Title Unit in a Deed of Sale' (2008) 29(1) *Obiter* 87). Further, the undivided share in the common property does not constitute a 'particular portion of land' and thus falls outside the scope of the definition of an 'erf' as envisaged in section 67(1) of the Town Planning and Townships Ordinance 15 of 1987 (Gauteng) (*Erf 441 Robertsville Property* at 183C–D), with the result that future units on unproclaimed land can legally be sold.

In *Rasmussen*, Schwartman J rejected this approach, relying on *Forsyth & others v Josi* 1982 (2) SA 164 (N); *Orkin en'n ander v Phone-A-Copy Worldwide (Pty) Ltd* 1983 (3) SA 881 (T); and *Phone-A-Copy Worldwide (Pty) Ltd v Orkin & another* 1986 (1) SA 729 (A)). In *Forsyth*, it was held that a merx consisting of a building to be erected was sufficiently described if, at the time of the conclusion of the contract, it could be ascertained what the building will be (despite the fact that the written agreement did not incorporate a building plan), without recourse to evidence by the parties. With reference to the undivided share in the common property, the court held that if the area of the unit had been agreed upon and the total size of the sectional title development

was known, the undivided share in the common property could be calculated by reference to the Sectional Titles Act 95 of 1986.

However, the principles relating to generic sales were applied by both courts in *Orkin*. It was accordingly found that a reference to a flat number in an existing building was sufficient to describe a unit in terms of the relevant statutory requirements. As to the undivided share in the common property, it was held that such share could be ascertained under the Act without reference to the parties, and that this fact rendered the property description legally adequate.

One should take into account that the merx in *Orkin* could have been described adequately only if the parties intended a generic sale. With this type of sale, a valid contract of sale comes into being without an adequate description of the merx, because it is determined through individualization after the conclusion of the contract. It is, therefore, unnecessary to provide a complete description of the merx where the parties intend this type of sale. Such intention must be clear from the wording of the contract. A court cannot draw such an inference without further ado. In *Orkin*, there was no indication that the parties intended to conclude this type of sale. As the merx in *Orkin* came into being only after the opening of the sectional register, it did not exist at the time of conclusion of the contract. The flat numbers do not identify the merx and extrinsic evidence is necessary to determine it. Also, the authorities referred to in *Orkin* (*Clements v Simpson* 1971 (3) SA 1 (A); *Odendaalsrus Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O); *Glover v Bothma* 1948 (1) SA 661 (W); *Van der Merwe v Cloete & another* 1950 (3) SA 228 (T)) did not deal with generic sales. Rather, the merces in those cases existed already upon the conclusion of the relevant contracts (see Gerrit Pienaar '*Phone-A–Copy Worldwide (Pty) Ltd v Orkin & another* 1986 (1) SA 729 (A) — Formaliteite met Betrekking tot Koopkontrak van 'n Deeltiteleenheid' (1986) 49 *THRHR* 479).

In conclusion, in *Rasmussen*, Schwartman J held that despite the three-dimensional requirement to describe a unit on a sectional plan (s 5(3)*(d)* read with s 5(4)*(a)* of the Sectional Titles Act), it was unnecessary to do so in describing a unit in a deed of sale. In the latter, such a three-dimensional requirement is directory and not peremptory (para [10.2]). Regarding the description (or the lack of it) of an undivided share in the common property, the court reasoned that the undivided share in the common property is determined by operation of law (s 32

of the Sectional Titles Act), and that the failure to disclose or mention the undivided share in the common property in a deed of sale rendered the agreement voidable at the instance of the purchaser (paras [11.1] and [11.3]). In the present case, the deed of sale contained a site plan drawn to scale indicating a development comprising of 54 units, and described the merx as 'Unit 23B, Plan C, Genmare, 177 Blandford Road, North Riding, measuring approximately 124m^{2}'. The judge held that this description was adequate, despite the fact that the site plan was later amended to provide for a development of 69 units, with the effect that unit 23B no longer existed on the site plan.

Formalities by Agreement

The principle that, despite the absence of statutory requirements, contractual parties may bind themselves to observe certain formalities in framing a contract, was reaffirmed in *Shaik & others v Pillay & others* 2008 (3) SA 59 (N). The court envisaged three scenarios. In the first instance, no binding agreement comes into existence until the agreed formalities have strictly been complied with (para [27]; see Grotius *Inleiding* 3.14.26; Voet *Commentarius* 5.1.73; *Goldblatt v Fremantle* 1920 AD 123; *Woods v Walters* 1921 AD 303; *Mitchell v Knox-Gore* 1935 NPD 490; *Schlinkmann v Van der Walt* 1947 (2) SA 900 (E); *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en andere* 1964 (4) SA 760 (A); *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C)). Secondly, the parties intend the purpose of the agreed formalities merely to be to facilitate proof of the agreed terms and conditions (para [28]; see *Woods v Walters* 1921 AD 303; *De Bruin v Brink* 1925 OPD 68; *Electric Process Engraving and Stereo Co v Irwin* 1940 AD 220; *Cole v Stuart* 1940 AD 399; *SOS-Kinderdorf International v Effie Lentin Architects* 1991 (3) SA 574 (Nm)). Thirdly, the parties reach an oral agreement which includes an obligation that a written record of the transaction must be produced and signed by them. In this instance, a breach of the oral agreement occurs if the written record is not produced and signed (para [29]); see *Amoils & others v Amoils* 1924 WLD 88). The court further held that in the absence of clear proof that the parties intended their contract to be in writing, it is presumed that the oral agreement between them is binding (para [30]). It held that it was a matter of construction to establish which of the above scenarios is apposite (para [48], with reference to *Meter Motors (Pty) Ltd v Cohen* 1966 (2) SA 735 (T)).

Latent Defects

In *Odendaal v Ferraris* [2008] 4 All SA 529 (SCA), the respondent bought a dwelling from the appellant. The dwelling, inter alia, had defects (a collapsed staircase railing, water-damaged ceilings, a covered sewer manhole in the middle of the laundry, a faulty jacuzzi, leaking roofs, and wood panels infested with bore beetle) and was built on constructions that did not comply with building regulations. To enable him to address these problems, the respondent instructed the bank to delay transfer. The appellant then sought to have the respondent evicted, but failed in the court below.

On appeal, the question was whether the failure to obtain statutory approval to build on such constructions constituted a latent defect. And, if so, whether a *voetstoots* clause protected a seller from liability.

In *Van Nieuwkerk v McCrae* 2007 (5) SA 21 (W), it was held that with a sale of residential property, a purchaser was entitled to assume that improvements were erected in compliance with all statutory requirements, so that the merx could be used fully. As this assumption is implied as a matter of law, it is regarded as a tacit term. However, relying on *Ornelas v Andrew's Café* 1980 (1) SA 378 (W), Goldblatt J held that a seller could not in these circumstances rely on a *voetstoots* clause, as it excludes liability only for latent defects of a physical nature. Hence, a *voetstoots* clause does not apply to the lack of certain qualities or characteristics (such as statutory compliance) of the merx on which the parties have agreed.

In *Ornelas*, property was sold as a going concern for purposes of a café and restaurant. After conclusion of the sale, the purchasers became aware that the business was operated without a licence and that they were unable to obtain one. In an action to cancel the agreement, the seller sought to rely on a *voetstoots* clause. Nestadt J confined the *voetstoots* clause to physical or visible qualities of the merx. As the absence of a licence (a statutory requirement) is not a physical or visible quality, it is also not a (latent) defect. The solution to the licence problem lies in an implied contractual term and not a *voetstoots* clause.

In *Odendaal*, Cachalia JA distinguished *Ornelas* from *Van Nieuwkerk* and *Odendaal*. In *Ornelas*, the merx was unfit for the purpose for which it was purchased because of the absence of a trading licence. By contrast, the merces in *Van Nieuwkerk* and

Odendaal were still fit for the purpose for which they were bought, despite the lack of statutory compliance regarding the building plans (paras [21]–[22]). Put differently, in *Ornelas* the purchaser received something different from what was bought, whereas in *Van Nieuwkerk* and *Odendaal*, the purchasers received exactly what they purchased. In a broad sense, any imperfection in a merx may be described as a defect, but the exclusionary scope of a *voetstoots* clause must be decided on the peculiar facts of any case. Hence, 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 the ordinary or common use of the merx is an aedilitian defect (para [25]). Or, as explained in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 684 (quoted with approval by Cachalia JA in para [25]):

> 'Broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita, for the purpose for which it has been sold or for which it is commonly used. . . . Such defect is latent when it is one which is not visible or discoverable upon an inspection of the res vendita.'

The court concluded that the absence of statutory approval to build on constructions constituted a latent defect which interfered with the ordinary use of the merx, thus satisfying the *Holmdene Brickworks* test (para [26]). Also, a *voetstoots* clause covered the absence of statutory authorization (ibid). Here Cachalia JA effectively overruled *Van Nieuwkerk* and confirmed the purpose of a *voetstoots* clause — to exempt a seller from liability for defects of which he or she is unaware. These defects include non-compliance with statutory measures, as in the present case (para [27]).

A purchaser who hopes to avoid the consequences of a *voetstoots* sale must prove that the seller not only knew of the latent defect and did not disclose it, but also that he deliberately concealed it with the intention to defraud (dolo malo) (para [29]; cf *Van der Merwe v Meades* 1991 (2) SA 1 (A); *Truman v Leonard* 1994 (4) SA 371 (SE)). Where a seller recklessly tells a half-truth, or knows the facts but does not reveal them because he or she has not bothered to consider their significance, such conduct may also amount to fraud (para [29]). However, if a purchaser has the opportunity to inspect the merx yet buys it without inspecting it, the purchaser has no recourse against the seller for any patent defects (para [35]).

Adri du Plessis ('Pre-contractual Misrepresentation, Contractual Terms, and the Measure of Damages when the Contract Is Upheld' (2008) 125 (2) *SALJ* 413) argues that Parliament should intervene, especially regarding the sale of land, to clarify, inter alia, a seller's duty to disclose latent and patent defects, and to put the determination of liability in these circumstances on a sure footing, provided that the courts retain their discretionary powers to award damages.

Pretium

Payment by Bank Guarantee

Payment of the purchase price by way of a bank 'guarantee' was analysed in *Koumantarakis Group CC v Mystic River Investment 45 Ltd & another* [2008] 3 All SA 384 (SCA). The seller rejected the purchaser's guarantee as it contained a 'right to withdraw' and insisted on an irrevocable guarantee. The court below found that the seller acted reasonably and in good faith in rejecting the bank guarantee and so was entitled to cancel the agreement. The crux of this appeal concerned the meaning and ambit of a bank guarantee, and when it is reasonable to reject it.

With reference to *Mouton v Mynwerkersunie* 1977 (1) SA 119 (A) and *Hermes Ship Chandlers (Pty) Ltd v Caltex Oil (SA) Ltd* 1973 (3) SA 263 (D), Mhlantla AJA held that the term 'guarantee' was capable of bearing different meanings depending upon the context in which it was used. The meaning attributed to the term 'guarantee' thus had to be contextualized (para [23]). The purpose of a 'guarantee' in the context of a sale of immovable property is normally payment rather than security (paras [30]–[32]). The only 'security' afforded by the provision of a guarantee in the present instance was the knowledge that the purchaser had access to the necessary funds to pay the purchase price when due (para [31]). In the context of the present agreement, the guarantee was not intended to serve as security in the true sense of the word. If a seller requires security pending transfer, it is inevitable that the agreement explicitly requires that and, for example, insists on an irrevocable guarantee (para [33]). This was not so in the present case.

To determine whether a seller acted reasonably when rejecting a guarantee, two requirements should be met (para [39]). In the first instance, a seller should exercise an honest judgement in

deciding whether to accept or reject the guarantee. Secondly, the decision to reject, objectively viewed, should be based on reasonable grounds (*Herbert Porter & Co Ltd v Johannesburg Stock Exchange* 1974 (4) SA 781 (W)). In the present case, the bank's right to withdraw the guarantee was not as wide as contended and could not be exercised capriciously (para [47]). The seller was accordingly not entitled to reject the purchaser's guarantee and cancel the agreement (para [49]).

The subject of guarantees was again broached in *Blake & another v Cassim & another* [2008] 4 All SA 15 (SCA). Here, Mpati AP held that a seller does not have carte blanche to accept or reject guarantees for payment of the purchase price. Such discretion does not solely depend upon the will of the seller. Relying on *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A), the court found that the discretion thus given to the seller had to be exercised arbitrio boni viri (para [22]; cf *Machanick v Simon* 1920 CPD 333).

Method and Time of Payment

In *Exdev (Pty) Ltd v Yeoman Properties 1007 (Pty) Ltd* [2008] 2 All SA 223 (SCA), the method of and time for payment of the purchase price was not addressed in an option to purchase immovable property. In the court below, Makhafola AJ accepted the argument that the option was for this reason null and void. On appeal, it was held that the court below did not have regard to the basic principle, applied consistently in our law, that in the absence of an express agreement on the time for and method of payment, the pretium is payable in cash against delivery (transfer) (para [6]). Hence, an option to purchase immovable property, including a simple contract of sale of immovable property, is not null and void merely because it does not set out the method of and time for payment. Absent express agreement, the above principle applies by operation of law (para [7]).

This scenario can be distinguished from *Patel v Adam* 1977 (2) SA 653 (A), where the purchase price for immovable property was payable by way of instalments. There, the number and frequency of the instalment payments were not set out in the deed of sale. The court held that the wording of the contract that the purchase price 'shall be payable in monthly instalments free of interest' was so vague that the number and amount of the instalments could not be determined. The method of payment was thus left to the sole discretion of the purchaser, which was

unacceptable. The court accordingly held that the contract was void, because the manner in which the purchase price had to be paid had not been described adequately (see also *Herselman v Orpen* 1989 (4) SA 1000 (SE)).

Subdivision and Status of Agricultural Land

The uncertainty relating to the status of 'agricultural land' was clarified by the Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & others* 2008 (11) BCLR 1124 (CC). The question was whether Parliament intended to do away with the powers of the national Minister of Agriculture to preserve and control 'agricultural land' (for example, by preventing the uneconomical subdivision of farming units) as set out in the Subdivision of Agricultural Land Act.

The Supreme Court of Appeal held that the words 'municipal council, city council, town council' in the definition of 'agricultural land' in section 1 of the Subdivision of Agricultural Land Act had to be constructed as including a category A municipality (*Stalwo v Wary Holdings* (supra)). The proviso to the definition of agricultural land — land classified as agricultural land and situated within the area of jurisdiction of a transitional council retained such classification — is meant to operate only for as long as the land envisaged in it remained situated in the jurisdiction of a transitional council. Once the transitional council is disestablished and the land falls within the jurisdiction of a category A municipality, it ceases to be 'agricultural land' within the meaning of the Act. Section 3 then no longer applies and the Minister's consent is not a prerequisite for the subdivision of 'agricultural land' situated in such area.

The Constitutional Court, however, held that the ordinary meaning of the words in the proviso to the definition of 'agricultural land' in section 1, read in context of the Act as a whole and its purpose, led to the conclusion that the life of the proviso in section 1 was not tied to the life of transitional councils. The reference in the proviso to land within the area of a transitional council was dictated by the factual position at the time, which had to be addressed. That was done by the proviso pinpointing the stage from which land classified as 'agricultural land' would retain that classification, whatever development in local government structures had taken place. The enhanced status of current municipalities, and the fact that they have extended powers, were not grounds for ascribing to Parliament the intention that the

national control over 'agricultural land' through the Act was effectively a thing of the past. The proviso still applies.

A dispute about the validity of a deed of sale of agricultural land arose in *Naudé en 'n ander v Terblanche en andere* 2008 (4) SA 178 (C). Here, the merx consisted of the remainder of portion 18 of the farm Brandwacht. Against the title deed of this property a condition in terms of section 6(2) of the Subdivision of Agricultural Land Act was endorsed to the effect that the above portion 18 and portion 28 of the farm Brandwacht may not, without the written consent of the Minister of Agriculture, be separately transferred, hypothecated, or dealt with in any other manner. At the time of conclusion of the deed of sale of portion 18, no such consent had been obtained. The respondents contended that, in view of the absence of the ministerial consent, the sale was a nullity, as the separate sale of portion 18 amounted to a subdivision of agricultural land in contravention of the prohibition in section 3*(e)*(i).

The court held that portion 18, as a separate piece of land with its own title deed, had already been subdivided in accordance with the necessary ministerial consent (para [18]). Accordingly, the prohibition in section 3*(e)*(i) did not apply. The court further confirmed that the above endorsement in terms of section 6(2) was incorporated in the title deed as a title and sub-divisional condition, required by the preceding ministerial consent (para [21]; cf *Von Wielligh v Mimosa Inn (Pty) Ltd* 1982 (1) SA 717 (A)). Applying the eiusdem generis rule, the court interpreted this endorsement (title condition) strictly as a prohibition against the separate transfer and hypothecation of portions 18 and 28 (para [22]). Hence, the Minister's consent was required only for the separate transfer or hypothecation acts of registration, and not for the establishment of an obligation creating agreement, which entitled a purchaser to claim transfer or acquisition of a hypothec (para [23]). The Minister's consent was thus not required for the conclusion of the deed of sale. (For further discussion, see DJ Lötz & CJ Nagel '*Geue & another v Notling* [2003] 4 All SA 553 (SCA): Verbod op die Verkoop van Landbougrond Sonder die Minister se Toestemming Kragtens Artikel 3*(e)*(i) van die Wet op Onderverdeling an Landbougrond' (2004) 67(4) *THRHR* 702.)

Transfer of Ownership

The application of the abstract system of transferring ownership of movable and immovable property was reaffirmed in

Prophitius & another v Campbell & others 2008 (3) SA 552 (D) para [40]. Does the fraudulent behaviour of a seller (transferor) influence the passing of ownership in terms of the abstract system? Nicholson J held that if it were to be accepted that fraud vitiated the preceding causa and thus the passing of ownership, the consequence would be repugnant to an abstract system, the primary aim of which was to secure legal certainty in commercial transactions (paras [39]–[41], with reference to WA Joubert (founding ed) *The Law of South Africa* vol 27 sv 'Things' (by CG van der Merwe) 1st reissue (2002) par 364). However, if the purchaser (transferee) is aware of such fraud, the real agreement may be under suspicion (*Mvusi v Mvusi NO & others* 1995 (4) SA 994 (Tk)). Hence, if the real agreement is defective, ownership, despite the formal act of registration, will not pass (*Gounder v Saunders & others* 1935 NPD 219; *Britz v De Wet NO en 'n ander* 1965 (2) SA 131 (O); *Air-kel (Edms) Bpk h/a Merkel Motors v Bodenstein en'n ander* 1980 (3) SA 917 (A)).

By contrast, in *Menqa & another v Markom & others* 2008 (2) SA 120 (SCA), it was held that if an execution sale of immovable property was null and void because it violated the principle of legality (such as where the warrant of execution was issued without judicial supervision), transfer of ownership will not be effected, despite registration of the property in the purchaser's name. The reason is that non-compliance with the principle of legality unreasonably and unjustifiably limits debtors' fundamental right of access to adequate housing, entrenched in section 26(1) of the Constitution of the Republic of South Africa, 1996, and may contravene section 25 in so far as it may result in an arbitrary deprivation of property (paras [21] and [47]).

CREDIT AGREEMENTS

Instalment Agreements Under the Alienation of Land Act

It is trite law that the seller of residential land by way of an instalment agreement (an agreement where the purchase price is payable in more than two instalments over a period longer than twelve months) is not by reason of any breach of contract entitled to enforce the acceleration of payments, penalties, cancellation, or damages, unless the purchaser has been notified by letter to rectify the breach within not less than thirty days, calculated from the date the notice was handed to the purchaser or sent to him by registered post (ss 19(1) and (2) of the Alienation of Land Act). In

terms of section 19(2)*(c)*, such notice must contain a description of the alleged breach, a demand to rectify the breach and an 'indication of the steps the seller intends to take if the alleged breach of contract is not rectified'.

After twenty years section 19(2)*(c)* raised its ugly head in *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA) and *Van Niekerk & another v Favel & another* 2008 (3) SA 175 (SCA). In *Merry Hill*, the court stated that this provision raised two questions: May a seller indicate the steps that he or she intends to take by way of *alternatives*, if the breach is not rectified? And, if the purchaser persists in his or her breach, is it obligatory for the notice to indicate what the seller *intends* to do, and will a mere recordal of what he or she is *entitled* to do render the notice ineffective and futile (para [7])?

In *Oakley v Bestconstructo (Pty) Ltd* 1983 (4) SA 312 (T), Grosskopf J stated obiter that section 19(2)*(c)* renders a notice futile if such a notice reserves the seller's right to choose between contractual remedies before the thirty-day notice period has lapsed. This line of reasoning was supported in *Miller v Hall* 1984 (1) SA 355 (D), where it was held that Parliament's intention with section 19(2)*(c)* was to underscore the principle that defaulting purchasers should know exactly what the consequences will be if they persist in their default. Hence a mere recital of the alternative steps that a seller might elect to take after the expiry of the thirty-day notice period is not enough.

Oakley and *Miller* were followed by the court below in *Merry Hill* (*Engelbrecht v Merry Hill (Pty) Ltd & others* 2006 (3) SA 238 (E)). However, in *Van Niekerk & another v Favel & another* 2006 (4) SA 548 (W) the court concluded the contrary: it held that Parliament did not intend to restrict the contents of the thirty-day notice to specifics. If that was intended, Parliament would have used stronger language.

On appeal in *Merry Hill*, Brand JA held that the thirty-day notice in terms of section 19(2)*(c)* is not yet a notice of cancellation. If the purchaser persists in his or her breach after the expiry of this period, the seller is required to make an election between the available remedies and convey that election to the purchaser (para [17]). The express wording of this provision clearly does not require an early election by the seller (para [18]). The aim of the notice is to inform the purchaser that the seller is not willing to tolerate the breach any longer, and that if the purchaser persists in his or her breach, it will result in either cancellation or a claim

for specific performance (para [19]). The reference to 'steps' (plural) in section 19(2)*(c)* supports the perception that the seller need not elect a single step and thus is allowed to indicate in the notice an intention to take more than one step in the alternative. Thus, an election between those alternative steps is not a prerequisite for the thirty-day notice (paras [20]–[21]).

As to the contents of the notice under section 19(2)(c), Brand JA held that it is peremptory for the seller to indicate what he or she *intends* to do; a mere recordal of what he or she is *entitled* to do is inadequate (para [22]). However, a deviation from the literal compliance with such a statutory prescription is not fatal, as long as the notice complies in substance with the requirements of section 19(2)*(c)* (para [23], with reference to *Moela v Shoniwe* 2005 (4) SA 357 (SCA); *Maharaj & others v Rampersad* 1964 (4) SA 638 (A); *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA)). In the present case, the following wording of the notice was considered adequate:

> 'In accordance with clause 9.1 of the deed of sale we . . . demand from you, as we hereby do, payment of the arrear instalments . . . within 32 days of the date of this letter. Should payment not be made as aforesaid then and in that event, the seller shall be entitled to claim immediate payment of the full balance of the purchase price and interest as due by you, as well as all cost and collection commission; *or alternatively* shall be entitled to cancel this contract' (quoted in para [5], original emphasis).

Again, the Supreme Court of Appeal's approach is one of substance over form.

On appeal in *Van Niekerk v Favel* (supra), Hurt AJA agreed with the above decision of Brand JA. However, Hurt AJA stressed the importance of the consumer protection role played by section 19 (paras [10]–[12]), and concluded that the purchaser to be protected is on average vulnerable, uninformed, unacquainted with the law, and without legal assistance (para [12]). It is thus of great importance that the purchaser be notified in specifics of the remedies as listed in section 19(1) that are available to the seller (para [14]). If the seller does not seek these remedies, a notice in terms of section 19 is not required (ibid). Section 19(2)*(c)* intends that the purchaser be put in a position where the extent of his jeopardy if he so fails to purge his default becomes clear to him by reading the notice alone without recourse to the Act, the contract, or legal advice (para [12]). A mere reference to a clause in the contract, without reference to the specific available rem-

edies, fails to achieve the very purpose of section 19(2)*(c)* (para [14]), which is specifically to alert the purchaser to the consequences of his breach. This must be made clear in the notice itself, otherwise section 19(2)*(c)* would serve no purpose (para [15]). It was found that the following wording of the present notice was inadequate:

> 'U word ingevolge paragraaf 26 van die ooreenkoms dertig (30) dae geleentheid gegee vanaf ontvangs van hierdie kennisgewing om die versuime soos hierbo te herstel by gebreke waarvan kliënt sy keuse sal uitoefen wat hy regtens mag hê. Die nodige bewyse van herstel kan direk aan kliënt of aan ons kantore gelewer word binne die gemelde dertig (30) dae.'

Credit Agreements Under the National Credit Act

Attachment Without Cancellation

The question for decision in *Absa Bank Ltd v De Villiers & another* [2008] JOL 22874 (C) was whether a credit provider was entitled to a final order of attachment, despite the absence of cancellation of the credit agreement when the consumer was in default.

The court held that, at common law, an attachment order is ancillary to the cancellation of an (instalment) agreement (para [19]). In the absence of a claim for cancellation, a final attachment order is thus not legally possible. What has to be decided, according to Fourie J, is whether the National Credit Act 34 of 2005 has introduced a procedure that changed the above common-law rule. The court was of the view that the purpose and intention of section 127 was to prescribe the execution and realization process of goods attached by the credit provider in terms of a court order (para [28]). The relevant court order would be obtained upon cancellation of the agreement by the credit provider, pursuant to its breach by the consumer, which cancellation terminates the respective obligations of the parties. Then the execution and realization procedure prescribed by section 127 in the context of section 131 should be followed. Hence Parliament did not intend to change the common law by doing away with the requirement of cancellation of a credit agreement prior to the repossession of the goods (para [42]). Furthermore, the protection under section 127 is still afforded to the consumer despite the cancellation of the credit agreement (para [31]). To allow a credit provider to repossess the goods without showing that he is

entitled to cancellation by virtue of a material breach or a lex commissoria will lead to an unfair result, as the consumer is finally and permanently dispossessed, which absolves the credit provider from any counter-performance (para [32]). Put differently, although the consumer is dispossessed of the goods, he remains liable for payment of the instalments (para [33]). This approach is in accordance with the view of JM Otto (*The National Credit Act Explained* (2006)), and JW Scholtz, JM Otto, E van Zyl, CM van Heerden and N Campbell (*Guide to the National Credit Act* (2008)).

The court concluded that the intention of Parliament was to encroach upon credit providers' common-law rights only in two limited ways (para [40]) — by prescribing procedures to be followed prior to the enforcement of a debt (ss 129 and 130), by prescribing the execution and realization process to be followed after cancellation of the credit agreement (s 131 read with s 127(2)–(9); cf A Boraine & S Renke 'Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in Terms of the National Credit Act 34 of 2005 (Part 1)' (2007) 40 *De Jure* 222; 'Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in Terms of the National Credit Act 34 of 2005 (Part 2)' (2008) 41 *De Jure* 1). It is certain that the common-law principle requiring cancellation prior to attachment and repossession in order to maintain a consistent and harmonized system of debt enforcement remains untouched by Parliament (para [42]).

For the sake of completeness, note that the National Credit Act provides that the passing of ownership in a 'credit transaction' can either be reserved until the consumer fully complies with the contract, or not. In the latter instance, the credit provider is still entitled to repossession upon the consumer's default. Apparently the reason for the possible scenario of ownership transfer on conclusion of the 'credit transaction' is to motivate credit providers to adhere to the strict provisions of the Act (Stéfan Renke & Marissha Pillay 'The National Credit Act 34 of 2005: the Passing of Ownership of the Thing Sold in Terms of an Instalment Agreement' (2008) 71 *THRHR* 641).

Concurrent Jurisdiction

In *Absa Bank Ltd v Myburg* [2008] JOL 21210 (T), Bertelsmann J addressed in detail the objects pursued by Parliament in protecting credit-receiving consumers against exploitation by

credit providers, preventing predatory lending practices, levelling the playing field between unsophisticated consumers and well-advised credit providers, limiting the harm that a consumer may suffer in instances of default, protecting the consumer's fundamental rights to dignity, equality, non-discrimination, and fair administrative and trail procedures. (On over-indebtedness and the measures to counter that, see Michelle Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' (2008) 20 *SA Merc LJ* 200.)

In *Myburg*, the defendant had purchased a motorcycle by way of an instalment agreement, which was regulated by the Credit Agreements Act 75 of 1980, the predecessor of the National Credit Act 34 of 2005. The parties consented to the jurisdiction of the magistrate's court. The defendant defaulted on the payment of R5 277,87, and the plaintiff instituted action. When the defendant failed to appear, the plaintiff sought default judgment in the High Court. This was refused by the Registrar, who was of the opinion that the matter belonged in the magistrate's court.

As the protective shield of the National Credit Act includes limiting legal costs, Bertelsmann J held that consent to the jurisdiction of the High Court, if the magistrate's court has concurrent jurisdiction, is outlawed by section 90*(k)*(vi)*(aa)* and (bb) (para [43]), which provisions apply to the entire Act and are not restricted to debt re-arrangement in terms of section 86 (para [49]). Section 90*(k)*(vi) provides that a credit agreement is unlawful if it contains a consent to the jurisdiction of —

> '*(aa)* the High Court, if the magistrate's court has concurrent jurisdiction; or
> *(bb)* any court seated outside the area of jurisdiction of a court having concurrent jurisdiction in which the consumer resides or works or where the goods in question (if any) are ordinarily kept. . . .'

Bertelsmann J suggested that section 90*(k)*(vi)*(aa)* and *(bb)* be read as declaring unlawful '[t]he practice of instituting action in the High Court to enforce the credit provider's right in terms of a credit agreement while a magistrate's court has concurrent jurisdiction' (para [10]). The reasons are that litigation in the High Court is more expensive than in the magistrate's court, and that Parliament intended to prevent the institution of an action in the High Court in circumstances such as the present (para [50]; cf *Marques v Unibank Ltd* 2001 (1) SA 145 (W)). Issuing summons in the High Court for a debt that could be recovered in the

magistrate's court thus runs counter to the express purpose of the Act, especially in the context of sections 2, 3, and 127 (para [56]).

Bertelsmann J reached the same conclusion in *Absa Ltd v Pretorius* [2008] JOL 21209 (T).

The question of jurisdiction was again addressed in *Nedbank Ltd v Mateman & others; Nedbank Ltd v Stringer & others* 2008 (4) SA 276 (T). Default judgment was sought in the High Court. It was refused by the Registrar, who was of the opinion that these matters belonged in the magistrate's court. In both matters, the defendants had consented to the jurisdiction of the magistrate's court, but reserved to the plaintiffs the election to institute proceedings in either the magistrate's court or the High Court.

Van der Merwe J held that these questions must be answered: Does the National Credit Act oust the jurisdiction of the High Court and thus also the jurisdiction of the Registrar to deal with applications for default judgment? Or, is the High Court's jurisdiction partly ousted by the Act? If so, to what extent?

It is settled law that the High Court has concurrent jurisdiction with any magistrate's court in its area of jurisdiction (*Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W)). Further, there is a strong presumption against the ouster or curtailment of the High Court's jurisdiction (*Lenz Township Co (Pty) Ltd v Lorentz NO en andere* 1961 (2) SA 450 (A); *Minister of Law and Order & others v Hurley & another* 1986 (3) SA 568 (A); *Millman & another NNO v Pieterse & others* 1997 (1) SA 784 (C)). There need not be express words in a statute ousting the jurisdiction of the High Court, but the inference that the jurisdiction is ousted must be clear and unequivocal (*Reid-Daily v Hickman & others* 1981 (2) SA 315 (ZA). In *Mateman*, the court found that there is no express or implied provision in the Act ousting the High Court's jurisdiction or the Registrar's authority to deal with applications for default judgment. A credit provider's reservation of his right to approach the High Court is not unlawful and in contravention of section 90(k)*(vi)*(aa) and (bb). This section merely forbids consent to the jurisdiction of the High Court in circumstances where the magistrate's court has concurrent jurisdiction. Also, section 90*(k)*(vi)(aa) and (bb) of the National Credit Act did not affect the conferred jurisdiction of the High Court in terms of the Supreme Court Act 59 of 1959. The purpose of section 90(k)*(vi)*(aa) and (bb), according to Van der Merwe J, is to outlaw forum shopping in credit agreements.

The fact that Bertelsmann J dealt with this jurisdictional matter in *Absa Bank v Myburg* (supra) and *Absa v Pretorius* (supra)

indicates that the judge accepted the High Court's authority to address the matter; otherwise it would have been struck from the roll.

Melanie Roestoff and Hermie Coetzee ('Consent to Jurisdiction — Unlawful Provision in a Credit Agreement in Terms of the National Credit Act — Is this Jurisdiction of a Court Ousted Thereby?' (2008) 71 *THRHR* 678) are of the opinion that section 90*(k)*(vi)*(aa)* and *(bb)* do affect the jurisdiction of the High Court. If these provisions did not, they would serve no purpose, which would run counter to the common-law presumption that Parliament does not intend to enact purposeless provisions (*Esselman v Administrateur SWA* 1974 (2) SA 597 (SWA). In their view, the purpose of section 90*(k)*(vi)*(aa)* is not to oust the High Court's jurisdiction, but to prevent indigent and unsophisticated consumers from consenting to the jurisdiction of the High Court, in this way rendering themselves contractually liable for legal costs on the High Court scale, when the matter could have been be heard in the magistrate's court (*Standard Bank of SA v Pretorius* 1977 (4) SA 395 (T); *Mofokeng v General Accident Versekering Bpk* 1990 (2) SA 712 (W)). The consumer is thus protected by section 90*(k)*(vi)*(aa)* against the unnecessary use of a more expensive forum. In their view, the purpose of section 90*(k)*(vi)(bb) is to oust the jurisdiction of a court, including the High Court, not closest in distance to the consumer's residence, work, or the place where the goods are kept (Otto op cit at 45).

CM van Heerden ('Perspectives on Jurisdiction in Terms of the National Credit Act 34 of 2005' 2008 *TSAR* 840) is of the opinion that the aim of section 90*(k)*(vi)*(aa)* is to limit legal costs by giving unlimited monetary jurisdiction to magistrates' courts concurrent to that of any High Court, without ousting the latter's jurisdiction completely. As for section 90*(k)*(vi)*(bb)*, she shares the view of Roestoff and Coetzee.

In short, Parliament should reconsider the clumsily worded section 90*(k)*(vi)*(aa)* and *(bb)*.

Credit Facility, Credit Transaction, and Discounting

In *Bridgeway Ltd v Markam* 2008 (6) SA 123 (W), the respondent, a seller of immovable property, sold and transferred his right to receive payment of the purchase price by way of cession to the applicant, a discounter, who, in return, advanced R350 000 up front to the respondent. On cancellation of the discounter agreement, the respondent raised, inter alia, the defence that, in

terms of the National Credit Act, the discounter agreement qualified as a 'credit facility' or a 'credit agreement'. The applicant was accordingly precluded from instituting legal proceedings, unless he complied with sections 129(1) and 130(1)*(a)* and *(b)* of the Act. The latter provisions essentially concern the delivery of prescribed notices to remedy the default prior to the institution of legal action.

A 'credit facility' is defined in section 8(3) of the National Credit Act:

'An agreement, irrespective of its form but not including an agreement contemplated in subsection (2) or section 4(6)*(b)*, constitutes a credit facility if, in terms of that agreement —

(a) a credit provider undertakes —
  (i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
  (ii) either to —
    (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any park of an amount contemplated in subparagraph (i); or
    (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of —
  (i) any amount deferred as contemplated in paragraph *(a)*(ii)*(aa)*; or
  (ii) any amount billed as contemplated in paragraph *(a)*(ii)*(bb)* and not paid within the time provided in the agreement'.

A 'credit transaction', in turn, is defined in section 8(4):

'An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is —

(a) a pawn transaction or discount transaction;
(b) an incidental credit agreement, subject to section 5(2);
(c) an instalment agreement;
(d) a mortgage agreement or secured loan;
(e) a lease; or
(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of —
  (i) the agreement; or
  (ii) the amount that has been deferred.'

The court accepted the merit of the following submissions (para [21]), and found (on the same submissions) that a discounter agreement (discount sale) does not qualify as a 'credit facility' or 'credit transaction' as defined by the Act (para [24]). In the first instance, the whole course of the transaction (not merely its objects or form) must be scrutinized to establish its nature and substance (para [15]; cf *Tucker v Ginsberg* 1962 (2) SA 58 (W)). Secondly, section 8 of the Act clearly indicates that a credit provider periodically supplies goods or services to the consumer and in certain instances may defer the latter's obligations, including the payment of interest. A discounter agreement, however, has the hallmark features of an immediate payment of money without the deferral of periodic instalments (para [16]). Put differently, once a discounter pays the purchase price up front, he steps into the shoes of the seller *vis-à-vis* the purchaser, and no money is in this instance borrowed (para [18]). In *De Villiers v Roux* 1916 CPD 295 at 298, it was held that —

> '[t]he difference between ''advancing'', ''lending money'' and ''discounting'' is distinct and palpable. ''Discounting'' is purchasing, not lending. The discounter, whether of a bill or bond, or any other security, becomes the owner.'

The court concluded that, taking the nature, substance, and intention of the parties into account, the inescapable inference to be drawn was that the agreement reached was one of discounting and not a money-lending or a credit transaction, despite the fact that the contract provided for a deferred payment of interest upon its breach (para [23]). (For a complete and critical discussion of the scope of the National Credit Act, see PN Stoop 'Kritiese Evaluasie van die Toepassingsveld van die ''National Credit Act''' (2008) 41 *De Jure* 352; ML Vessio 'What Does the National Credit Regulator Regulate?' (2008) 20 *SA Merc LJ* 227.)

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