CONSTITUTIONAL COURT OF SOUTH AFRICA

Richard Timothy Harris N.O & Others v Herold Gie and Broadhead Incorporated

CCT 295/24

Date of hearing: 13 May 2025
Date of judgment: 13 February 2026

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday, 13 February 2026, the Constitutional Court handed down judgment in an application for leave to appeal against part of the judgment and order of the Supreme Court of Appeal. The court a quo had found that section 6(4) of the Housing Development Scheme Act (HDSA) does not provide a statutory remedy for repayment of funds entrusted with a practitioner, under section 6(3)(a), and paid over to a developer prior to the developer's insolvency.

The appeal was brought by a purchaser, Mr Grondel, and a number of executors of the estates of deceased purchasers (the applicants). Between April 2009 to November 2011, the applicants purchased "life rights" in the St Leger Retirement Hotel, a 'housing development scheme' under the HDSA. The purchase price was paid into the trust account of the respondent, Herold Gie and Broadhead Inc (HGB) in terms of the contracts concluded with the developer. HGB opposed the matter.

On 24 October 2014, the applicants cancelled their "life rights" agreements and requested a refund of their purchase price, alleging that they had not been furnished with the certificates of compliance contemplated under section 6(1)(a) of the HDSA and section 14(1)(a) of the National Building Regulations Standards Act 103 of 1977. They also claimed that the developer had failed to inform them prior to the conclusion of the agreement that use and occupation of the hotel would not be "legally possible."

Litigation was launched in the High Court in October 2017 and the High Court separated three questions for determination. The first separated question was: whether section 6(4) of the HDSA provides a statutory remedy for the repayment of proceeds of a section 6(3) "entrustment" where a practitioner has paid away these proceeds without compliance with section 6(1). The second separated question was whether section 6(4) of the HDSA can found an action by a purchaser, or an executor of a deceased purchaser, of a "housing interest" from a developer, for repayment by a "practitioner" of an amount contemplated in section 6(3)(a), prior to the developer becoming insolvent and the purchaser cancelling the contract. The third separated question was whether in the case that section 6(4) of the HDSA does not apply, the averments in the applicant's particulars of claim, read with the averments in the respondent's plea that were admitted, were sufficient to sustain an action.

The High Court ruled in favour of the applicants on all three questions. The Supreme Court of Appeal, however, upheld the appeal of the respondent with costs. It held that the section 6(4) did not found a claim where the funds held by HGB had been paid out to the developer. The first separated question was therefore answered in favour of the respondent. It set aside the High Court answer to the third question and remitted that issue together with all the remaining issues to the High Court for determination.

Before the Constitutional Court the applicants submitted that the Supreme Court of Appeal's answer to the first separated question did not give effect to the intention of the legislature to provide protection for vulnerable elderly purchasers. The applicants submitted that the true purpose of section 6(4) is to provide for immediate and unconditional reimbursement to a purchaser of the proceeds of a section 6(3)(a) entrustment or payment to a purchaser under a section 6(3)(b) guarantee in the event of the developer becoming insolvent without having complied with the requirements of section 6(1).

The applicants submitted that this matter raised constitutional issues as it concerned the interpretation of section 6(4) of the HDSA, which has previously been held to constitute consumer protection legislation. Further, the interpretation has implications for the right to equality (section 9) as well as the right to housing provided by section 26 and right to healthcare. The applicants also contended that this Court had jurisdiction under section 167(3)(b)(ii) as the matter raised an arguable point of law of general public importance.

The respondent submitted that there was no constitutional issue in this matter, nor was there any arguable point of law of general public importance which would have given this Court jurisdiction to entertain the matter. Further, the respondent submitted that the Supreme Court of Appeal's interpretation of section 6(4) of the HDSA was correct and aligned with established principles of statutory interpretation. Additionally, the respondent submitted that the applicants had alternative remedies available to them, which they had not pursued.

The respondents submitted that section 6(4) on its plain wording is clear and unambiguous and does not support the extended interpretation put forward by the applicants. Instead, the respondent submitted that the Supreme Court of Appeal's judgment was correct and

does not place retirees in a more vulnerable position, but rather that they would possibly be able to bring claims on a different cause of action.

First Judgment

The first judgment (minority judgment), penned by Goosen AJ (with Kollapen J and Theron J concurring), accepted that the matter engaged this Court's general jurisdiction, but ultimately would have dismissed the appeal on the merits.

On jurisdiction, the first judgment found that it is unlikely that the matter raised a constitutional issue, as the interpretation of section 6(4) of the HDSA did not require the consideration of a constitutional rule or principle. However, it did not conclusively reject the applicant's arguments on constitutional jurisdiction. Instead, it found the matter engaged with the Court's general jurisdiction. The first judgment held that the meaning and effect of section 6(4) is of general public importance, and that its interpretation may bear on other legislation containing similarly-worded provisions such as the Alienation of Land Act, the Share Blocks Control Act, and the Property Time-Sharing Control Act.

The first judgment went on to examine the interpretive approach adopted by the Supreme Court of Appeal, in light of the concerns raised by the applicants that the interpretation adopted would render retired persons more vulnerable to financial hardship when a developer of a housing scheme becomes insolvent. The first judgment found that it was not the interpretive approach adopted by the Supreme Court of Appeal which was at issue, but the effect the interpretation would have on retired persons.

Next, it turned to the purpose of the HDSA, finding that the HDSA constitutes a piece of "social" or "consumer protection" legislation which aims to protect elderly or retired persons who invest their savings in a housing development scheme from possible exploitation by a developer. The manner in which the HDSA achieves this is by allowing elderly or retired persons to purchase a "life right" to live in a housing scheme, and by offering a number of statutory protections to residents in such housing schemes.

Importantly, section 6 of the HDSA provides protections for elderly and retired persons during the process of buying into a housing development scheme. Generally, section 6 prevents the developer of a housing scheme from taking payment from potential residents until the scheme has been certified as ready for the residents to move in. There are two exceptions to this rule contained in section 6(3) of the HDSA: first, the purchase price can be entrusted to an attorney or estate agent for the benefit of the developer once the housing scheme is certified, or second, the developer can provide a financial guarantee to the purchaser and receive the purchase price before the housing scheme has been certified as ready for occupancy.

The first judgment found that these two provisions enabled the payment, albeit through different mechanisms, of the purchase price to the developer. The protections created by the HDSA operate in the same manner in each case, by guaranteeing to the purchaser that the developer will only receive the payment on condition that the purchaser is able to take

up residence in the housing scheme. In the former instance, this is achieved by the legal obligation of an attorney or estate agent to abide by the terms of the HDSA and not release funds before the housing scheme can be occupied, and in the latter instance by providing a guarantee that the funds will be returned if the housing scheme cannot be occupied.

Turning to the interpretation of section 6(4) specifically, the first judgment held that the section allowed for the repayment of funds held in trust under section 6(3) if the developer becomes in solvent. However, this only applies to funds still held in trust *at the time* that the developer becomes insolvent. If the funds have been properly disbursed to the developer prior to the insolvency, then the purchasers may claim against the developer for the return of their payments, but not against the attorney or estate agent who had been holding the funds in trust. A claim against the attorney or estate agent would only be possible if the funds had not been unlawfully disbursed to the developer, or otherwise misappropriated. As the applicants had taken up residency at the time of the developer's insolvency, and HGB had properly disbursed the funds held in trust to the developer prior to the insolvency, the applicants did not have a claim against HGB.

The first judgment would thus have dismissed the appeal.

Second Judgment

The second judgment (majority judgment), penned by Majiedt J (with Madlanga ADCJ, Mhlantla J, Opperman AJ and Tshiqi J concurring), held that section 6 of the HDSA had to be interpreted purposively and in light of its character as legislation enacted to protect vulnerable elderly purchasers.

The Court held that section 6(4) did establish a statutory cause of action against a practitioner for repayment of funds entrusted under section 6(3)(a) where those funds should have been kept in trust at the time of the developer's insolvency, regardless of whether the practitioner had unlawfully disbursed them beforehand. It held that the phrase "kept in a trust account" required a legal, rather than factual, inquiry and that funds unlawfully paid away remained, in law, funds that were required to be kept in trust. The practitioner's statutory duty to safeguard the entrusted funds therefore persisted, and any deficit caused by unlawful payment had to be made good by the practitioner.

The Court held further that section 6 created a statutory escrow-type arrangement regulating the flow of consideration between purchaser, practitioner and developer. Until the statutory conditions in section 6(1) were fulfilled, funds entrusted under section 6(3)(a) could lawfully flow only in one direction, namely back to the purchaser upon cancellation or insolvency.

The second judgment held that the true purpose of section 6(4) is not to protect the purchasers from the operation of the *concursus creditorum.* Instead, it held that its purpose was to make plain that the financial relationship between the developer and the purchaser comes to an end upon the insolvency of the developer prior to fulfilment of the conditions under section 6(1). Any payment of entrusted funds by the practitioner will be unlawful.

That unlawful payment by the practitioner cannot absolve the practitioner of their duty to reimburse the purchasers.

The second judgment held that the purpose of section 6(4) is to create a statutory provision which establishes an unconditional right to repayment on the occurrence of a trigger event: the insolvency of the developer. The purpose of the impugned provision is not simply to exclude the proceeds of a section 6(3)(a) entrustment from the estate of a developer who becomes insolvent without having complied with the provisions of section 6(1). Had that been the purpose of section 6(4), the Legislature could simply have provided therefor expressly, in the same way as it has provided for exclusion of funds in the trust account of an attorney from the estate of the attorney upon their insolvency.

The second judgment concluded that section 6(4) of the HDSA provides a statutory remedy for repayment of funds entrusted by a purchaser in terms of section 6(3)(a) even where the practitioner concerned has unlawfully paid away the proceeds of the relevant entrustment prior to insolvency of the developer.

The Court thus granted leave to appeal, upheld the appeal, set aside and replaced the order of the Supreme Court of Appeal. The matter was thus remitted back to the High Court for consideration of the remaining issues.