IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No: /2024
SCA Case No: 602/2023

In the matter between:

RICHARD TIMOTHY HARRIS N.O.	First Applicant
CHRISTOPHER ALEXANDER SCAIFE & STEPHEN JOHN EARLY NN.O.	Second Applicants
OSCAR WALTER & ALAN LEONARD HARVIE BROADHURST NN.O.	Third Applicants
ANNELISE JANSEN VAN RENSBURG-HATTINGH N.O.	Fourth Applicant
CLIFFORD OWEN KEET & MICHELE ANN WALLIS NN.O.	Fifth Applicants
EDGAR GRONDEL	Sixth Applicant

and

HEROLD GIE & BROADHEAD INC.	Respondent

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DATED at **CAPE TOWN** this 8th day of **OCTOBER 2024**.

BICCARI BOLLO MARIANO INC.

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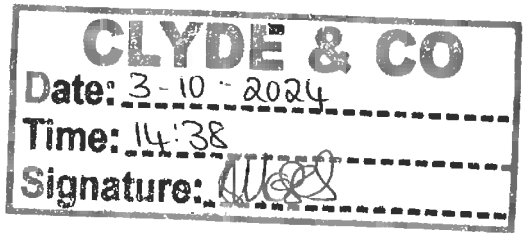

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EDGAR GRONDEL	Sixth Applicant

and

HEROLD GIE & BROADHEAD INC.	Respondent

APPLICANTS' NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the applicants hereby apply for leave to appeal to this Honourable Court against part of a judgment and order of the Supreme Court of Appeal in Case 602/2023 per Dambusa JA (Nicholls & Mabindla-Boqwana JJA and Tolmay & Mbhele AJJA concurring) dated 13 September 2024, copies of which judgment and order are attached to the undermentioned affidavit of Bernhard Kurz.

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TAKE NOTICE FURTHER that the applicants seek an order in the following terms:

1. The applicants are granted leave to appeal against part of the judgment and order of the Supreme Court of Appeal in Case 602/2023 per Dambusa JA (Nicholls & Mabindla-Boqwana JJA and Tolmay & Mbhele AJJA concurring) dated 13 September 2024, namely the answering in favour of the respondent of the first of three questions separated in terms of Uniform Rule 33(4) for prior determination by the Western Cape Division of the High Court in consolidated Cases 17698/2017, 17711/2017, 17738/2017, 17753/2017(b), 17757/2017 and 17765/2017 and, ancillary thereto, the award of the costs of appeal in favour of the respondent.

2. The costs of this application for leave to appeal shall be costs in the appeal.

3. Granting the applicants such further and / or alternative relief as to the Court may seem fit.

TAKE NOTICE FURTHER that, should leave to appeal be granted, the applicants will seek an order in the following terms pursuant to the hearing of the appeal:

'1. The appeal is upheld with costs.

2. The order of the Supreme Court of Appeal is set aside and replaced with an order in the following terms:

"1. The appeal is upheld in part.

2. The decision of the High Court is replaced with an order in the following terms:

'1. Of the three questions referred for determination in terms of Uniform Rule 33(4), the first two are determined in favour of the plaintiffs.

2. The third of the said three question is referred for determination together with the remaining issues in the consolidated cases.

3. *The plaintiffs' applications for leave to qmend their particulars of claim in the manner they seek to do is granted.*

4. *The costs stand over for determination together with the remaining issues in the consolidated cases.'*

3. *The consolidated cases are referred back to the High Court for determination of the remaining issues therein.*

4. *The costs of appeal are awarded in favour of the respondents."'*

TAKE NOTICE FURTHER that the accompanying affidavit of **BERHARD KURZ** will be used in support of this application.

TAKE NOTICE FURTHER that the applicants have not applied and do not intend to apply for leave or special leave to appeal to any other Court.

TAKE NOTICE FURTHER that the applicants have appointed attorneys Biccari Bollo Mariano Inc. ('BBM') as as their attorneys of record in this application and appoint as the address which they will accept all notice and service of all documents in these proceedings the Sandton office of BBM at Building 1, Ground Floor, Oxford & Glenhove, 16 Oxford Road, Melrose Estate, Sandton (Reference B Kurz), email address kurz.b@mweb.co.za and telephone numbers (021) 422 2173 and (082) 658 2005.

TAKE NOTICE FURTHER that in accordance with Rule 19(4) of this Court's Rules, the respondent may within ten (10) days of the date on which this application is lodged respond thereto in writing, indicating whether or not the application for leave to appeal is being opposed, and if so the grounds for such opposition, and further that the respondent may lodge a cross-appeal as provided for in Rule 19(5) of this Court's Rules.

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TAKE NOTICE FURTHER that if no such notice in intention to oppose is given, the applicants will request the Registrar to place the matter before the Chief Justice to be dealt with in terms of Rule 11(4) of this Court's Rules.

DATED at **CAPE TOWN** this 3RD day of **OCTOBER 2024**.

BICCARI BOLLO MARIANO INC.

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CLYDE & CO
Date: 3-10-2024
Time: 14:37
Signature:

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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In the matter between:

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CLIFFORD OWEN KEET & MICHELE ANN WALLIS NN.O.	Fifth Applicants
EDGAR GRONDEL	Sixth Applicant

and

HEROLD GIE & BROADHEAD INC.	Respondent

FOUNDING AFFIDAVIT:
APPLICATION FOR LEAVE TO APPEAL

I, the undersigned, **BERNHARD KURZ**, make oath and say:

1. I am an attorney, practising as such as a consultant to Biccari Bollo Mariano Inc. ('BBM') in Cape Town, the attorneys for the applicants in this matter, and I am authorised by the applicants to make this application on their behalf.

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THE PARTIES

2. The applicants are:

   2.1. Richard Timothy Harris as executor of the estate of the late Renee Parry-Davies ('Mrs Parry Davies');

   2.2. Christopher Alexander Scaife & Stephen John Early as executors of the estate of the late Phyllis Mary Early ('Mrs Early');

   2.3. Oscar Walter & Alan Leonard Harvie Broadhurst as executors of the estate of the late Lionel Walter ('Mr Walter');

   2.4. Annelise Jansen van Rensburg-Hattingh as executrix of the estate of the late Ingeborg Maria-Luise Arndt ('Mrs Arndt');

   2.5. Clifford Owen Keet & Michele Ann Wallis as executor and executrix respectively of the estate of the late Michael Bosman Keet ('Dr Keet');

   2.6. Edgar Grondel ('Mr Grondel').

3. BBM were from inception the attorneys for the plaintiffs in the action proceedings in the Western Cape Division of the High Court ('the WCC') and the respondents in the appeal proceedings in the Supreme Court of Appeal ('the SCA') that give rise to this application; and from inception I had the conduct of those proceedings at BBM.

4. The respondent is Herold Gie & Broadhead Inc., a company registered in accordance with the company laws of South Africa with registration number 1985/000891/21, carrying on business as attorneys under the style *'Herold Gie Attorneys'*, with principal place of business at Wembley 3, 80 McKenzie Street, Cape Town ('HGA').

5. HGA, the defendant in the action proceedings in the WCC and the appellant in the appeal proceedings in the SCA that give rise to this application, has been represented in

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those proceedings by attorneys Clyde & Co, 13th Floor, SA Reserve Bank Building, 60 St Georges Mall, Cape Town, and it remains so represented.

PURPOSE OF APPLICATION

6. The applicants apply for leave to appeal against part of a judgment and order of the SCA in Case 602/2023 per Dambuza JA (Nicholls & Mabindla-Boqwana JJA and Tolmay & Mbhele AJJA concurring) dated 13 September 2024, copies of which are attached marked **'FA1'** and **'FA2'** respectively.

7. The judgment and order of the SCA upheld with costs an appeal by HGA against a judgment and order of Le Grange J dated 27 February 2023 in six similar consolidated actions in the WCC, copies of which are attached marked **'FA3'** and **'FA4'** respectively.

8. The said judgments and orders reflect Mrs Early rather than the second applicants as a plaintiff in the actions and the second respondent in the appeal. She was a plaintiff in the actions but died just prior to the hearing before Le Grange J. The second applicants were not formally substituted for her as a plaintiff in the actions and as a result she remained cited as such and was cited as the second respondent in the appeal.

9. The judgment and order of Le Grange J answered in favour of the plaintiffs, i.e. affirmatively, three questions separated for prior determination in terms of Rule 33(4) and granted applications by them for leave to amend their particulars of claim.

10. The three questions separated for prior determination were the following:

    10.1. In each case, whether s 6(4) of the the Housing Development Schemes for Retired Persons Act 65 of 1988 ('the HDSA') can found an action by a purchaser, or the executor of the estate of a deceased purchaser, of a *'housing interest'* ... from a *'developer'* ..., for repayment by a *'practitioner'* ... of an amount entrusted, as contemplated in s 6(3)(a), by the purchaser to such *'practitioner'* by virtue of a

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'contract' ..., where, in the absence of compliance with the provisions of s 6(1) and prior to the *'developer'* having become an insolvent, as it subsequently did, the *'practitioner'* disbursed, to or for the account of the *'developer'*, from the trust account of such *'practitioner'*, an amount equivalent to the amount so entrusted to the *'practitioner'*, as purported release to the *'developer'* of the amount so entrusted to the *'practitioner'*.

10.2. In each case, whether s 6(4) of the HDSA can found an action by a purchaser, or the executor of the estate of a deceased purchaser, of a *'housing interest'* ... from a *'developer'* ..., for repayment by a *'practitioner'* ... of an amount entrusted, as contemplated in s 6(3)(a), by the purchaser to such *'practitioner'* by virtue of a *'contract'* ..., where, prior to the *'developer'* having become an insolvent, as it subsequently did, the purchaser, or the executor of the estate of the deceased purchaser, cancelled the *'contract'*.

10.3. In each case, whether, if s 6(4) of the HDSA does not apply, the averments in the particulars of claim, read with the averments in HGA's plea that were admitted by the plaintiff(s), were sufficient to sustain an action.

11. HGA sought leave from Le Grange J to appeal to the SCA against his judgement and order in respect of the three separated questions but not in respect of the grant of the applications for leave to amend. HGA was granted such leave by Le Grange J but in the event it only pursued its appeals in respect of the first and third separated questions.

12. The SCA upheld HGA's appeal by answering the first separated question in favour of HGA and referring the third separated question back to the WCC for determination with the remaining issues in the cases, and it awarded HGA the costs of the appeal.

13. The applicants seek leave to appeal against the answering by the SCA of the first separated question in favour of HGA and, ancillary thereto, the award of the costs of the appeal in favour of HGA.

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BASIS OF APPLICATION

14. I respectfully submit that the jurisdiction of this Court is engaged under s 167(3)(b)(i) and / or s 167(3)(b)(ii) of the Constitution.

15. As regards s 167(3)(b)(ii), I submit that the proposed appeal to this Court on the first separated question raises an arguable point of law of general public importance which ought in the interests of justice to be considered by this Court.

16. In that connection:

16.1. The proposed appeal concerns the interpretation of a statutory provision, namely s 6, more specifically s 6(4) in the context of s 6(1) and s 6(3), of the HDSA, which I submit is a point of law.

16.2. The point of law is, I submit further, an arguable one from the side of the applicants, having regard to the submissions below on the first separated question and also to the fact that it was answered by Le Grange J in favour of the plaintiffs and to the fact that in *Cierenberg en Andere v Rorich, Wolmarans & Luderitz; Van Wyk en Andere v Lamprecht en 'n Ander*[1] (*'Cierenberg'*) it was answered similarly.

16.3. The point of law is, I submit further, one of general public importance which in the interests of justice ought to be considered by this Court.

16.3.1. Firstly, the point is of importance not only to the applicants but on an ongoing basis to purchasers from time to time country-wide of housing interests in retirement schemes in course of development.

[1] 2003 (1) SA 40 (TPA)

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16.3.2. However, s 6 of the HDSA is clearly modelled on similar provisions in s 26 of the Alienation of Land Act 68 of 1981 ('the ALA'), s 5A of the Share Blocks Control Act 59 of 1980 ('the SBCA') and s 7 of the Property Time-sharing Control Act 75 of 1983 ('the PTSCA'). The point is thus also of importance on an on-going basis to purchasers from time to time country-wide of intended subdivisions in townships and otherwise, units in sectional title schemes in course of development, shares in share block companies in course of establishment and rights to accommodation in property time-sharing schemes in course of development.

16.3.3. In addition, the point is of importance on an ongoing basis country-wide to developers of retirement schemes, townships, sectional title schemes, share block schemes and time-sharing schemes and to practitioners and estate agents who receive *'entrustments'* under s 6(3)(a) of the HDSA, s 26(3)(a) of the ALA, s 5A(2)(a) of the SBCA and s 7(3)(a) of the PTSCA.

17. As regards s 167(3)(b)(i), I submit that the proposed appeal to this Court on the first separated question raises constitutional matters which ought in the interests of justice to be considered by this Court.

18. In that connection, I submit, on authority cited below[2], that the HDSA constitutes *'social'* or *'consumer protection'* legislation. Its object is to protect elderly or retired persons investing their savings in a housing development scheme from possible exploitation by a developer.

19. As such, I submit that the interpretation thereof at least implicates the rights provided for

[2] In paras 58-60

in s 9 (equality) (as, for example, the interpretation of the National Credit Act 34 of 2005 has been held to do[3]), s 26 (housing) and s 27 (health care, food, water and social security) of the Constitution.

20. I submit that s 9 of the Constitution is implicated for the reasons mentioned in 18 above, s 26 because an *'entrustment'* under s 6(3)(a) of the HDSA will often constitute a substantial part of the savings of the retiree, the loss of which compromises his or her ability to access suitable housing, and s 27 because loss of an *'entrustment'* under s 6(3)(a) of the HDSA, which will often include proceeds of a pension benefit of the retiree, will also often compromise the ability of the retiree to access amenities such as health care, including frail care, which are common features of retirement developments.

21. The interpretation adopted by the SCA places a class of vulnerable persons – retirees - in a more vulnerable position. It reduces the circumstances in which they can rely on s 6(4) to recover their '*entrustments*'. It increases the risk that they will lose their '*entrustments*' because of the misconduct of the practitioner and / or developer concerned. This Court must, I submit, prefer an interpretation of the HDSA that advances their said rights over the SCA's interpretation which inhibits the enjoyment of those rights. The question of which interpretation is correct is a '*constitutional matter*' within this Court's jurisdiction.

THE SCA JUDGMENT

22. The SCA judgment overrules *Cierenberg*, which it considers not to have undertaken a deliberate interpretative exercise of s 6(4) of the HDSA, incorrectly I submit.

23. In *Cierenberg*, *'retired persons'* had purchased *'housing interests'* in a *'housing*

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[3] *Sebola & Another v Standard Bank of South Africa Ltd & Another 2012 (5) SA 142 (CC) para [36]*, approved in *Ferris & another v Firstrand Bank Ltd 2014 (3) SA 39 (CC) paras [7] & [8].*

development scheme' under *'contracts'*. They had *'entrusted'* their purchase prices to *'practitioners'* under s 6(3)(a). The *'practitioners'* had made corresponding payments to the *'developer'*, which was subsequently liquidated.

24. The *'purchasers'* had claimed repayment of their purchase prices from the *'practitioners'*, relying on s 6(4). The *'practitioners'* relied on an alleged s 6(1)(a) certificate to justify their payments to the *'developer'*, but it was held that such certificate did not meet the requirements of s 6(1)(a).

25. It was held that on the merits the *'practitioners'* had no defence, notwithstanding the payments made by the *'practitioners'* to the *'developer'*, and that, but for the question of prescription, the claims of the *'purchasers'* would undoubtedly have had to succeed[4].

26. However, as proceedings by the *'purchasers'* for enforcement of their claims against the *'practitioners'* had been initiated more than three years after the commencement of liquidation of the *'developer'*, the claims were held to have prescribed[5].

27. Le Grange J, in arriving at his decision on the first separated question, cited <u>Cierenberg</u> with approval on the point of whether s 6(4) conferred a right of action on a *'purchaser'* in the circumstances postulated in the first separated question.

28. The SCA dealt with the interpretation of s 6(4) in its judgment as follows:

> *'25. The exclusion under s 6(3) is premised on the purchase price being kept in a practitioner's account, for the benefit of the developer, until the provisions of subsection 1 have been complied with ....*
>
> *26. Section 6(4) empowers a practitioner to immediately repay to the purchaser the moneys entrusted <u>and kept</u> by him or her as provided in s 6(3) ....*

---

[4] At 441-461 read with 47E-F
[5] At 461-50F

27. *The meaning and purpose of s 6(4) within the context of s 6 is clear. It is the protective measure provided to safeguard the interests of elderly purchasers in instances where a developer of a retirement home becomes insolvent before the guarantees on the suitability of the life right housing unit are in place as provided in s 6(1). Section 6(4) empowers the practitioner or estate agent to immediately release to the elderly purchaser, the purchase price that is kept in the trust account, thus protecting the purchaser from having to compete in the concursus creditorum. The section is triggered by the developer's insolvency, in the circumstances where the purchase price, or a portion of the price, that was entrusted to the practitioner or an estate agent is "... kept, ... in the trust account of the practitioner ..." as provided under s 6(3)(a).*

28. *...*

29. *... On a proper interpretation, s 6(4) is not an open-ended statutory foundation for claims of repayment to purchasers, of moneys entrusted to practitioners under the HDSA. It is confined to instances where the developer becomes insolvent while there are moneys held in trust by a practitioner, for the developer's benefit.*

30. *The high court's conclusion, that the purchasers were HGB's trust creditors, is inconsistent with the language of s 6(3)(a). Under that section the purchase price is entrusted to the practitioner, "to be kept for the benefit of the developer ...". Consequently, under ss 6(3) and (4), it is the developer rather than the purchaser, that is the practitioner's trust creditor. Ordinarily, on sequestration of the developer, the purchase price funds would become part of the developer's insolvent estate. Had this not been the case it would have been unnecessary to protect the purchasers from the concursus creditorum as provided in s 6(4).'*

29. The SCA judgment holds that the meaning and purpose attributed by it to s 6(4) within the context of s 6 is clear.

30. However, Le Grange J took an opposite view to that of the SCA as to the meaning and purpose of 6(4) within the context of s 6. So too did the court in Cierenberg, which considered its opposite view to be clear. So too evidently did the senior counsel for the *'practitioners'* in Cierenberg, who appears to have relied on other grounds for resisting the merits of the claims against them. There also does not appear to have been any

academic criticism of the finding in *Cierenberg* on the merits of the claims under s 6(4) against the practitioners in that case. And counsel for HGA did not contend for the interpretation espoused by the SCA until nearly five years into the litigation in the WCC.

31. I respectfully submit that the SCA erred in its finding on the first separated question and that Le Grange J, and before him the court in *Cierenberg*, correctly interpreted s 6(4) in the context of s 6 of the HSDA.

SCHEME OF REMAINDER OF THIS AFFIDAVIT

32. In what follows, I deal with the following in sequence:

32.1. The HDSA and related legislation.

32.2. The background to the WCC litigation.

32.3. The WCC litigation.

32.4. Submissions on the first separated question.

32.5. Critique of the SCA judgment.

32.6. The requirements for the grant of leave to appeal to this Court.

THE HDSA AND RELATED LEGISLATION

33. S 6 of the HDSA provides as follows:

'(1) Subject to subsection (3) and notwithstanding any other law, no developer may by virtue of a contract receive any consideration or any part thereof, unless-

(a) an architect or a quantity surveyor has issued a certificate that the housing development scheme concerned has been erected substantially in accordance with any applicable officially approved building plans and town-planning scheme and applicable local authority by-laws, and is sufficiently completed for the purposes of utilisation of the housing interest concerned;

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(b) a copy of that certificate and a copy of the contract have been furnished to the purchaser concerned; and

(c) in the case where a housing interest includes a right of occupation, a practitioner has issued a certificate that the title deed of the land to which the right of occupation relates, has been endorsed as contemplated in section 4C, insofar as endorsement is required by that section, and a copy of that certificate has been furnished to the purchaser concerned.

(2) Any person who contravenes any provision of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R20,000, or to imprisonment for a period not exceeding five years, or to both that fine and that imprisonment.

(3) Subsection (1) shall not apply to the receipt of any amount-

(a) which the purchaser by virtue of a contract entrusts to a practitioner or an estate agent in his capacity as such, to be kept, for the benefit of the developer, in the trust account of the practitioner or estate agent until the provisions of subsection 1 have been complied with; or

(b) which by virtue of a contract is paid to the developer if, before such payment, the purchaser was furnished with an irrevocable and unconditional guarantee by a banking institution ..., a mutual building society ..., a building society ..., or a registered insurer ..., in terms of which the banking institution, mutual building society, building society or insurer undertakes to repay the said amount to the purchaser, if the provisions of subsection (1) on not being complied with.

(4) If, in the circumstances contemplated in subsection (3), the developer becomes an insolvent before the provisions of subsection (1) have been complied with, any amount kept in a trust account in terms of paragraph (a) of subsection (3) or the repayment of which was guaranteed in terms of paragraph(b) of that subsection, shall immediately become payable to the purchaser concerned by the practitioner, estate agent, banking institution, mutual building society, building society or insurer concerned.'

34. As mentioned above, s 6 of the HDSA is clearly modelled on s 26 of the ALA, s 5A of the BCA and s 7 of the PTSCA, copies of which are attached marked **'FA5.1'**, **'FA5.2'** and **FA5.3'** respectively.

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BACKGROUND TO THE WCC LITIGATION

35. The applicants are, in the case of Mr Grondel a purchaser, and in the cases of the others the executors / executrixes of the estates of deceased purchasers of life rights in the St Leger Retirement Hotel ('the SLRH') a '*housing development scheme*' under the HDSA established in Muizenberg by The St Leger Trust ('the SLT').

36. The purchasers purchased their life rights over the period April 2009 to November 2011, from the SLT as *'developer'*, in terms of *'contracts'*, each styled *'Life Right Agreement'* ('LRA'), to which it is common cause the HDSA applied, each of which provided for the purchase price to be paid into a trust account of HGA ('the HGA Trust Account').

37. Pursuant to the LRA's, the purchasers made payments totalling R7,719,000, over the period May 2009 to November 2011, into the HGA Trust Account, in respect of the purchase prices owing by them under their respective LRAs, and took (*de facto*) occupation of suites in the SLRH to which their respective LRAs pertained.

38. Each payment aforesaid constituted an *'entrustment'*, as contemplated in s 6(3)(a) of the HDSA, of the amount in question, by the purchaser concerned, to HGA *qua 'practitioner'* as contemplated in the HDSA; and each LRA stipulated a date by which a certificate as contemplated in s 6(1)(a) of the HDSA would be issued and furnished to the purchaser.

39. By letters dated 24 October 2014 from BBM to SLT, the executor of the estate of Mrs Parry-Davies cancelled her LRA, and each of Mrs Early, Mr Walter, Mrs Arndt, Dr Keet and Mr Grondel cancelled his / her LRA, *inter alia* on the ground of non-compliance by the developer with the provisions of s 6(1) of the HDSA.

40. The estate of the SLT was sequestrated provisionally on 17 February 2016 and finally on 9 March 2016.

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THE WCC LITIGATION

41. On 4 October 2017 actions were instituted in the WCC against HGA by Mrs Early, Mr Grondel and the executors / executrixes of the estates of Mrs Parry-Davies, Mr Walter, Mrs Arndt and Dr Keet respectively.

42. In each such case the plaintiff(s) claimed repayment from HGA with interest of the amount(s) paid into the trust account of HGA under the relevant LRA (which claims fall to be reduced as a result of the subsequent receipt of dividends on claims proved against the insolvent estate of the SLT).

43. In each case it was pleaded *inter alia* that to the knowledge of HGA the relevant payments mentioned in 37 above constituted payments contemplated in s 6(3)(a) of the HDSA and that no certificate as contemplated in s 6(1)(a) of the HDSA had ever been furnished to the purchaser or plaintiff(s) concerned.

44. In response, HGA pleaded that over the period June 2009 to November 2011 it effected payments from the HGA Trust Account, to or for the account of the SLT, of amounts equivalent to those mentioned in 37 above by way of release by it to or for the benefit of the SLT of the amounts mentioned in 37 above.

45. By way of justification for the making of such payments, HGA pleaded in each case that its role was to hold in trust the funds paid by the purchaser until such time as payment to the SLT had to be effected in terms of the relevant LRA and that it paid the funds *'held in trust on behalf of* [the purchaser]*'* to the SLT in accordance with the provisions of the LRA read with the HDSA.

46. In amplification of its contention that it paid the funds *'held in trust on behalf of* [the purchaser]*'* to the SLT in accordance with the provisions of the LRA read with the

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HDSA, HGA pleaded in each case that in it had, on behalf of, but without authority from, the purchaser concerned, requested of Dealtry Pickford, a trustee of the SLT, a certificate as contemplated in s 6(1)(a) of the HDSA, and had, in response to such request, been provided by email from him with such a certificate.

47. In further amplification of its contention that it paid the funds *'held in trust on behalf of* [the purchaser]*'* to the SLT in accordance with the provisions of the LRA read with the HDSA, HGA pleaded in each case that it relied on authorisation from the purchaser concerned to make the payment in question. Mr Grondel's authorisation was alleged to have been given orally, which he denied. The rest were alleged to have been given in writing, although in the case of Mr Walter the document in question related to only R178,000 of a total of R1,03 million paid by him into the HGA Trust Account.

48. On the question of the alleged s 6(1)(a) certificates mentioned in 46 above, the plaintiffs replicated that, apart from the fact of no such document had been received by any purchaser or plaintiff, the documents in question did not in any instance meet the requirements for a certificate as contemplated in s 6(1)(a) of the HDSA, and it was eventually conceded by HGA, on 21 November 2022, that they did not in fact do so.

49. As regards the alleged written authorisations mentioned in 47 above, the plaintiffs concerned replicated that in the event of it being held that HGA would otherwise have been legally justified thereby in paying away any funds of the purchaser concerned, which was denied (the HDSA serving a public purpose, with the consequence that purported authorisations to disregard it are legally invalid[6]), the purchasers concerned were not bound thereby inasmuch as they had not understood the import of the documents in question and HGA had taken no steps to ensure that they did.

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[6] Compare *ABSA Insurance Brokers (Pty) Ltd v Luttig & Another NNO* 1997 (4) SA 339 (SCA) 238F-241F

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50. On 22 September 2022, close on five years after institution of the actions, in second amendments to its pleas, HGA for the first time asserted that s 6(4) of the HDSA found no application in any of the cases, in that by virtue of the payments mentioned in 44 above there had since the time of such payments been no funds kept in its trust account as contemplated in the section, and in that the LRAs had all been cancelled by the time of the provisional sequestration of the estate of the SLT.

51. At the same time, HGA amended its pleas to allege for the first time that the funds paid by the purchasers into the HGA Trust Account had been held by it as agent of the SLT rather than on behalf the purchasers as it had until then pleaded it had held such funds.

52. That gave rise to formulation of the three questions aforesaid and to a request being directed to Le Grange J to order that they be determined separately in advance in terms of Rule 33(4), to which he acceded.

SUBMISSIONS ON THE FIRST SEPARATED QUESTION

53. What follows in this section corresponds *mutatis mutandis* with what was advanced to the SCA on the first separated question on behalf of the appeal respondents.

Attorneys' Trust Accounts

54. The nature of an attorney's trust account and the relationships between bank, attorney and the latter's client were summarised in *Fuhri v Geyser NO & Another*[7], as follows:

54.1. Trust creditors have no control over the trust account.

54.2. Ownership in the money in the trust account vests in the bank or other institution in which it has been deposited.

[7] 1979 (1) SA 747 (N) 749C-E

54.3. It is the attorney who is entitled to operate on the trust account and to make withdrawals from it.

54.4. The only right that trust creditors have is the right to payment by the attorney of whatever is due to them.

54.5. The right to payment arises from the relationship between the parties and has nothing to do with the way in which the attorney handles the money.

55. The above principles were approved on appeal by a full court in *Geyser NO v Fuhri*[8], and by this Court in *Wypkema v Lubbe*[9].

56. In *S v Gathercole*[10] it was emphasised that *confusio / commixtio* takes place with regard to monies deposited to the trust account of an attorney and that it is the duty of an attorney to maintain in his trust account monies equivalent to the relevant trust purposes.

Purposive Interpretation of the HDSA

57. The importance of interpreting statutes purposively was emphasised by this Court in *Cool Ideas 1186 CC v Hubbard & Another*[11].

58. According to *Silberberg and Schoeman's The Law of Property*[12], the HDSA was designed and introduced to provide protection for a particularly vulnerable group of investors in property, namely retired persons, its main object being to regulate the alienation of housing interests in schemes that qualify for protection under its provisions.

59. In *Eden Village (Meadowbrook) (Pty) Ltd v Edwards*[13], it was stated that the HDSA falls within the category of what might be termed *'social'* or *'consumer protection'*

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[8] 1980 (1) SA 598 (N) 600A & 602B
[9] 2007 (5) SA 138 (SCA) paras 4-7
[10] 1964 (1) SA 21 (AD) 25E
[11] 2014 (4) SA 474 (CC) paras 27-37
[12] Sixth Edition, pages 602-603 para 20.7.1
[13] 1995 (4) SA 31 (AD) 44A-B

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legislation. Its object is to protect elderly or retired persons investing their savings in a housing development scheme from possible exploitation by a developer.

60. In *Flower Foundation Pretoria Homes for the Aged NPC v Registrar of Deeds, Pretoria & Others*[14] the SCA endorsed the statement in Eden Village that the HDSA was intended to provide protection for retirees against possible exploitation by a developer and held that the text of the HDSA, in that instance s 4B, fell to be interpreted purposively.

61. I submit that, having regard to the purpose of the HDSA as set out above, the HDSA generally, and for current purposes in particular the prohibition in s 6(1), the exceptions in s 6(3) and the entitlement in s 6(4), falls to be interpreted purposively to advance and render effective protection for retirees against possible exploitation by developers.

Argument

62. The first separated question, namely whether s 6(4) of the HDSA can found an action for repayment of the proceeds of a s 6(3)(a) *'entrustment'* where the practitioner has purported to pay away such proceeds without the provisions of s 6(1) having been complied with, was expressed in general terms and fell to be so determined.

63. It was thus irrelevant that any LRA was cancelled prior to the sequestration of the estate of the SLT. It was also irrelevant whether any 'authorisation' was furnished to HGA by any purchaser to make any payment to or for the account of SLT from the proceeds of any 6(3)(a) *'entrustment'*.

[14] 2022 (6) SA 99 (SCA)

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64. Moreover, it being common cause that the payments to HGA constituted s 6(3)(a) *'entrustments'*, the first separated question fell to be answered purely as a matter of construction of the HDSA and not with reference to the provisions of any LRA.

65. The main thrust of the argument for HGA on the first separated question was that s 6(4) did not create a statutory *causa* upon which a purchaser could rely to claim from a practitioner an amount previously kept in trust but already paid out to the developer even if the payment out was unlawful.

66. That, according to the argument for HGA, was by reason of the language used in s 6(4) and because the purpose of s 6(4) was to exclude the proceeds of a s 6(3)(a) *'entrustment'* from the estate of an insolvent developer, the need for which fell away when the practitioner concerned had already paid the funds away for whatever reason.

67. It bears emphasis in the latter regard that the first separated question did not imply payment away by the practitioner concerned of the actual proceeds of the s 6(3)(a) *'entrustment'* in question. It implied only unlawful payments by the practitioner from his trust account of amounts equivalent to such proceeds purporting thereby to pay away such proceeds.

68. Whether any such payment in fact constitutes payment away by the practitioner of the actual proceeds in question, as contended by HGA, or merely the creation by the practitioner of a shortage in his trust account which he is obliged to make good, as contended by the appeal respondents and held by Le Grange J, was contested.

69. On behalf of the appeal respondents it was submitted, as I again submit, that s 6(4) provides a statutory remedy even where the practitioner concerned has meanwhile purported unlawfully to pay away the proceeds of the relevant *'entrustment'*.

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Cierenberg

70. I have referred above to the judgment in *Cierenberg* where the court was in no doubt that s 6(4) provided a statutory remedy in circumstances where retired persons had purchased housing interests in a housing development scheme under contracts and had *'entrusted'* their purchase prices to practitioners under s 6(3)(a) and the practitioners had made corresponding payments to the developer which was subsequently liquidated.

71. There does not appear to have been any suggestion by the senior counsel representing the practitioners in *Cierenberg* that s 6(4) did not provide a statutory remedy in view of the unlawful payments by them to the developer; nor does it appear to have been suggested in any other judgment or in any academic commentary that s 6(4) does not provide a statutory remedy in circumstances such as those that pertained in *Cierenberg*.

72. It also does not appear to have been suggested in any judgment or academic commentary that any of the similarly-worded provisions of s 26(4) of the ALA, s 5A(3) of the SBCA and s 7(4) of the PTSCA, on which s 6(4) is modelled, does not provide a statutory remedy where there has been an unlawful payment away or purported payment away of the proceeds of a corresponding '*entrustment*'.

73. An attempt was made in argument for HGA, and HGA may seek in answer hereto, to impugn the judgment in *Cierenberg* by contending that the practitioners there were regarded as stakeholders whereas on the authority of *Baker v Probert*[15] (*'Baker'*) they should have been regarded as agents for the developer in holding the proceeds of the relevant s 6(3)(a) *'entrustments'*.

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[15] 1985 (3) SA 429 (AD)

74. However, in *Cierenberg* the question of the capacity in which the practitioners held the proceeds of the relevant s 6(3)(a) *'entrustments'* arose because counsel for the purchasers sought to avoid a finding of prescription on the basis that the practitioners were stakeholders and that prescription therefore did not run against the purchasers until they had made demand for payment.

75. In that regard, it was held in *Cierenberg* that, even allowing the characterisation of the practitioners as stakeholders, prescription began to run against the purchasers from the time of the liquidation of the developer, as it was then that the cause of action of the purchasers under s 6(4) was complete.

76. The finding in *Cierenberg* on the merits of the claims of the purchasers was not premised on the practitioners being stakeholders as opposed to agents for the developer; and I submit that there is no reason to suppose that such finding would, or should, have been any different had the practitioners been characterised as agents for the developer.

Capacity in which proceeds of s 6(3)(a) *'entrustment'* held

77. As to the contention referred to in 73 above that a practitioner in receipt of a s 6(3)(a) *'entrustment'* should be regarded as agent for the developer in holding the proceeds thereof, I submit that this is not the case.

78. In the first instance, I submit that the position of a practitioner as recipient of a s 6(3)(a) *'entrustment'* indeed displays characteristics of and is akin to that of a stakeholder and that the judgment in *Baker*, in which the operative clause[16] was a far cry from the provisions of s 6(3)(a), is no bar to such characterisation.

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[16] At 437D-E

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79. However, if such a practitioner is not in effect a stakeholder, I submit that the proceeds of the s 6(3)(a) *'entrustment'* in question fall properly to be regarded as held by such practitioner as agent for the purchaser until the developer becomes legally entitled thereto, i.e. upon compliance with the provisions of s 6(1).

80. The wording of s 6(3)(a), I submit, points to an intention on the part of the legislature that when funds are *'entrusted'* by a purchaser to a practitioner thereunder they should be held by the practitioner in trust for the purchaser until the developer becomes legally entitled thereto, i.e. upon compliance with the provisions of s 6(1).

81. Had the intention of the legislature been for a practitioner to hold such funds as agent for the developer, it could easily have made that clear, by providing for *'payment'* (rather than *'entrustment'*) to the practitioner and for the practitioner to hold the proceeds *'as agent for'* (rather than *'for the benefit of'*) the developer pending compliance by the developer with the provisions of s 6(1).

82. That funds *'entrusted'* by a purchaser to a practitioner under s 6(3)(a) fall properly to be regarded as held as agent for the purchaser is far more consonant with the clear purpose of the HDSA as a whole and s 6 in particular, namely the protection of retired persons from exploitation by a developer.

83. It is entirely consonant with such purpose, I submit, for the intention of the legislature in enacting s 6 to have been to ensure that a developer obtains no interest in or title to the proceeds of a s 6(3)(a) *'entrustment'* save for the right to require payment thereof to him upon compliance by him with the provisions of s 6(1).

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84. The reference in s 6(3)(a) to funds to which it relates being kept *'for the benefit of the developer'* means no more, I submit, than that in the normal course of events they must be released to the developer when the requirements of s 6(1) have been fulfilled.

85. Thus *Van Rensburg & Treisman: The Practitioner's Guide to the Alienation of Land Act*[17] state, regarding the similarly-worded s 26(3)(a) of the ALA;

> *'It is specifically provided that the practitioner or estate agent is to keep the money in the trust account for the benefit of the alienator. This means that, in the normal course of events the practitioner or estate agent must pay the money out to the alienator when the conditions laid down in section 26(1) have been fulfilled.'* [emphasis supplied].

86. *In casu*, the fact that the funds in question were to be kept by HGA *'for the benefit of* [the SLT]*'* did not mean that HGA held the funds in question as agent for the SLT. The *'entrustments'* to HGA were by the purchasers; and the *'benefit'* of the SLT as developer was simply the right to require release to it of the funds in question upon compliance by it with the provisions of s 6(1).

87. I have already mentioned that until the most recent amendments thereof in September 2022, the pleas by HGA in the actions in the WCC referred to funds paid into the HGA Trust Account as being held in trust by HGA for the purchaser concerned.

88. Moreover, it was apparent from an email exchange between HGA and Mr Grondel incorporating a draft *'Authority to Invest'* forwarded by HGA to Mr Grondel for signature and return by him authorising HGA to invest *'on my behalf'* monies paid by him into the HGA Trust Account under his LRA, that HGA saw itself as agent for Mr Grondel in holding the amounts in question.

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[17] *Second Edition, page 89 para 2 2 3 (a)(ii)*

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89. It is reasonable to assume that similar authorities to invest would have been obtained from other purchasers and that interest-bearing bank accounts in terms of s 78(2A) of the Attorneys Act 53 of 1979 ('the Attorneys Act') opened pursuant thereto would have reflected the monies as held in trust for the purchasers.

Purpose of s 6(4)

90. As to the purpose of s 6(4), I submit that it is not to exclude the proceeds of a s 6(3)(a) *'entrustment'* from the estate of a developer who becomes an insolvent without having complied with the provisions of s 6(1).

91. Had that been the purpose of s 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 his insolvency[18].

92. The true purpose of s 6(4), I submit, is to provide for immediate and unconditional reimbursement to a purchaser of the proceeds of a s 6(3)(a) *'entrustment'* or payment to a purchaser under a s 6(3)(b) guarantee in the event of the *'developer'* becoming an insolvent without having complied with the requirements of s 6(1).

93. That this, rather than exclusion from the estate of an insolvent developer of the proceeds of a s 6(3)(a) *'entrustment'*, is the true purpose of s 6(4), finds support, I submit, in the fact that s 6(4) applies equally as regards payment under an institutional guarantee under s 6(3)(b).

94. Had the purpose of s 6(4) been to exclude the proceeds of a s 6(3)(a) *'entrustment'* from the estate of a developer upon insolvency, there would have been no need at all to provide

[18] In s 88 of the Legal Practice Act 28 of 2014 and previously s 79 of the Attorneys Act.

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therein for an amount which is the subject of a s 6(3)(b) guarantee to become immediately repayable by the guarantor concerned upon insolvency of the developer.

95. A s 6(3)(b) guarantee is issued in respect of an amount paid directly by the purchaser to the developer. There can thus be no question of excluding that amount from the estate of the developer. And the guarantee is a self-standing obligation of the guarantor, payment under which does not serve to exclude anything from the estate of the developer.

96. Treating the purpose of s 6(4) as being exclusion of the proceeds of a s 6(3)(a) *'entrustment'* from the estate of an insolvent attributes to the legislature the intention to unnecessarily create a problem by providing for such proceeds to be held by a practitioner as agent for the developer and to do so inferentially rather than explicitly.

97. It attributes to the legislature the further intention then to solve the problem it has unnecessarily created, by providing for exclusion of the funds in question from the estate of the developer, not by simply saying so, but by entitling a purchaser to immediate repayment thereof (and providing gratuitously for a purchaser in receipt of a s 6(3)(b) guarantee to immediate payment thereunder).

98. I submit that the attribution to the legislature of such intentions is artificial and unwarranted and leads to insensible results that detract from the very purpose of the HDSA, namely protection of purchasers from exploitation by a developer.

99. In any event, I submit that the supposed need to exclude the proceeds of a s 6(3)(a) *'entrustment'* from the assets of an insolvent developer is misconceived.

100. The only circumstance in which a developer would ever be entitled to release of such proceeds to him would be upon compliance by him with the provisions of s 6(1); and I

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submit that the insolvency trustee or liquidator of an insolvent developer is in no better position and is not entitled to untrammelled release to him of such proceeds.

Wording of s 6(4)

101. As to the wording of s 6(4), the argument for HGA was in effect that the word *'kept'* therein means *'still being kept'*, so that s 6(4) has no application where the practitioner has paid the developer amounts from his trust account purporting thereby to have paid away the proceeds of a s 6(3)(a) *'entrustment'*.

102. However, allowing for the sake of argument that purported unlawful payment away by a practitioner of the proceeds of a s 6(3)(a) *'entrustment'* in fact constitutes payment away by him of such proceeds rather than mere creation by him of a shortage in his trust account, I submit that there is no warrant for such a narrow interpretation of s 6(4).

103. Indeed, I submit that such interpretation runs counter to the very purpose of the legislature in promulgating the HDSA and s 6 thereof in particular, namely the protection of retired persons from exploitation by a developer.

104. The word *'kept'* can refer to past or present[19]. In each instance here in question, the amount in question was deposited into the HGA Trust Account. And in each instance here in question, an equivalent amount should at all relevant times have remained available in the HGA Trust Account.

105. I submit that the reference in s 6(4) to *'any amount kept in the trust account in terms of paragraph (a) of subsection (3)'* is really just a reference to any amount referred to in s 6(3)(a), namely any amount which a purchaser by virtue of a contract has *'entrusted'* to

[19] The New Shorter Oxford English Dictionary

a practitioner in his capacity as such to be kept in the trust account of the practitioner until the provisions of s 6(1) have been complied with.

106. That this is the natural reading of s 6(4) finds support in what *Van Rensburg & Treisman: The Practitioner's Guide to the Alienation of Land Act*[20] state, regarding the similarly-worded s 26(4) of the ALA:

> *'Section 26(4) provides that if, in a case where the alienee has paid money into the trust account in terms of section 26(3)(a) or has been furnished with a guarantee in terms of section 26(3)(b), the alienator should become insolvent before the erf or unit has become registrable or the relevant contract has been recorded, any amount*
>
> - *paid into the trust account* [emphasis supplied]*; or*
> - *the repayment of which was guaranteed;*
>
> *shall immediately become payable to the alienee concerned by the practitioner, estate agent, banking institution, building society or insurer concerned.'*

107. The reference in s 6(4) to *'any amount kept in the trust account in terms of paragraph (a) of subsection (3)'* could not, I submit, sensibly have been intended by the legislature as a reference simply to any balance of such amount as might remain after deduction therefrom of any amount the practitioner may unlawfully have paid from his trust account by way of purported disposal thereof.

108. It could never have been the intention of the legislature, I submit, to exempt from the provisions of s 6(4) a practitioner who had violated a s 6(3)(a) *'entrustment'*. Thus, for the purposes of s 6(4), funds *'kept'* in a trust account must be understood as covering funds paid into the trust account against which no payment away should have been made.

109. Were it otherwise, a practitioner could at any time defeat the protection afforded by s 6(4) by simply removing equivalent funds from his trust account for any purpose, even

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[20] *Second Edition, page 90 para 2 2 4 (a)(ii)*

by way of misappropriation, and purporting thereby to have disposed of, and to be no longer *'keeping'* in his trust account, the funds *'entrusted'* to him under s 6(3)(a).

110. S 6(4) applies, I submit, to the full proceeds of a s 6(3)(a) *'entrustment'* to a practitioner, whether or not the practitioner has meanwhile purported to pay it or part thereof away or for any other reason has purported to remove it or part thereof from his trust account.

111. The reference in s 6(4) to *'an amount kept in a trust account in terms of paragraph (a) of subsection (3)'* is, I submit, a reference to the full peoceeds of the s 6(3)(a) *'entrustment'*, not merely any remnant thereof after purported irregular payment away or even misappropriation of any part thereof by the practitioner.

Effect of unlawful payments away

112. I submit, however, that if a practitioner makes a payment from his trust account purporting thereby to pay away unlawfully the proceeds of a s 6(3)(a) *'entrustment'*, it is in any event not those particular funds that are in fact paid away.

113. What is paid away is simply a portion of the general pool of money in the trust account of the practitioner; and the practitioner does not thereby cease to *'keep'* the proceeds of the *'entrustment'* in his trust account as contemplated in s 6(4).

114. The proceeds of a deposit into the trust account of an attorney do not, I submit, exist as a discreet fund capable of being regarded as retained or disposed of by the attorney according to the intention of the attorney.

115. When someone makes a deposit into the trust account of an attorney *commixtio* occurs of the proceeds thereof with funds already in the trust account. The money in the trust

account belongs to the relevant bank, with the attorney having the right of control over the account and the disposition of the funds therein.

116. An attorney is at all times required to retain sufficient in his trust account to meet the claims of all his trust creditors; and a trust creditor becomes and remains such irrespective of whether the attorney has made a payment from his trust account purporting thereby to pay away unlawfully the funds of that trust creditor.

117. In the case where the attorney has made a payment from his trust account purporting thereby to pay away unlawfully the funds of that trust creditor, the attorney has not paid away funds of the trust creditor in question – he has simply created an overall shortage in his trust account which he is obliged to make good.

Trust creditor in respect of s 6(3)(a) entrustment

118. I have already submitted that a practitioner holds the proceeds of a s 6(3)(a) *'entrustment'*, if not effectively as stakeholder, then as agent for the purchaser, pending compliance by the developer with the provisions of s 6(1).

119. If a practitioner holds the proceeds of a s 6(3)(a) *'entrustment'* from a purchaser as agent for the purchaser pending compliance by the developer with the provisions of s 6(1), the purchaser is throughout the trust creditor of the practitioner in respect of such proceeds.

120. And if a practitioner holds the proceeds of a s 6(3)(a) *'entrustment'* as stakeholder, the purchaser becomes the trust creditor in respect of the proceeds thereof upon the developer becoming an insolvent without complying with the provisions of s 6(1).

121. However, even if the developer were to be regarded initially as the trust creditor in respect of the proceeds of a s 6(3)(a) *'entrustment'*, I submit that upon the developer becoming

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an insolvent prior to complying with the provisions of s 6(1), the purchaser concerned replaces the developer as the trust creditor in respect of such proceeds.

122. In *Baker* a purchaser of shares in a share block company paid the purchase price to an estate agent to be held in trust by the estate agent for payment to the seller on the effective date provided the seller had delivered to the estate agent the share certificates in respect of the shares together with a duly completed share transfer form. The estate agent became an insolvent and the purchaser sued the seller for reimbursement of the purchase price.

123. It was held that on a proper construction of the contract in question, payment by the purchaser to the estate agent constituted payment to the seller, and that the purchaser was entitled to reimbursement from the seller, which had failed to deliver the share certificates in respect of the shares together with a duly completed share transfer form.

124. In the course of his judgment, Botha JA said the following[21]:

> *It is true, of course, that if (as happened in this case) the contract were cancelled because of the* [seller's] *breach, the* [seller] *would cease to be a creditor vis-a-vis both* [the purchaser] *and* [the estate agent] *and the* [purchaser] *would possibly become a creditor against* [the estate agent] *for repayment to her of the purchase price ....'* [emphases supplied].

125. If in such a case the seller ceases to be a trust creditor of the estate agent, someone else would obviously have to take the place of the seller as such, and the reference to it *'possibly'* being the purchaser who did so presumably had regard to the possibility of transmission of the claim from the purchaser to someone else.

126. I submit that by the same token, upon a developer becoming an insolvent without complying with the provisions of s 6(1), the purchaser concerned replaces the developer as the trust creditor in respect of the proceeds of a s 6(3)(a) *'entrustment'* by him.

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[21] At 441H-I

Conclusion

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127. For these reasons, which were advanced to the SCA, I submit that the first separated question fell properly to be answered in favour of the appeal respondents, as Le Grange J had done, and that the appeal by HGA to the SCA against the finding of Le Grange J in that regard should have failed.

CRITIQUE OF THE SCA JUDGMENT

128. The SCA judgment holds in paragraph [27] that the repayment provision in s 6(4) protects a purchaser from having to compete in a *concursus creditorum* and is triggered by a developer's insolvency where proceeds of a s 6(3)(a) *'entrustment'* are *'kept ... in the trust account of the practitioner'*.

129. The SCA judgment holds further in paragraph [29] that s 6(4) is not an open-ended statutory foundation for claims of repayment to purchasers of money entrusted to practitioners under the HDSA but is confined to instances where the developer becomes insolvent while monies are held by the practitioner for the developer's benefit,

130. The SCA judgment holds further in paragraph [30] that because s 6(3)(a) relates to funds entrusted to a practitioner *'to be kept for the benefit of the developer'* it is the developer rather than the purchaser who is the practitioner's trust creditor under s 6(3) and s 6(4),

131. The SCA judgment holds further in paragraph [30] that ordinarily on sequestration of the estate of the developer the proceeds of a s 6(3)(a) *'entrustment'* would become part of the developer's insolvent estate, otherwise it would have been unnecessary to protect purchasers from a *concursus creditorum* as provided in s 6(4).

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132. That, as I see it, is the sum total of the findings and reasoning of the SCA judgment for its decision to uphold the appeal by HGA to it on the first separated question and to answer that question in favour of HGA rather than the plaintiffs as Le Grange J did.

133. Those findings and reasoning assume, without motivation, that where s 6(3)(a) refers to the proceeds of an *'entrustment'* thereunder being *'for the benefit of the developer'* the *'benefit'* in question is that of immediate title to such proceeds so that the practitioner holds such proceeds as agent for the developer.

134. Those findings and reasoning also assume, again without motivation, that absent s 6(4) the insolvency trustee or liquidator of a developer who has become an insolvent without complying with the provisions of s 6(1) is entitled to untrammelled release of the proceeds of s s 6(3)(a) *'entrustment'*, leaving the purchaser to compete in the *concursus creditorum* as a concurrent creditor.

135. Those findings and reasoning also assume, again without motivation, that a purported unlawful payment away by a practitioner of the proceeds of s 6(3)(a) *'entrustment'* constitutes payment away of those actual proceeds so that those actual proceeds are no longer kept in the trust account of the practitioner.

136. The assumptions referred to in the preceding three paragraphs underpin the decision by the SCA to uphold the appeal by HGA to it on the first separated question on the basis that s 6(4) finds no application where a practitioner has purported to have already paid away the proceeds of a s 6(3)(a) *'entrustment'*.

137. The findings of the SCA on the first separated question are reached without any engagement with the contentions advanced to the SCA on behalf of the appeal respondents, as set out in the previous section of this affidavit, *inter alia* the following:

137.1. The prohibition in s 6(1), the exceptions in s 6(3) and the entitlement in s 6(4), fall to be interpreted purposively to advance and render effective protection for retirees against possible exploitation by developers.

137.2. Proceeds of a s 6(3)(a) *'entrustment'* are held by a practitioner as agent for the purchaser, not the developer, pending compliance by the developer with the provisions of s 6(1)(a).

137.3. It is the purchaser, not the developer, who is the trust creditor of the practitioner in respect of proceeds of a s 6(3)(a) *'entrustment'* pending compliance by the developer with the provisions of s 6(1)(a).

137.4. Alternatively, the purchaser becomes s the trust creditor of the practitioner in respect of the proceeds of a s 6(3)(a) *'entrustment'* upon the developer becoming an insolvent without complying with the provisions of s 6(1).

137.5. The reference in s 6(3)(a) to funds to which it relates being kept *'for the benefit of the developer'* means only that in the normal course of events they must be released to the developer when the requirements of s 6(1) have been fulfilled.

137.6. Proceeds of a s 6(3)(a) *'entrustment'* would not fall into the estate of a developer who becomes an insolvent absent compliance by the developer with the provisions of s 6(1)

137.7. The purpose of s 6(4) is not to exclude the proceeds of a s 6(3)(a) *'entrustment'* from the estate of a developer who becomes an insolvent, the supposed need for which is misconceived.

137.8. The purpose of s 6(4) is to provide for immediate and unconditional reimbursement to a purchaser of the proceeds of a s 6(3)(a) *'entrustment'* or

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payment to a purchaser under a s 6(3)(b) guarantee if the *'developer'* becomes an insolvent without having complied with the requirements of s 6(1).

137.9. Purported unlawful payment away by a practitioner of proceeds of s 6(3)(a) *'entrustment'* does not constitute payment away of those actual proceeds but merely the creation of a general shortage in the trust account of the practitioner.

137.10. The reference in s 6(4) to *'any amount kept in the trust account in terms of paragraph (a) of subsection (3)'* is a reference to the full amount of a s 6(3)(a) *'entrustment'* not just any remnant thereof.

137.11. S 6(4) applies to the full proceeds of a s 6(3)(a) *'entrustment'*, whether or not the practitioner has meanwhile purported to pay it or part of it away or for any other reason has purported to remove it or part of it from his trust account.

138. I submit that the contentions and the reasons therefor advanced to the SCA on behalf of the appeal respondents, as set out in the previous section of this affidavit, were cogent and should have led to failure of the appeal by HGA on the first separated question.

139. It has never been, and is not, suggested that s 6(4) is an open-ended statutory foundation for claims of repayment to purchasers of money *'entrusted'* to practitioners.

140. What has been, and is, submitted, is that s 6(4) provides a statutory foundation for a claim by a purchaser against a practitioner for repayment of a s 6(3)(a) *'entrustment'* by the purchaser to the practitioner upon the developer becoming an insolvent without complying with the provisions of s 6(1).

141. I draw attention to the fact that s 4A of the HDSA confers upon the holder of a *'right of occupation'* the rights of a lessee under a lease contemplated in s 1(2) of the Formalities in respect of Leases of Land Act 18 of 1969 registered against the title deed of the land

and ranking in priority over any other right, whether registered or endorsed against the title deed or not and irrespective of when so registered or endorsed.

142. The intention of the legislature, I submit, is obviously to protect vulnerable elderly purchasers by ensuring that they have unassailable rights of occupation once a housing development scheme has reached a stage of completion to permit of beneficial enjoyment of their housing interests and that in the interim they have cast-iron assurances of return of purchase prices they may have disbursed if the developer meanwhile becomes an insolvent without that stage of completion having been reached.

143. It would run quite counter to that intention, I submit, for a practitioner faced with a claim under s 6(4) to be able to avoid liability thereunder by asserting that he has (wrongfully) disbursed or removed the amount in question from his trust account.

144. Notably, the SCA does not suggest what remedy a purchaser actually has in the circumstances postulated in the first separated question.

145. I submit that it could never have been the intention of the legislature to leave the vulnerable elderly purchasers it sought to protect casting about, upon insolvency of a developer who has not complied with the provisions of s 6(1), for a cause of action other than under s 6(4) against a practitioner who has violated a s 6(3)(a) *'entrustment'*.

REQUIREMENTS FOR LEAVE TO APPEAL TO THIS COURT

S 167(3)(b)(i) of the Constitution

146. S 167(3)(b)(i) of the Constitution invests this Court with jurisdiction to decide constitutional matters.

147. I submit, for the reason mentioned in 17 to 21 above, that the proposed appeal by the

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applicants engages the jurisdiction of this Court under s 167(3)(b)(i) of the Constitution.

148. The HDSA must be interpreted to promote the '*spirit, purport and objects of the Bill of Rights*' (s 39(2) of the Constitution). In this instance, the SCA's interpretation makes a vulnerable class of people – retired persons – even more vulnerable. It increases the risk they will lose access to suitable housing and healthcare. It passes a risk that should be borne by the developer to the very people the HDSA is meant to protect.

149. The applicants' interpretation, by contrast, provides better protection for vulnerable, retired persons, and promotes the fulfilment of the rights at stake. It does so by fully protecting their '*entrustments*' up until compliance with the provisions of s 6(1). That reduces the risk that they will lose their savings and access to housing and healthcare.

150. Which interpretation is preferable is a *'constitutional matter'* within this Court's jurisdiction.

151. I submit further, for the reasons mentioned in 175 to 177 below, that the constitutional matter is one that in the interests of justice ought to be considered by this Court.

S 167(3)(b)(ii) of the Constitution

152. S 167(3)(b)(ii) of the Constitution provides that this Court may decide any matter if this Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the Court.

153. I respectfully submit that this Court's jurisdiction is engaged on the basis envisaged in section 167(3)(b)(ii) of the Constitution, i.e. that the appeal raises an arguable point of law of general public importance which ought to be considered by this Court.

154. The requirements for leave to appeal under the Court's expanded jurisdiction were

considered by this Court in *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd*[22]. I refer to paragraphs [16] to [30] thereof, where the various requirements are discussed.

155. In the tax context, these aspects were also considered in *Big G Restaurants (Pty) Ltd v Commissioner for the South African Revenue Service*[23]and *Clicks Retailers (Pty) Ltd v Commissioner for South African Revenue Service*[24].

Arguable Point of Law

156. The judgement of the SCA on the first separated question clearly turns on a point of law.

157. The point of law that warrants an appeal in this matter is whether s 6(4) of the HDSA provides a statutory remedy for a purchaser in the circumstances postulated in the first separated question.

158. Ancillary thereto is the question whether the purchaser or the developer is the trust creditor of the attorney or estate agent in respect of an *'entrustment'* under s 6(3)(a) of the HDSA or, by implication, under s 26(3)(a) of the ALA, s 5A(2)(a) of the SBCA or s 7(3)(a) of the PTSCA.

159. As set out in *Big G*[25] and *Clicks*,[26] a question relating to the interpretation of a statute is quintessentially a question of law.

160. The fact that Le Grange J and before him the court in *Cierenberg*, on the one hand and the SCA on the other reached opposing conclusions thereon means, I submit, that the point of law is plainly arguable.

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[22] 2015 (3) SA 479 (CC)
[23] 2020 (6) SA 1 (CC)
[24] 2021 (4) SA 390 (CC)
[25] Paragraph [11].
[26] Paragraph [24].

161. I submit further that in any event the point of law is arguable for the reasons set out above as to why the appeal by HGA to the SCA on the first separated question should have failed, which reasons I submit are cogent.

General Public Importance

162. The point of law in question is, I submit, of significant public importance.

163. In his judgment granting HGA leave to appeal to the SCA, Le Grange J said that he considered there to be need for a definitive decision on the point.

164. A reason advanced on behalf of HGA in its application to Le Grange J for leave to appeal to the SCA as to why it should be granted such leave was that the issues raised by its proposed appeal were of general public importance as the HDSA applied to many housing developments for retirees.

165. As previously mentioned, the SCA judgment on s 6 of the HDSA also applies equally to the similarly-worded provisions of s 26 of the ALA, s 5A of the SBCA and s 7 of the PTSCA on which s 6(4) is modelled.

166. The judgment thus also affects *'entrustment's'* not only under s 6(3)(a) of the HDSA but also under s 26(3)(a) of the ALA, s 5A(2)(a) of the SBCA and s 7(3)(a) of the PTSCA, of which there must at any time be a considerable number country-wide.

167. An indication of the public importance of the point is that the SCA judgment has already evoked public comment.

168. On 19 September 2024, less than a week after the handing down of the judgment, an article appeared on the Moneyweb website titled *'Retirement housing: SCA ruling casts doubt on protection of life right buyers'*.

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169. And an article on the website of attorneys Nic Barnard titled: *'SCA Ruling Raises Concern for Life Right Buyers in Retirement Housing'* begins: *'In a significant recent judgment, the Supreme Court of Appeal (SCA) has cast doubt on the protections afforded to individuals who purchase life rights in retirement developments.'*

170. Copies of those articles are attached marked **'FA6'** and **'FA7'** respectively.

171. As previously mentioned, the point is of importance not only to purchasers but also to developers and to practitioners and estate agents to whom *'entrustments'* may be made under s 6(3)(a) of the HDSA, s 26(3)(a) of the ALA, s 5A(2)(a) of the SBCA and s 7(3)(a) of the PTSCA.

172. As far as developers are concerned, the fact that a developer is able to point to concluded contracts pursuant to which *'entrustments'* have been made under made under s 6(3)(a) of the HDSA, s 26(3)(a) of the ALA, s 5A(2)(a) of the SBCA or s 7(3)(a) of the PTSCA could facilitate the raising of finance for the relevant development.

173. If the effect of the SCA judgment is to inhibit purchasers from providing such *'entrustments'*, as I submit it may do, that may in turn inhibit the ability of developers to raise finance for developments on the basis of the existence of concluded contracts under which such *'entrustments'* have been made.

174. Developers could try to arrange instead for the issue of guarantees under s 6(3)(b) of the HDSA and the corresponding sections of the ALA, the SBCA and the PTSCA in order to access purchase prices, but that could be costly and may well involve providing security for the guarantees, which could be impractical.

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Interests of Justice

175. Given the wide range of interests affected by the SCA judgment, its material significance for purchasers, developers, practitioners and estate agents and the absence of prior authority other than judgments diametrically opposed to that of the SCA, I respectfully submit that it would be in the interests of justice for this Court to assume jurisdiction.

176. Moreover, the issue is one that primarily affects vulnerable, retired persons. As I have explained, the effect of the SCA's judgment is to make them *more* vulnerable to losing a substantial portion of their savings, diminishing their ability to access not only suitable housing, but also healthcare. The applicants' interpretation, by contrast, would decrease their risk and promote the enjoyment of their constitutional rights.

177. With regard to the prospects of success, which I understand to be a factor in the '*interests of justice*' enquiry, I have explained the applicants' arguments above. Those arguments prevailed before Le Grange J and I submit that they have a more than reasonable prospect of success on appeal to this Court.

CONCLUSION

178. In the premises, I respectfully submit that the applicants have made out a proper case to satisfy the requirements the grant leave to appeal on the basis that:

178.1. The matter engages the jurisdiction of the Court; and

178.2. All the requirements for granting leave have been satisfied.

179. I accordingly respectfully request the Court to grant an order as sought in the accompanying notice of application.

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BERNHARD KURZ

I hereby certify that the deponent acknowledged to me that he knows and understands the content of this affidavit, which affidavit was signed and attested before me at Cape Town on this the 30 day of OCTOBER 2024 in accordance with Regulation R1258 dated 21st July 1972, as amended by Regulations R1648 dated 19 August 1977 and R1428 dated 11 July 1980.

COMMISSIONER OF OATHS

LAUREN HELENE MULLER
Commissioner of Oaths
Practising Attorney & Conveyancer R.S.A
3rd Floor, 42 Keerom Street
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45 'FA 1'

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No:602/2023

In the matter between:

HEROLD GIE & BROADHEAD INC	**APPELLANT**
and	
RICHARD TIMOTHY HARRIS N O	**FIRST RESPONDENT**
PHYLLIS MARY EARLY	**SECOND RESPONDENT**
OSCAR WALTER & ALAN LEAONARD	**THIRD RESPONDENT**
HARVIE BROADHURST N O	**FOURTH RESPONDENT**
ANNELISIE JANSEN VAN RENSBURG-HATTINGH N O	**FIFTH RESPONDENT**
MICHELE ANN WALLIS N O	**SIXTH RESPONDENT**
SANTAM LIMITED	**THIRD PARTY**

Neutral citation:	*Herold Gie & Broadhead Inc v Harris N O and Others* (602/2023) [2024] ZASCA 125 (13 September 2024)
Coram:	DAMBUZA, NICHOLLS and MABINDLA-BOQWANA JJA, and TOLMAY and MBHELE AJJA
Heard:	13 May 2024
Delivered:	13 September 2024

Summary: Statutory interpretation – s 6(4) of the Housing Development Schemes for Retired Persons Act 65 of 1988 (HDSA) does not provide basis for a claim by a purchaser of a housing interest in a development scheme, to claim refund of purchase price entrusted to a legal practitioner under s 6(3)*(a)* of the HDSA, where the practitioner has disbursed the entrusted amount to the developer of the scheme, prior to the developer's insolvency.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town: (Le Grange ADJP, sitting as a court of first instance):

1 The appeal is upheld with costs.

2 Save for the decision on the second question, the order of the high court is set aside and replaced with the following:

'2.1 The first question is decided in favour of the defendant.

2.2 The third question is referred back to the high court for determination.

2.3 The costs stand over for determination together with the remaining issues.'

3 The case is referred back to the high court for determination of the remaining issues.

JUDGMENT

Dambuza JA (Nicholls and Mabindla-Boqwana JJA and Tolmay and Mbhele AJJA concurring)

Introduction

[1] This appeal is against a judgment of the Western Cape Division of the High Court, Cape Town (the high court), given in six consolidated actions. Each action relates to cancellation of a life rights agreement concluded by each of the respondents as purchasers, with the St Leger Trust No IT 953/2008 (the developer or the trust)[1], as the developer and seller of the life rights. The main issue is whether on insolvency of the developer, the purchasers had a claim in terms of s 6(4) of the Housing Development Schemes for Retired Persons Act 65 of 1988

[1] also described in the agreement as the 'grantor' or 'nominee'.

(the HDSA), for repayment of the purchase price by the appellant, Herold Gie and Broadhead Incorporated (HGB). This, in circumstances where HGB, into whose trust account the purchase price for the life rights was paid, had disbursed the purchase price to the trust before it became insolvent. The high court determined this issue in favour of the purchasers. It found that the purchasers had a valid claim in terms of s 6(4) of the HDSA for refund of the purchase price by HGB, and that the assertions made in their summons supported such a claim. HGB appeals against the high court judgment with the leave of that court.

The background

[2] Each of the six purchasers bought a 'life right' or a 'housing interest' in respect of a specific suite in the St Leger Retirement Hotel located in Muizenberg, Cape Town.[2] Some of the life rights included garages. All the purchasers were retired persons as contemplated in the HDSA.[3] Save for the different purchase prices paid by the purchasers, and the sizes of the properties to which each life right related, the facts pertaining to the conclusion and cancellation of the life rights agreements are similar.

[3] The developer established the retirement hotel as a 'development scheme' as envisaged in s 1 of the HDSA. Under that section, read with s 1 of the Sectional Titles Act 95 of 1986 (Sectional Titles Act), a 'development scheme':

'means a scheme in terms of which a building or buildings situated or to be erected on land within the area of jurisdiction of a local authority is or are, for the purposes of selling, letting or otherwise dealing therewith, to be divided into two or more sections, or as contemplated in the proviso to section 2 (a) [of the Sectional Titles Act]'.

[2] In the life rights agreements a life right is defined as: 'the housing interest as defined in the Act [the HDSA], and in this agreement is the right of the occupant and occupant's spouse where applicable, to occupy the Suite and use the Garage, mentioned in the Covering Schedule, for the remainder of the life of the occupant, and subject to the provisions of Section 7 of the Act, for the life of the Occupant's Spouse and in any event subject to the terms and conditions of this agreement.'

[3] In s 1 of the HDSA a retired person is a person who is 50 years of age or older.

[4] In addition to payment of the purchase price, the purchasers had to pay to the developer a specified monthly service fee or levy.[4] The levy was payable until termination of the life right. On termination of the agreement a portion of the purchase price would be repaid by the developer to the purchaser, or to the purchaser's estate, subject to certain conditions.[5] Clause 16.4 of the agreement specified the formula for computation of the amount of the purchase price refundable to each purchaser or the executor of their estate, on termination of the agreement. The purchasers would also be entitled to 50% of the interest earned on the re-sale of their life rights.

[5] On payment of the purchase price the purchasers took occupation of their units during the period June 2009 to November 2011. During June and July 2009, the purchasers authorised HGB, in writing, to pay to the developer all the moneys that had been entrusted to it as the purchase price in respect of the life rights. HGB released the funds to the developer accordingly.

[6] In a letter dated 24 October 2014, the purchasers cancelled their life rights agreements and each demanded a refund of their purchase price. They alleged that they had not been furnished with the certificates of compliance contemplated under s 6(1)*(a)* of the HDSA[6] and s 14(1)*(a)* of the National Building Regulations

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[4] Clause 7.1 of the Life Right Agreement.

[5] Clauses 15.1 and 15.2. P27 In terms of Clause 15.2 the first condition for repayment was the return of the Certificate of Life Rights to the trust or an affidavit furnished by the purchaser or the executor of purchaser's estate stating that: *(a)* the deponent is the legal holder of the Certificate of Life Rights, *(b)* the certificate got lost or destroyed, and that *(c)* despite a diligent search for the certificate, it had not been found.
The second condition was vacation of the suite by the occupant and by his/her spouse where applicable. The third was that (to the satisfaction of the trust) the suite had been reinstated to the same condition it was in when the occupant (and spouse) took occupation. The last condition was resale of the suite and the purchase price and all amounts payable prior to occupation of the suite by the new purchase had been paid to and received by the trust.

[6] Section 6(1)(*a*) of the HDSA provides that:
(1) Subject to subsection (3) and notwithstanding any other law, no developer may by virtue of a contract receive any consideration or any part thereof, unless—
(*a*) an architect or a quantity surveyor has issued a certificate that the housing development scheme concerned has been erected substantially in accordance with any applicable officially approved building plans and town planning scheme and applicable local authority by-laws, and is sufficiently completed for the purposes of utilization of the housing interest concerned;

Standards Act 103 of 1977 (the NRBA)[7]. They alleged that the developer failed to inform them, prior to the conclusion of the agreement, that use and occupation of the retirement hotel, as contemplated in the agreement, would not be 'legally possible', despite being aware that the required certificates could not be issued.

[7] On 17 February 2016, the developer was placed under provisional sequestration, and an order of final sequestration was granted on 9 March 2016.[8] The purchasers duly lodged their claims for refund of the purchase price with the trustees of the insolvent developer's estate. They received concurrent dividends.[9] In October 2017, they instituted action proceedings against HGB, claiming a refund of the purchase prices which had been paid into HGB's trust account.

Proceedings in the high court

[8] The purchasers' claims for reimbursement of the purchase prices was founded on the provisions of s 6(4) of the HDSA. This section entitles a purchaser in a scheme developed in terms of the same Act, to a refund of the purchase price held in a legal practitioner's trust account, where the developer of the scheme becomes insolvent.

[9] In addition to pleading that when the developer became insolvent it had not met its obligation to furnish them with the s 6(1)*(a)* certificates, the purchasers

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[7] This section provides that:
(1) A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building—
(a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7, and if certificates issued in terms of the provisions of subsection (2) and, where applicable, subsection (2A), in respect of such building have been submitted to it.

[8] The high court stated that the trust was provisionally sequestrated on 17 February 2016. However, it was not in dispute that the application for sequestration was filed in court on 10 December 2015.

[9] Mrs Parry-Davies whose estate is represented by the first respondent, her executor, received R988 836.15. The second respondent, Mrs Phyllis Early received R R433 384.61, the third respondent, Mr Oscar Walter and Alan Leonard Harvey Boadhurst NO – R390 495.60, the fourth respondent Mr Jansen van Rensburg-Hatting – R278 756 50, Mr Clifford Keet (now represented by the fourth respondent, Ms Michelle Ann Wallis NNO, and the sixth respondent, Mr Edgar Grondel received R397 036.07.

also pleaded that they cancelled their life rights agreements as communicated in the letter dated 24 October 2014 from their attorneys, Biccari Bollo Mariano Incorporated. In their replication the purchasers contended that they were not 'bound' by the written authority to release the funds which each of them had signed. They maintained that HGB was not entitled to rely on the authorisations.

[10] HGB filed a special plea asserting that the purchasers' claims had prescribed. This was because the purchasers instructed HGB to pay the purchase prices to the developer during June and July 2009. HGB had immediately acted on the instructions. However, the summons were served on HGB on 4 October 2017, more than three years after the claimed debts had arisen. Furthermore, Mrs Parry-Davies[10] died on 18 June 2013, resulting in full discharge from exercise of rights and performance of obligations under the life rights agreements. Therefore, the executor of her (Mrs Davies') estate had no locus standi to claim refund of moneys under the agreement, HGB contended.

[11] Of relevance in this appeal is the plea by HGB, that s 6(4) of the HDSA finds no application in this case because by the time the trust became insolvent they had paid to the developer all the moneys that had been entrusted to them by the purchasers. There were therefore no moneys 'kept in trust' as specified in s 6(4) of HDSA.

[12] Pursuant to a request by the parties, the high court separated three questions for anterior determination as points of law in terms of Rule 33(4) of the Uniform Rules of Court. The first point of law was formulated as follows:

'"Whether Section 6(4) of the Housing Development Schemes for Retired Persons Act 65 of 1988 (the 'HDSA') can found an action by a purchaser of a '*housing interest*' from a

[10] The estate of the late Mrs Parry-Davies is represented in these proceedings by the first respondent in his capacity as the executor of Mrs Davies' estate. Her husband Dr Davies predeceased her.

'*developer'* for repayment by a *'practitioner'* of an amount entrusted as contemplated in Section 6(3)*(a)* of the HDSA, by the purchaser to such *'practitioner'* by virtue of a *'contract'*, where, in the absence of compliance with the provisions of Section 6(1) of the HDSA and prior to the *'developer'* having become an insolvent, as it subsequently did, the *'practitioner'* disbursed, to or for the account of the *developer'*, from the trust account of such *'practitioner'*, an amount equivalent to the amount so entrusted to the *'practitioner'*, as purported released to the *'developer'* of the amount so entrusted to the *'practitioner"*.'

[13] The second point of law was:

'"Whether Section 6(4) of the HDSA can found an action by a purchaser of [a] '*housing interest'* from a *developer'* of an amount entrusted as contemplated in Section 6(3)*(a)* of the HDSA, by the purchaser to such '*practitioner'* by virtue of [a] '*contract'* where, prior to the *'developer'* having become insolvent, as it subsequently did, the purchaser cancelled the '*contract'*".'

[14] The third question was:

'"Whether, if Section 6(4) of the HDSA does not apply, the averments in the particulars of claim, read with the averments in the Defendant's plea that are admitted by the Plaintiff(s), are sufficient to sustain an action".'

[15] The high court determined all three questions in favour of the purchasers. It found that the argument made by HGB, that the purchasers could not rely on s 6(4) in the circumstances, was inconsistent with the purpose for which s 6 of HDSA was enacted, i.e. the protection of elderly persons against 'possible exploitation or misfortune by a developer'. The conclusion reached by the high court was also premised on s 78 of the Attorneys Act 53 of 1979, relating to regulation of attorneys' trust accounts. The court found that the purchasers were the trust creditors of HGB. Consequently, by releasing to the developer the entrusted moneys that were the equivalent of the purchase prices entrusted to it by purchasers, HGB had 'violated an entrustment under s 6(3)*(a)* of the HDSA'.

The court held that s 6(4) confers a statutory right of action on the purchasers to claim reimbursement of the purchase price in the circumstances.

[16] Thus, the high court held that s 6(4) of the HDSA confers a right of action on a purchaser who had entrusted purchase price funds to a practitioner, where such funds or an equivalent of the funds are released to the developer prior to compliance with s 6 (1) of that Act.

Discussion

(i) The issues referred for separate determination

[17] Rule 33(4) provides that:

'Special cases and adjudication upon points of law. —

If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

[18] The purpose of this rule is to determine the plaintiff's claim without the costs of delays of a trial. The rule facilitates convenient and expeditious disposal of litigation.[11] Against this background, this Court has warned on many occasions that a decision under Rule 33(4) must be considered carefully.[12] The issue(s) which are to be decided separately must be clearly defined. This is because in many cases, at first sight, there might appear to be discrete issues that may be considered separately. However, when properly considered, the issues will be

[11] *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA); 25 ILJ 659; [2005] 4BLLR 313 para 3.
[12] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) para 15.

found to be inextricably linked with the rest of the issues that arise in a particular case.[13]

'And even where the issues are discrete the expeditious disposal of the litigation is often served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try the issue separately'.[14]

Therefore the trial court must give careful consideration to whether a contemplated separation of issues will result in a convenient, expeditious disposal of the case before it. Where it appears that separation of issues will not result in a convenient and prompt finalisation of litigation the court must refuse to order separate adjudication.[15]

[19] In this case, as stated, HGB filed a special plea of prescription that remains undetermined. Furthermore, the purchasers pleaded their cancellation of the life rights agreements. In addition HGB sought to repel the claim for repayment by relying on the authorisations to release the purchase price. It seems to me that the separated questions might be inextricably linked to these issues. Furthermore, the first question is framed in a complicated manner. Apart from this, the factual context and the legal framework within which the identified points of law arise in this case are complex, and have not received much consideration by our courts. It would have been more convenient to have all the issues fully ventilated in the same hearing. Nevertheless, we are constrained to considering the appeal on the issues determined by the high court.

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[13] *Denel supra para 3.*
[14] Ibid.
[15] *Denel (Pty) Ltd v Vorster* [2004] ZASCA 4; [2005] 4 BLLR 313 (SCA); 2004 (4) SA 481 (SCA); (2004) 25 ILJ 659.

(ii) Whether s 6(4) of the HDSA is applicable

[20] In the summonses the purchasers set out the salient terms of the life agreements. They also pleaded the provisions of ss 6(1) and *(b)*, 6(3)*(a)* and *(b)*, and 6(4) of the HDSA. Their cause of action was framed in the following terms:

'15 No certificate in terms of s 6(1)(*a*) of the HDSA was ever furnished to [the purchasers], nor was any guarantee of the kind mentioned in s 6(3)(*b*) of the HDSA ever furnished to [the purchasers].

16 [HGB] was at all times aware that the SLRH was a 'development scheme' as contemplated in s 1 of the HDSA and that the payments into its said trust account mentioned in 10 above were payments contemplated in s 6(3)(a) of the HDSA.

16A By letter dated 24 October 2014 from attorneys Biccari Bollo Mariano Inc. to SLT, a copy of which is annexure "Y" to the defendant's plea, the plaintiff lawfully cancelled the LRA on the grounds set out in the letter, including non-compliance with the provisions of s 6(1) of the HDSA, and demanded reimbursement of the purchase price paid under the LRA.

17 Through attorneys Biccari Bollo Mariano Inc., the plaintiff demanded payment from the defendant by 24 October 2016 of the amount of R2,4 million, being the sum of the amounts mentioned in 10 above, with interest on R220,000 thereof from 8 May 2009 and on R2,18 million thereof from 2 June 2009.

18 The defendant has refuted liability to make such payment'.

[21] The HDSA regulates sales of life rights in housing development schemes built for retired persons. A right of occupation is defined in s 1 of the HDSA as:

'the right of a purchaser of a housing interest-

(a) which is subject to the payment of a fixed or determinable sum of money by way of a loan or otherwise, payable in one amount or instalments in addition to or in lieu of a levy, and whether or not such a sum is in whole or in part refundable to the purchaser or any other person or to the estate of the purchaser or of such other person; and

(b) which confers the power to occupy a portion in a housing development scheme for the duration of a lifetime of the purchaser or, subject to section 7, any other person mentioned in the contract in terms of which the housing interest is acquired, but without conferring the power to claim transfer of ownership of the portion to which the housing interest relates.'

[22] Section 6(4) of the HDSA, on which the purchasers' claims are founded, must be interpreted within the context of the other provisions of s 6. Section 6(1) restricts the developer's entitlement to receipt of the purchase price as follows:

'6 **Restriction on receipt of consideration**

(1) Subject to subsection (3) and not withstanding any other law, no developer may by virtue of a contract receive any consideration or any part thereof, unless-

(a) An architect or a quantity surveyor has issued a certificate that the housing development scheme concerned has been erected substantially in accordance with any applicable officially approved building plans and town planning scheme and applicable local authority by-laws, and is sufficiently completed for the purposes of utilization of the housing interest concerned;

(b) A copy of that certificate has been furnished to the purchaser concerned;

(c) In the case where a housing interest includes a right of occupation, a practitioner has issued a certificate that the title deed of the land to which the right of occupation has been endorsed as contemplated in section 4 C, in so far as endorsement is required by that section, and a copy of that certificate has been furnished to the purchaser concerned.'

[23] In relation to this appeal s 6(1)*(a)* therefore prohibited receipt by the developer of moneys paid as the purchase prices for the life rights, under the HDSA, until two conditions had been met. First, an architect or estate agent had to furnish a certificate that guaranteed that the housing development scheme had been built substantially in accordance with applicable, approved building plans, the town planning scheme, and the applicable local authority by-laws. In addition, the certificate had to confirm that the housing unit to which the life right related, was suitable for the purposes of utilisation of the housing interest.[16] Secondly, a copy of the certificate had to be furnished to the purchaser.

[24] Section 6(2) is not relevant for determination of this appeal. Section 6(3) excludes the restriction on release of the purchase price to the developer (imposed

[16] Subsections 6(1)*(a)* and *(b)* of the HDSA.

in terms of s 6(1)) in circumstances where the purchase price is paid to a legal practitioner, an estate agent or the developer. The section reads as follows:

'Subsection (1) shall not apply to the receipt of any amount-

(a) which the purchaser by virtue of a contract entrusts to a practitioner or an estate agent in his capacity as such, to be kept, for the benefit of a developer, in the trust account of the practitioner or estate agent until the provisions of subsection (1) have been complied with; or

(b) which by virtue of a contract is paid to the developer if, before such payment, the purchaser was furnished with an irrevocable and unconditional guarantee by a banking institution registered otherwise than provisionally under the Banks Act, 1965 (Act No 23 of 1965), a mutual building society registered otherwise than provisionally under the Mutual Building Societies Act, 1965 (Act No 24 of 1965), a building society registered otherwise than provisionally under the Building Societies Act, 1986 (Act No 82 of 1986), or a registered insurer as defined in s 1 of the Insurance Act, 1943 (Act No 27 of 1943 (Act No 27 of 1943), in terms of which the banking institution, mutual, building society, building society or insurer undertakes to repay the said amount - to the purchaser, if the provisions of subsection (1) are not being complied with.'

[25] The exclusion under s 6(3) is premised on the purchase price being kept in a practitioner's account, for the benefit of the developer, until the provisions of subsection 1 have been complied with. It is not in dispute that in this case the purchasers entrusted the moneys to HGB on this basis.

[26] Section 6(4) empowers a practitioner to immediately repay to the purchaser the moneys entrusted and kept by him or her as provided in s 6(3). The section provides that:

'If, in the circumstances contemplated in subsection (3), the developer becomes an insolvent before the provisions of subsection (1) have been complied with, any amount kept in a trust account in terms of paragraph *(a)* of subsection (3) or the repayment of which was guaranteed in terms of paragraph *(b)* of that subsection, shall immediately become payable to the purchaser concerned by the practitioner, estate agent, banking institution, mutual building society, building society or insurer concerned.'

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[27] The meaning and purpose of s 6(4) within the context of s 6 is clear. It is the protective measure provided to safeguard the interests of elderly purchasers in instances where a developer of a retirement home becomes insolvent before the guarantees on the suitability of the life right housing unit are in place as provided in s 6(1). Section 6(4) empowers the practitioner or estate agent to immediately release to the elderly purchaser, the purchase price that is kept in the trust account, thus protecting the purchaser from having to compete in the concursus creditorum. The section is triggered by the developer's insolvency, in the circumstances where the purchase price, or a portion of the price, that was entrusted to the practitioner or an estate agent is '. . . *kept, . . . in the trust account of the practitioner* . . . ' as provided under s 6(3)*(a)*.[17]

[28] The facts of this case are comparable to those in *Cierenberg en Andere v Rorich, Wolmarans*[18] *& Luderitz*. In that case too, the applicants in the high court were retired persons who had bought life rights in terms of the HDSA. The purchase prices were paid into trust accounts of two firms of attorneys, to be kept on behalf of the seller. When the seller was liquidated the applicants claimed a refund from the attorneys of the purchase price funds. Their claims for refund were founded on s 6(4), the practitioner having released the purchase in the absence of the s 6(1) certificates. It was not in dispute that the purchasers had been aware for more than three years that the attorneys had paid the moneys to the seller. And the court applications in terms of which the refunds were claimed, were served on the attorneys more than three years after the seller was liquidated. There the high court upheld the plea of prescription on the basis that the cause of action was complete because, pending the fulfilment of the s 6(1) conditions there was a statutory obligation on the attorneys to refund the purchase price to the

[17] Section 6(3)*(a)* of HDSA.
[18] *Cierenberg en Ander v Rorich, Wolmarans & Luderitz* 2003 (1) SA 40.

applicants upon the seller's insolvency. The period of prescription was completed before service of the application on the practitioners.

[29] It does not appear to me that the court in *Cierenberg* undertook a deliberate interpretative exercise of s 6(4), perhaps because it was clear on all accounts that the claims by the purchasers had prescribed. And the court in that case considered directly, the issue of prescription. On a proper interpretation, s 6(4) is not an open-ended statutory foundation for claims of repayment to purchasers, of moneys entrusted to practitioners under the HDSA. It is confined to instances where the developer becomes insolvent while there are moneys held in trust by a practitioner, for the developer's benefit.

[30] The high court's conclusion, that the purchasers were HGB's trust creditors, is inconsistent with the language of s 6(3)*(a)*. Under that section the purchase price is entrusted to the practitioner, 'to be kept for the benefit of the developer . . .'. Consequently, under ss 6(3) and (4), it is the developer rather than the purchaser, that is the practitioners' trust creditor. Ordinarily, on sequestration of the developer, the purchase price funds would become part of the developer's insolvent estate. Had this not been the case it would have been unnecessary to protect the purchasers from the concursus creditorum as provided in s 6(4).

Are the averments in the particulars of claim, read with the averments in the Defendant's plea that are admitted by the Plaintiff(s), sufficient to sustain an action?

[31] The high court did not consider this point because, in its view, the purchasers could validly claim refund in terms of s 6(4). The issue whether a pleading lacks averments which are necessary to sustain an action or defence, is regulated under Rule 23 of the Uniform Rules of Court, under the heading 'Exceptions and applications to strike out'. Under this Rule an excipient bears the

responsibility of establishing that, upon any construction of the particulars of claim, no cause of action is disclosed. Exceptions are not to be dealt with in an over-technical manner, and as such a court looks benevolently instead of over-critically at a pleading. [19] In addition a court has the power to defer consideration of an exception to the trial, particularly where the issue raised in the exception appears 'interwoven' with the evidence that will be led at the trial.[20] These are some of the guiding principles that were not ventilated in the high court in relation to the pleading in this case because of the manner in which the issues were dealt with in the high court. It would be improper to decide this issue on appeal. The decision of the high court on this issue must, also be set aside, and the issue must properly considered together with the rest of the contested issues.

[32] Consequently:

1 The appeal is upheld with costs.

2 Save for the decision on the second question, the order of the high court is set aside and replaced with the following:

'2.1 The first question is decided in favour of the defendant.

2.2 The third question is referred back to the high court for determination.

2.3 The costs stand over for determination together with the remaining issues.'

3 The matter is referred back to the high court for determination of the remaining issues.

N DAMBUZA
JUDGE OF APPEAL

[19] *Erasmus and Van Loggerenberg; Superior Court Practice;* Vol 2 D1-294.
[20] *Ibid* at D1-301 including the authorities referred to therein.

Appearances:

Counsel for the appellant:	S Olivier SC with him JP White
Instructed by:	Clyde & CO, Cape Town
	Lovius Block Inc, Bloemfontein.
Counsel for the respondents:	J Rogers
Instructed by:	Biccari Bollo Mariano Inc, Cape Town
	McIntyre Van Der Post Inc, Bloemfontein.

'FA2'
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SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 602/2023
WCC CASE NO: 17698/2017
17711/2017
17738/2017
17753/2017(b)
17757/2017
17765/2017

On FRIDAY 13 SEPTEMBER 2024

BEFORE:

THE HONOURABLE MS. JUSTICE DAMBUZA	JA
THE HONOURABLE MS. JUSTICE NICHOLLS	JA
THE HONOURABLE MS. JUSTICE MABINDLA-BOQWANA	JA
THE HONOURABLE MS. JUSTICE TOLMAY	AJA
THE HONOURABLE MS. JUSTICE MBHELE	AJA

In the matter between:

HEROLD GIE & BROADHEAD INC	APPELLANT
And	
RICHARD TIMOTHY HARRIS N O	FIRST RESPONDENT
PHYLLIS MARY EARLY	SECOND RESPONDENT
OSCAR WALTER & ALAN LEAONARD	THIRD RESPONDENT
HARVIE BROADHURST N O	FOURTH RESPONDENT
ANNELISIE JANSEN VAN RENSBURG-HATTINGH N O	FIFTH RESPONDENT
MICHELE ANN WALLIS N O	SIXTH RESPONDENT
SANTAM LIMITED	THIRD PARTY

Having heard counsel on 03 May 2024 on an appeal from the judgment of the Western Division of the High Court of South Africa, Cape Town, delivered on the 27th February 2023 and having read the record of the proceedings in the said Court (Case number

17698/2017 17711/201717738/2017 17753/2017(b) 17757/2017 17765/2017). 63

THEREAFTER, on this day, the following order is made:

1 The appeal is upheld with costs.

2 Save for the decision on the second question, the order of the high court is set aside and replaced with the following:

'2.1 The first question is decided in favour of the defendant.

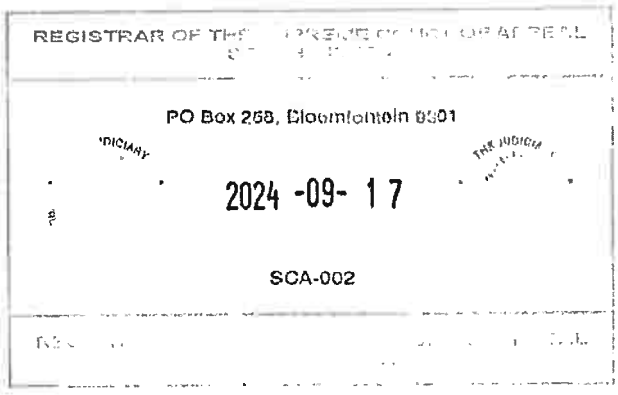
2.2 The third question is referred back to the high court for determination.

2.3 The costs stand over for determination together with the remaining issues.'

3 The case is referred back to the high court for determination of the remaining issues.

BY ORDER OF THIS COURT

COURT REGISTRAR
CL DE WEE (Ms)



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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 17765/17
Case No: 17753/17
Case No: 17738/17
Case No: 17757/17
Case No: 17698/17
Case No: 17711/17

In the matters between:

RICHARD TIMOTHY HARRIS N.O.	Plaintiff
PHYLLIS MARY EARLY	Plaintiff
OSCAR WALTER & ALAN LEAONARD HARVIE WALTER NN.O.	Plaintiffs
ANNELISE JANSEN VAN RENSBURG-HATTINGH N.O.	Plaintiff
CLIFFORD OWEN KEET & MICHELE ANN WALLIS NN.O.	Plaintiffs
EDGAR GRONDEL	Plaintiff
And	
HEROLD GIE & BROADHEAD INC.	Defendant
And	

SANTAM LIMITED Third Party

Judgment Delivered: 27 February 2023 (Electronically)

Le Grange J

Introduction:

[1] In each of these matters there are three crisp issues for determination as requested by the parties in terms of rule 33 (4) of the Uniform Rules. The first is:

> "Whether Section 6(4) [1] of the Housing Development Schemes for Retired Persons Act 65 of 1988 ('the HDSA') can find an action by a purchaser of a *'housing interest'* from a *'developer'* for repayment by a *'practitioner'* of an amount entrusted, as contemplated in Section 6(3)(a)[2] of the HDSA, by the purchaser to such

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[1] S 6 (4) of the HDSA provides:

> "(4) If, in the circumstances contemplated in subsection (3), the developer becomes an insolvent before the provisions of subsection (1) have been complied with, any amount kept in a trust account in terms of paragraph (a) of subsection (3) or the repayment of which was guaranteed in terms of paragraph (b) of that subsection, shall immediately become payable to the purchaser concerned by the practitioner, estate agent, banking institution, mutual building society, building society or insurer concerned.

[2] S 6 (3) Subsection (1) shall not apply to the receipt of any amount—

> (a) which the purchaser by virtue of a contract entrusts to a practitioner or an estate agent in his capacity as such, to be kept, for the benefit of the developer, in the trust account of the practitioner or estate agent until the provisions of subsection (1) have been complied with; or
>
> (b) which by virtue of a contract is paid to the developer if, before such payment, the purchaser was furnished with an irrevocable and unconditional guarantee by a banking institution registered otherwise than provisionally under the Banks Act, 1965 (Act 23 of

'practitioner' by virtue of a *'contract'*, where, in the absence of compliance with the provisions of Section 6(1) of the HDSA[3] and prior to the *'developer'* having become an insolvent, as it subsequently did, the *'practitioner'* disbursed, to or for the account of the *'developer'*, from the trust account of such *'practitioner'*, an amount equivalent to the amount so entrusted to the *'practitioner'*, as purported released to the *'developer'* of the amount so entrusted to the *'practitioner'*"

1965), a mutual building society registered otherwise than provisionally under the Mutual Building Societies Act, 1965 (Act 24 of 1965), a building society registered otherwise than provisionally under the Building Societies Act, 1986 (Act 82 of 1986), or a registered insurer as defined in section 1 of the Insurance Act, 1943 (Act 27 of 1943), in terms of which the banking institution, mutual building society, building society or insurer undertakes to repay the said amount to the purchaser, if the provisions of subsection (1) are not being complied with.

[3] Section 6(1) provides:

Restriction on receipt of consideration - (1) Subject to subsection (3) and notwithstanding any other law, no developer may by virtue of a contract receive any consideration or any part thereof, unless—

(a) an architect or a quantity surveyor has issued a certificate that the housing development scheme concerned has been erected substantially in accordance with any applicable officially approved building plans and town-planning scheme and applicable local authority by-laws, and is sufficiently completed for the purposes of utilisation of the housing interest concerned;

(b) a copy of that certificate and a copy of the contract have been furnished to the purchaser concerned; and

(c) in the case where a housing interest includes a right of occupation, a practitioner has issued a certificate that the title deed of the land to which the right of occupation relates, has been endorsed as contemplated in section 4C, in so far as endorsement is required by that section, and a copy of that certificate has been furnished to the purchaser concerned.

[2] The second issue for determination has been formulated as follows:

> "Whether Section 6(4) of the HDSA can find an action by a purchaser of a '*housing interest*' from a '*developer*', for repayment by a '*practitioner*' of an amount entrusted, as contemplated in Section 6(3)(a) of the HDSA, by the purchaser to such '*practitioner*' by virtue of '*contract*', where, prior to the '*developer*' having become an insolvent, as it subsequently did, the purchaser cancelled the '*contract*'."

[3] The third issue is:

> "Whether, if Section 6(4) of the HDSA does not apply, the averments in the particulars of claim, read with the averments in the Defendant's plea that are admitted by the Plaintiff(s), are sufficient to sustain an action."

[4] The Plaintiffs have also applied for leave to amend their respective particulars of claim by the insertion therein of a paragraph, corresponding to an averment in the defendant's plea, averring cancellation of their respective LRA's by letter dated 24 October 2014.

Background:

[5] The factual matrix underpinning the claims of the Plaintiffs can be summarized as follows: During 2008 and 2009, The St Leger Trust ('the Trust') acquired four adjoining

erven on the Muizenberg beachfront to establish thereon, the St Leger Retirement Hotel ('the Retirement Hotel') as a development scheme under the HDSA. After the various erven were registered and transferred during February 2009 into the name of the Trust. The title deeds of the erven were endorsed by the Registrar of Deeds in terms of s 4C of the HDSA to the effect that they were subject to a development scheme as contemplated in the HDSA.

[6] The Trust was a 'developer' as contemplated in s 1 of the HDSA in respect of the LRA. The Trust thereafter concluded contracts for the sale of housing interests with each of the purchasers styled 'Life Right Agreement' ('LRA').

[7] At the time of concluding the LRA, all the purchasers were retired persons and the housing interest in question had not previously been alienated with the result the HDSA applied to each LRA.

[8] The Trust concluded a LRA with each of the following purchasers:

i) Renee Parry-Davies ('Mrs Parry-Davies'), in respect of Suite 220, concluded on 30 April 2009, for a price of R2,4 million;

ii) Phyllis Mary Early ('Mrs Early'), in respect of Suite 109, concluded on 10 September 2009, for a price of R1,1 million;

iii) Lionel Walter ('Mr Walter'), in respect of Suite 110, concluded on 12 February 2010, for a price R1,03 million;

iv) Ingeborg Maria-Luise Arndt ('Mrs Arndt'), in respect of Suite 107, concluded on 20 May 2010, for a price of R790,000;

v) Michael Bosman Keet ('Dr Keet'), in respect of Suite 101, concluded on 31 October 2011, for a price of R1,49 million;

vi) Edgar Grondel ('Mr Grondel'), in respect of Suite 114, concluded on 3 November 2011, for a price of R1, 2 million.

[9] The LRA's were in similar form and had similar attachments and provided in each case, amongst others: for the purchase price payable thereunder by the purchaser to be paid into 'Herold Gie Trust Account at 'Nedbank Limited' ('the HGA Trust Account'), for an occupation date or estimated occupation date, and when a certificate as contemplated in s 6(1)(a) of the HDSA would be issued and furnished to the individual purchaser(s).

[10] It is not in dispute that the purchaser(s) made payments to the HGA Trust Account in respect of the purchase prices. According to the Particulars of Claim, each payment constituted an 'entrustment', as contemplated in s 6(3)(a) of the HDSA, by the purchaser concerned, to the defendant ('HGA') as contemplated in the HDSA.

[11] It is common cause that the purchasers took occupation of their relevant suite(s) in the Retirement Hotel during 2009 and 2012 as provided for in the LRA.

[12] It is not in dispute that HGA, effected payments from the HGA Trust Account, to

the Trust of amounts equivalent to those paid by the respective purchasers and that the purported certificate(s) as contemplated in s 6(1)(a) of the HDSA that was provided to the purchaser(s) and or the Plaintiffs were defective and did not meet the requirements of the HDSA.

[13] All the purchasers, save for Mr. Grondel, have all in the meanwhile passed on.

[14] On 24 October 2014, the Plaintiffs' by way of a letter, cancelled their LRA, on grounds set out in the letter, including non-compliance with s 6(1) of the HDSA, and demanded reimbursement of the amounts paid on account of the purchase price under the relevant LRA.

[15] The estate of the Trust was sequestrated provisionally on 17 February 2015 and finally on 9 March 2016.

[16] The current actions were instituted on 4 October 2017 wherein the Plaintiffs are seeking reimbursement from HGA of the full purchase priced paid for their individual LRA's. It needs to be mentioned that pursuant to the institution of the current actions, the Plaintiffs respectively have received concurrent dividends on claims proved by them or the relevant purchaser against the insolvent estate of the Trust.

The Dispute:

[17] HGA contends that s 6(4) of the HDSA finds no application in any of the cases. According to HGA, by virtue of the payments made, there had been no funds kept in its trust account as contemplated in the section, even if such payments were wrongfully made, and that the LRA's had all been cancelled by the time of the provisional sequestration of the estate of the Trust.

[18] The Plaintiffs on the other hand contend that their respective particulars of claim contain sufficient averments to sustain an action even if s 6(4) of the HDSA does not find application for either of the reasons advanced by HGA.

[19] As stated previously, the Plaintiffs have all given notice of their intention to apply for leave to amend their respective particulars of claim by the insertion therein of a paragraph, corresponding to an averment in the Defendant's plea, averring cancellation of their respective LRA's by letter dated 24 October 2014.

The questions of law:

[20] Turning to the questions for consideration. Counsel for HGA, Mr. Sven Olivier, SC assisted by Mr. J P White's main contentions were; that properly interpreted, the provisions of s 6(4), does not create a statutory cause of action, but provides protection to the purchaser against the consequences of the *concursus creditorum* (body of creditors) in the event of insolvency of the developer; that it is only the funds held at the

moment of insolvency that is relevant as the right to payment arises from the relationship between the parties and not in the way in which the attorney handles the money in his trust account. Accordingly, it was argued where funds held in trust to the credit of a client had been disbursed, even unlawfully, the claim would not be against the trust monies but against the attorney and or its directors. Furthermore, it was contended the Plaintiff's exercised their rights under s 8 of HDSA to cancel and claim repayment of the purchase consideration from the Trust and their claims in the sequestration were met and all received concurrent dividends. It was therefore contended that the questions of law should be answered in favour of HGA as s 6(4) cannot be interpreted that a practitioner is obliged to pay to a purchaser, in the event of the subsequent insolvency of the developer, money previously kept in trust, but already paid to the developer, albeit contrary to the provisions of s 6(1).

[21] The principal contentions by counsel for the Plaintiff, Mr. J Rogers were the following: the legislature by enacting s 6 of the HDSA, intended to protect retired persons against possible exploitation by developers and that the narrow interpretation advanced by HGA runs counter to the very purpose of the legislation; on a proper construction of the wording in s 6 and in particular s 6(3)(a), reading it in context, ensures that when funds were 'entrusted' by a purchaser to a 'practitioner' under the said section, such funds should be received and held by the practitioner concerned in trust for the purchaser until such time as the 'developer' becomes entitled thereto upon compliance with the provisions of s 6(1).

[22] Mr. Rogers also contended that by virtue of the fact that HGA accepted that the payments into the HGA Trust account having been made on the basis that they constituted 'entrustments' under s 6(3)(a) of the HDSA, such payments and acceptance unavoidably gave rise to tacit contracts between the purchaser concerned on the one hand and HGA on the other, that HGA would retain the funds in question in trust pending compliance by the Trust with the provisions of s 6(1).

Discussion:

[23] It is now settled law that when a court is called upon to interpret a document and or legislation, consideration must be given to 'the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'[4]

[24] S 6(1) prohibits the receipt of any consideration unless the prescribed conditions had been met. Section 6(3) on the other hand creates an exception in that subsection 6(1) shall not apply where the purchaser by virtue of a contract entrusts to a practitioner or an estate in his capacity as such, to be kept, for the benefit of the

[4] Natal Joint Municipal Pension Fund v Edumeni Municipality 2012 (4) SA 593 (SCA) para 18

developer, in the trust account of the practitioner or estate agent until the provisions of subsection (1) have been complied with.

[25] It is evident that the purpose of the HDSA is to regulate the alienation of certain interests in housing development schemes for retired persons and to provide for matters connected therewith. I can only repeat what the Court stated in Eden Village (Meadowbrook) (Pty) Ltd v Edwards and Another[5] (Eden Village) and which was confirmed in Flower Foundation Pretoria Homes for the Aged NPC v Registrar of Deeds, Pretoria and Others[6]:

> *'When one has regard to the objects of the Act the reason for such wide authorisation becomes more apparent. The Act falls within the category of what might be termed "social" or "consumer protection" legislation. Its object is to protect elderly or retired persons investing their savings in a housing development scheme from possible exploitation by a developer..... The whole Act is designed to protect the rights and the interests of the retired persons, and recognises the fact that the residents have a vested interest in the housing development scheme in which they have chosen to stay.'*

[5] 1995 (4) SA 31 (A) at 44A-F.

[6] 2022 (6) SA 99 (SCA) at para [15].

[26] As stated in Eden Village, the HDSA falls within the category of what might be termed "social" or "consumer protection" legislation and its object is to protect the elderly or retired persons investing their savings in a housing development scheme from possible exploitation or misfortune by a developer' but it also protects the legitimate interest of responsible developers[7]. With these guidelines, the text of s 6(4) must therefore be viewed through that prism and interpreted purposively.

[27] Having regard to the abovementioned, the argument advanced that the wording and operation of s 6(4) in its ordinary meaning finds no application if there are no funds at the moment of sequestration, as the purchaser is simply protected from the consequences of the concursus creditorum in respect of the funds held in trust for the benefit of the developer, cannot be sustained as it is manifestly contrary to the very purpose and object of the HDSA.

[28] As stated earlier, the purpose of s 6 of the HDSA is to protect one of the most vulnerable groups in our society against exploitation by a developer. The HDSA expressly ensures that a legitimate developer will obtain no interest in or entitlement to payments made into the trust account of a practitioner under s 6(3)(a) pending compliance by him with the provisions of s 6(1), save for the right to require payment thereof to him possibly with interest thereon, upon compliance with the said provision.

[7] The Law of Property: Silberberg and Schoeman 5th Edition para 20.3.2.1

[29] This brings me to two important issues, having regard to the wording of s 6(3)(a), whether firstly, the funds entrusted by the purchaser *'to be kept for the benefit of the developer, in the trust account of the 'practitioner'* is a discreet fund capable of being reserved or disposed of according to the intention of the attorney. And, secondly, whether such attorney by holding the entrusted funds for the benefit of the developer is doing so as an agent on behalf of the developer.

[30] With regards to the first issue. The proposition by HGA that the funds entrusted to it was all paid away to the developer, despite the non-compliance of s 6(1), and as a result there are no longer funds in the trust account to comply with the provisions of s 6(4), is simply unsustainable. It is now well established that when funds are paid into the trust account of an attorney *confusio* occurs of the funds paid with funds already in the trust account of the attorney[8]. An attorney is at all times required to retain sufficient funds in his trust account to meet the claims of all his trust creditors. Where an attorney has made an unlawful payment from his trust account purporting to pay away the funds of a trust creditor, such creditor does not cease to be a trust creditor. The attorney has not in such a case paid away funds of the trust creditor in question. He has simply created an overall shortage in his trust account which he is obliged to make good[9].

[8] S v Gathercole 1964 (1) SA 21 AD

[9] See Fuhri v Geyser No & Another 1979 (1) SA 747 (N) 749 C-E; De Villiers NO v Kaplan 1960 (4) SA 476 (C) and Wypkema v Lubbe 2007 (5) SA 138 (SCA) para 4-7.

[31] From the abovementioned, it follows that when HGA paid away funds *'entrusted'* to it by the purchaser (s) under s 6(3)(a), what was paid away was simply a portion of the general pool of money in the HGA Trust Account and if an overall shortage in the trust account was created HGA is obliged in law to remedy it. In any event, having regard to the purpose of the HDSA it could not have been the intention of the legislature to immunize a practitioner who knowingly violated an entrustment under s 6 (3)(a) as this could simply mean a practitioner can remove equivalent funds from his trust account for any purpose, even by way of misappropriation, and thus purporting thereby to have disposed of funds 'entrusted' to him under s 6(3)(a), in his trust account. To follow such an approach would undermine the very protection afforded by s 6(4) and the purpose of the HDSA.

[32] In respect of the second issue, reliance was placed on the dictum in Baker v Probert[10] in support of the proposition that s 6(3)(a) must be interpreted in the same way as the clause under consideration in that matter which provided that "*All payments made in terms of this paragraph shall be made to the agents to be held by them in trust for payment to the seller on the effective date provided that the sellers have complied with the provisions of para 5 hereof*".

[33] The common cause facts in Baker, briefly stated were the following: The Defendant owned a share-block in a company and wanted to sell it. The Defendant gave York Estate a mandate to find a purchaser for it. York Estate found a purchaser in

[10] 1985 (3) SA 429 (AD) at 441 F – G.

the person of the Plaintiff which signed an offer to purchase. The offer was in the form of a printed document, which was a standard form of offer used by York Estate. One of York Estate's employees inserted, in manuscript, the details relating to the transaction, before it was presented to the Plaintiff for her signature. At the foot of the last page of the document, immediately below the space provided for the offeror to sign as "purchaser" (where the Plaintiff had affixed her signature) there was a printed form of acceptance of the offer by the offeree. That acceptance was duly signed by the Defendant above the printed word, "Sellers". It is not in dispute that on the top left-hand corner of the first page of the contract the name "York Estate" appeared in large capital letters "Acting as AGENTS for the Defendant". The contract therefore recorded that York Estate was acting as "agents" on behalf of the Defendant. The Plaintiff duly paid the purchase price. The Defendant did however not deliver the share certificates, before or after the effective date and remained in default despite numerous demands for performance over a protracted period. The Plaintiff, finally cancelled the contract on the ground of the Defendant's breach of it. Shortly thereafter, York Estate was placed in liquidation. The Plaintiff proved a claim for repayment of the purchase price against York Estate, but received no dividend. In the main claim against the Defendant the crucial issue raised by the pleadings was whether or not York Estate was the agent of the Defendant for receiving payment of the purchase price from the plaintiff.

Botha JA at 441 F- G held as follows"

"When the plaintiff paid the price to York Estate, the defendant, and the defendant alone, was the creditor in respect of the money received and held by York Estate, notwithstanding the fact that he was not entitled to obtain the money from York Estate unless and until he had complied with his own obligations under the contract. In these circumstances I can perceive no difficulty at all in postulating that York Estate received the purchase price as the agent of the defendant."

[34] From the abovementioned, the contract in no uncertain terms stipulated that York Estate was the agent to receive payment of the purchase price from the Plaintiff on behalf of the Defendant and it follows that the Court held that *'In these circumstances I can perceive no difficulty at all in postulating that York Estate received the purchase price as the agent of the defendant.'*

[35] The facts in the Baker matter is totally distinguishable and does not assist in the present instance. Section 6(3)(a) clearly stipulates that s 6(1) shall not apply to the receipt of any amount which the purchaser by virtue of a contract entrusts to a practitioner or an estate agent in his capacity as such, to be kept, for the benefit of the developer, in the trust account of the practitioner or estate agent until the provisions of s 6(1) have been complied with. (my underlining).

[36] The word 'entrusted' on a plain reading means '*to assign or confer a responsibility to; put into someone's care*'[11]. It therefore must follow in as much as the practitioner must keep the funds by virtue of a contract for the benefit of the developer, there is an equal obligation envisaged by the wording in the subsection which confers an obligation on the practitioner to ensure the purchaser(s) funds so entrusted will be kept in his trust account until the provisions of s 6(1) had been complied with. To read it any differently would lead to insensible results which would undermine the very purpose of the HDSA.

[37] In Cierenberg en Andere v Rorich, Wolmarans and Luderitz; Van Wyk en Andere v Lamprecht en 'n Ander [12]"the Applicants had paid moneys into an attorney's trust account in respect of the purchase price of certain units in a retirement home. The seller of those units had gone into liquidation. Section 6(4) of the HDSA, was the relevant statute applicable to the development of the retirement homes. The point of prescription was taken. It was contended before the learned acting judge that Sadie's[13] case was applicable. Having considered the dicta in Sadie, the acting judge came to the following conclusion at 50D:

> *'Geen verjaring kon inderdaad teen die prokureurs in hulle hoedanigheid as sogenaamde 'stakeholders' plaasgevind het en daar was ook geen*

[11] Concise Oxford Dictionary.

[12] 2003 (1) SA 40 (TPA),

[13] Sadie v Currie's City (Pty) Ltd and Others 1979 (1) SA 363 (T)

skuld na die een of die ander kant toe ontstaan, voordat die voorwaarde soos vervat in art 6(4) nie in werking getree het nie. Daarna het die gelde egter betaalbaar geword.'

[38] Loosely translated, the finding of the Court having regard to section 6(4) was, the attorneys are stakeholders, and that the Applicants in that matter enjoyed a claim in law against the attorneys despite the fact that the Respondents had paid the monies over to the developer more than three years earlier. The claim nonetheless failed due to prescription because more than three years had also elapsed from the date of fulfilment of the applicable condition being the liquidation of the developer, before the legal proceedings had been instituted.

[39] Counsel for HGA was adamant that the approach adopted in Cierenberg should not be followed and referred to number of other cases including the matter of Eds South Africa (Pty) Ltd v Nationwide Airlines (Pty) Ltd and Others[14] where it was held that *'stake holding'* requires a clear agreement between the parties. It was strongly suggested that in the absent of a stakeholder's agreement between the purchasers and HGA, the approach in the Baker matter should be preferred and followed. I disagree. The Baker matter is clearly distinguishable on the facts. It cannot follow that because the estate agent to which payment was made in that case received and held the monies in question as agent for the seller, that in the current cases, HGA received and held the

[14] 2011 (5) SA 158 (SCA)

monies paid into the HGA Trust Account by purchasers as agent for the trust. Each case must be decided upon its own facts.

[40] Reference was also made to the decision of the Supreme Court of Appeal in Taljaard v T L Botha Properties[15] where the effect of section 34A of the Estate Agency Affairs Act, 112 of 1976, as amended, and whether a statutory provision has the effect of conferring a right of action, were considered. The relevant section provides as follows:

> *"(1) No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act ..., unless at the time of the performance of the act a valid Fidelity Fund Certificate has been issued ... to such estate agent ...".*

[41] In Taljaard a client who had already effected payment of a commission to an estate agent sought to rely on this statutory provision as conferring upon the client a right of action to reclaim the commission when it transpired that the estate agent did not hold the required certificate. The Court held as follows at paragraph 8:

> *"[8] It is well established that legislation is to be construed so as to interfere as little as possible with established rights. While it might indeed seem anomalous that an estate agent is prohibited from enforcing a claim for remuneration that has become due, but may*

[15] 2008 (6) SA 207 (SCA)

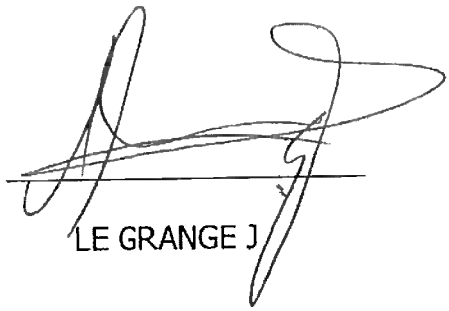
retain that remuneration if it has been paid, that apparent anomaly arises as no more than an incident of the purpose of the section. Had it been intended to confer a right of action upon a client for recovery of monies that became contractually due it would have been a simple matter to do so in express terms. Absent the express conferral of a right of action I do not think it is conferred by necessary implication."

[42] On a proper reading of s 34A of the Estate Agency Affairs Act, it merely excludes a claim by an estate agent in certain circumstances. The Court in Taljaard held that the section properly construed does not by implication confer a right of action for reimbursement where the amount in question had been received. Taljaard has therefore no bearing on whether s 6(4) of the HDSA confers a right of action on a *'purchaser'*. In fact, Cierenberg, says exactly the opposite. Section 6(4), does confer a right of action on the *'purchaser'* and there is no valid reason to depart from that decision.

[43] For all the stated reasons, I am satisfied that the stated questions of law should be decided in favour of the Plaintiffs and that they should be granted leave to amend their particulars of claim in the manner they deem necessary.

[44] In the result the following order is made:

1. The three issues referred for determination, as requested by the parties, in terms of rule 33 (4) of the Uniform Rules, are determined in favour of the Plaintiff.
2. The Plaintiffs application for leave to amend their particulars of claim in the manner they seek to do, is granted.
3. Costs stands over for later determination.



LE GRANGE J

85 'FA4'

AMENDED

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO. 17765/2017
CASE NO. 17753/2017
CASE NO. 17738/2017
CASE NO. 17757/2017
CASE NO. 17698/2017
CASE NO. 17711/2017

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
AT CAPE TOWN: FRIDAY, 27 FEBRUARY 2023
BEFORE THE HONOURABLE MR JUSTICE LE GRANGE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
Private Bag X9020, Cape Town 8000
2023 -07- 18
WCD-009
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,

In the matter between:

RICHARD TIMOTHY HARRIS N.O. **Plaintiff**

PHYLLIS MARY EARLY **Plaintiff**

OSCAR WALTER & ALAN LEAONARD HARVIE WALTER NN.O. **Plaintiffs**

ANNELISE JANSEN VAN RENSBURG-HATTINGH N.O. **Plaintiff**

PRIVATE BAG X9020
CAPE TOWN 8000
2023 -07- 19
GENERAL OFFICE
WESTERN CAPE HIGH COURT

CLIFFORD OWEN KEET & MICHELE ANN WALLIS NNO. **Plaintiffs**

EDGAR GRONDEL **Plaintiff**

and

HEROLD GIE & BROADHEAD INC **Defendant**

Certified a true copy of the original which has no noticeable evidence of alterations by an unauthorised person.
Gesertifiseer 'n ware afskrif van die oorspronklike waarop geen sigbare veranderings deur 'n ongemagtigde persoon aangebring is nie.

and

SANTAM LIMITED **Third Party**

Having heard the legal representatives for the Plaintiffs and the Defendant and having read the documents filed of record;

IT IS ORDERED:

1. That the three issue referred for determination, as requested by the parties, in terms of Rule

33 (4) of the Uniform Rules, are determined in favour of the Plaintiff;

2. That the Plaintiffs application for leave to amend their Particulars of Claim in the manner they seek to do, is granted;

3. That costs stands over for later determination.

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN
Private Bag X9020, Cape Town 8000
2023 -07- 18
WCD-009
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN

BY ORDER OF THE COURT

COURT REGISTRAR
247 BICCARI BOLLO MARIANO INC.
CAPE TOWN

/nh

PRIVATE BAG X9020
CAPE TOWN 8000
2023 -07- 19
GENERAL OFFICE
WESTERN CAPE HIGH COURT

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noticeable evidence of alterations by an unauthorised
person.
Gesertifiseer 'n ware afskrif van die oorspronklike
waarop geen sigbare veranderinge gemaak is nie
ongemagtigde persoon aangebring is nie.

87 FA 5.1

ALIENATION OF LAND ACT 68 OF 1981

26 Restriction on the receipt of consideration by virtue of certain deeds of alienation

(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until-

(a) such erf or unit is registrable; and

(b) in case the deed of alienation is a contract required to be recorded in terms of section 20, such recording has been effected.

[Sub-s. (1) amended by s. 12 (a) of Act 51 of 1983.]

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1,000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(3) The provisions of subsection (1) shall not apply to any amount paid by way of consideration which-

(a) the alienee, by virtue of a deed of alienation, entrusts to a practitioner or an estate agent in his capacity as such, to keep, for the benefit of the alienator in terms of that deed of alienation, in the trust account of the practitioner or estate agent; or

[Para. (a) substituted by s. 12 (b) of Act 51 of 1983.]

(b) by virtue of a deed of alienation is paid to the alienator if, before such payment, the alienee is furnished with an irrevocable and unconditional guarantee by a banking institution registered otherwise than provisionally under the Banks Act, 1965 (Act 23 of 1965), a building society registered otherwise than provisionally under the Building Societies Act, 1965 (Act 24 of 1965), or a registered insurer as defined in section 1 of the Insurance Act, 1943 (Act 27 of 1943), in terms of which the said banking institution, building society or insurer undertakes to repay the said amount to the alienee if the erf or unit is not registrable and, where applicable, a recording is not effected within a period specified in the said guarantee.

[Para. (b) substituted by s. 12 (b) of Act 51 of 1983.]

(4) If, in the circumstances contemplated in subsection (3), the alienator becomes an insolvent before the erf or unit has become registrable or the relevant contract has been recorded in terms of section 20, any amount kept in a trust account in terms of paragraph (a) of that subsection or the repayment of which was guaranteed in terms of paragraph (b) of that subsection, shall immediately become payable to the alienee concerned by the practitioner, estate agent, banking institution, building society or insurer concerned.

[Sub-s. (4) substituted by s. 12 (c) of Act 51 of 1983.]

[Date of commencement of s. 26: 6 December 1983.]

'FA 5.2'

SHARE BLOCKS CONTROL ACT 59 OF 1980

5A Restriction on receipt of consideration in respect of shares before incorporation of share block company

(1) If shares in a company which is to be formed will in any manner whatsoever confer a right to or an interest in the use of immovable property, no person shall, before the company has been incorporated under the Companies Act as a share block company, receive any consideration in respect of any right to a share in the company from any person other than a person who will be a share block developer in relation to the company.

(2) The provisions of subsection (1) shall not apply to any amount paid by way of consideration as contemplated therein, which-

(a) the person so paying it entrusts to a practitioner or an estate agent in his capacity as such, to keep, for the benefit of the person entitled to the amount as such consideration, in the trust account of the practitioner or estate agent; or

(b) is paid to the person entitled thereto as such consideration if, before the payment, the person who has paid it is furnished with an irrevocable and unconditional guarantee by a bank or building society registered otherwise than provisionally or a registered insurer as defined in section 1 of the Insurance Act, 1943 (Act 27 of 1943), in terms of which that bank, building society or insurer undertakes to repay the said amount to the person who has paid it if the company has not been incorporated as contemplated in that subsection within a period stated in the said guarantee.

(3) If, in the circumstances contemplated in subsection (2), the person entitled to the amount as consideration becomes an insolvent before the company has been incorporated, any amount kept in a trust account in terms of paragraph (a) of that subsection or the repayment of which was guaranteed in terms of paragraph (b) of that subsection, shall immediately become payable to the person concerned who paid it as contemplated in that subsection, by the practitioner, estate agent, bank, building society or insurer concerned.

[S. 5A inserted by s. 1 of Act 33 of 1982 (wef 24 March 1982).]

FA5.3

89

PROPERTY TIME-SHARING CONTROL ACT 75 OF 1983

7 Restriction on receipt of consideration by virtue of a contract

(1) No person shall by virtue of any contract relating to accommodation consisting of any building or improvements, or any portion or part thereof, receive any consideration or part thereof, unless an architect has issued a certificate that the relevant accommodation, as erected, is substantially in accordance with any applicable and relevant officially approved building plans and town planning scheme and applicable local authority by-laws, and is sufficiently complete for the purposes of utilization of the relevant time-sharing interest, and unless a copy of such certificate has been delivered to the purchaser concerned.

(2) Any person who contravenes any provision of subsection (1) shall, subject to the provisions of subsection (3), be guilty of an offence and liable on conviction to a fine not exceeding R1,000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(3) The provisions of subsection (1) shall not apply to the receipt of any amount-

(a) which the purchaser, by virtue of a contract, entrusts to a practitioner or an estate agent in his capacity as such, to keep, for the benefit of the seller in terms of that contract, in the trust account of the practitioner or estate agent until the certificate referred to in subsection (1) has been issued and a copy thereof has been delivered to the purchaser; or

(b) which by virtue of a contract is paid to the seller if, before such payment, the purchaser is furnished with an irrevocable and unconditional guarantee by a banking institution registered otherwise than provisionally under the Banks Act, 1965 (Act 23 of 1965), a building society registered otherwise than provisionally under the Building Societies Act, 1965 (Act 24 of 1965), or a registered insurer as defined in section 1 of the Insurance Act, 1943 (Act 27 of 1943), in terms of which the said banking institution, building society or insurer undertakes to repay the said amount to the purchaser if the certificate referred to in subsection (1) is not issued within the period referred to in section 4 (1) (k).

(4) If, in the circumstances contemplated in subsection (3), the seller becomes an insolvent before the certificate referred to in subsection (1) is issued, any amount kept in a trust account in terms of paragraph (a) of subsection (3) or the repayment of which was guaranteed in terms of paragraph (b) of that subsection, shall immediately become payable to the purchaser concerned by the practitioner, estate agent, banking institution, building society or insurer concerned.

FA6
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Personal Finance

Retirement housing: SCA ruling casts doubt on protection of life rights buyers

Overturns high court order that legal firm repay six retirees their entrusted purchase prices paid to developer prior to its insolvency.

By Roy Cokayne 19 Sep 2024 04:03

People who buy life rights in a retirement development might not have the level of protection they thought they had in the event that the developer of the scheme goes into liquidation.

This follows a Supreme Court of Appeal (SCA) judgment overturning part of a Western Cape High Court judgment that found that six purchasers of life rights in the St Leger Retirement Hotel located in Muizenberg in Cape Town had a valid claim in terms of Section 6(4) of the Housing Development Schemes for Retired Persons Act (HDSA) for the refund of the purchase price entrusted to a legal practitioner, where the practitioner had paid the entrusted amount to the developer of the scheme prior to the developer's insolvency.

Read: Should I move into a retirement village?

The appeal was lodged by legal firm Herold Gie & Broadhead Inc (HGB) against a judgment in favour of retirees Richard Timothy Harris, Phyllis Mary Early, Oscar Walter and Alan Leaonard, Harvie Broadhurst, Annelise Jansen van Rensburg-Hattingh and Michele Ann Wallis.

SCA Judge Nambiha Dambuza, with SCA judges Caroline Nicholls and Nolwazi Mabindla-Boqwana and acting SCA judges Ronel Tolmay and Nobulawo Mbhele concurring, said on payment of the purchase price, the purchasers took occupation of their units during the period June 2009 to November 2011.

During June and July 2009, the purchasers authorised HGB in writing to pay to the developer all the moneys that had been entrusted to it as the purchase price in respect of the life rights and HGB accordingly released the funds to the developer.

However, in a letter dated 24 October 2014, the purchasers cancelled their life rights agreements and each demanded a refund of their purchase price.

The purchasers alleged that:

- They had not been furnished with the certificates of compliance contemplated under sections of both the HDSA and the National Building Regulations Standards Act (NRBA); and

- The developer failed to inform them, prior to the conclusion of the agreement, that use and occupation of the retirement hotel as contemplated in the agreement would not be "legally possible" despite being aware that the required certificates could not be issued.

The developer was placed under provisional sequestration on 17 February 2016 and an order of final sequestration was granted on 9 March 2016.

Claiming refunds

The purchasers subsequently lodged their claims for a refund of the purchase price with the trustees of the insolvent developer's estate but only received concurrent dividends.

In October 2017, the purchasers instituted action proceedings against HGB, claiming a refund of the purchase prices which had been paid into HGB's trust account.

The purchasers' claims for reimbursement of the purchase prices were founded on the provisions of Section 6(4) of the HDSA, which they claimed entitles a purchaser in a scheme developed in terms of the HDSA to a refund of the purchase price held in a legal practitioner's trust account, where the developer of the scheme becomes insolvent.

The purchasers also pleaded that when the developer became insolvent:

- It had not met its obligation to furnish them with the relevant certificates;
- They cancelled their life rights agreements, as communicated in the letter dated 24 October 2014 from their attorneys, Biccari Bollo Mariano Incorporated; and
- They were not "bound" by the written authority to HGB to release the funds which each of them had signed.

HGB filed a special plea claiming that the purchasers' claims had prescribed because the purchasers instructed HGB to pay the purchase prices to the developer during June and July 2009 and HGB had immediately acted on the instructions but the summons were served on HGB on 4 October 2017, more than three years after the claimed debts had arisen.

Read: Understanding your residential retirement options

Judge Dambuza said of relevance in this appeal is the plea by HGB that Section 6(4) of the HDSA finds no application in this case because by the time the trust became insolvent they had paid to the developer all the moneys that had been entrusted to them by the purchasers and there were therefore no moneys "kept in trust", as specified in Section 6(4) of the HDSA.

High court conclusion 'inconsistent' with the law

However, Judge Dambuza said the high court's conclusion that the purchasers were HGB's trust creditors is inconsistent with the language of Section 6(3)(a) of the HDSA.

"Under that section, the purchase price is entrusted to the practitioner, 'to be kept for the benefit of the developer ...', she said.

Judge Dambuza said consequently it is the developer rather than the purchaser that is the practitioners' trust creditor.

She added that ordinarily, on sequestration of the developer, the purchase price funds would become part of the developer's insolvent estate and, had this not been the case, it would have been unnecessary to protect the purchasers from the creditors as provided for in Section 6(4) of the HDSA.

Dambuza referred to the high court separating three technical questions for prior determination as points of law in terms of the Uniform Rules of Court following a request by the parties.

She said the high court determined all three questions in favour of the purchasers and found that the argument made by HGB that the purchasers could not rely on Section 6(4) of the HDSA was inconsistent with the purpose of a section of the HDSA that was enacted to protect elderly persons against "possible exploitation or misfortune by a developer".

Judge Dambuza said the conclusion reached by the high court was also premised on a section of the Attorneys Act related to the regulation of attorneys' trust accounts and found that the purchasers were the trust creditors of HGB.

"Consequently, by releasing to the developer the entrusted moneys that were the equivalent of the purchase prices entrusted to it by purchasers, HGB had 'violated an entrustment under ... the HDSA'."

Judge Dambuza said the court held that Section 6(4) of the HDSA confers a statutory right of action on the purchasers to claim reimbursement of the purchase price in the circumstances.

Prescription

However, Judge Dambuza said in this case HGB filed a special plea of prescription that remains undetermined while the purchasers pleaded their cancellation of the life rights agreements and HGB further sought to repel the claim for repayment by relying on the authorisations to release the purchase price.

"It seems to me that the separated questions [on points of law] might be inextricably linked to these issues.

"Furthermore, the first question is framed in a complicated manner. Apart from this, the factual context and the legal framework within which the identified points of law arise in this case are complex, and have not received much consideration by our courts.

"It would have been more convenient to have all the issues fully ventilated in the same hearing.

"Nevertheless, we are constrained to considering the appeal on the issues determined by the high court," she said.

Judge Dambuza added that there are some guiding principles that were not ventilated in the high court in relation to the pleading in this case because of the manner in which the issues were dealt with in the high court, and it would be improper to decide this issue on appeal.

She said the decision of the high court on this issue must also be set aside and the issue must be properly considered together with the rest of the contested issues.

Judge Dambuza said the appeal is consequently upheld with costs, but referred the matter back to the high court for determination of the remaining issues.

TAGS: CAPE TOWN HDSA HOUSING DEVELOPMENT SCHEMES FOR RETIRED PERSONS ACT LIFE RIGHTS MUIZENBERG NATIONAL BUILDING REGULATIONS STANDARDS ACT NRBA RETIREMENT DEVELOPMENTS RETIREMENT VILLAGE ST LEGER RETIREMENT HOTEL

AUTHOR PROFILE

Roy Cokayne

COMMENTS
2

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Sort by: **Oldest first**

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jonny 3 days ago

Can someone explain this in simpler English please.

This is important for many who wish to move to a life rights retirement complex.

73

Vlad 3 days ago

I always wanted to know what happens with my money if I buy life rights from a company and that company eventually goes bankrupt.
This is the answer.
Don't buy life rights!

25 | 1

FA7

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SCA Ruling Raises Concerns For Life Rights Buyers In Retirement Housing

BI Barnard Inc.

MORE

In a significant recent judgment, the Supreme Court of Appeal (SCA) has cast doubt on the protections afforded to individuals...

South Africa Real Estate and Construction

AUTHORS

In a significant recent judgment, the Supreme Court of Appeal (SCA) has cast doubt on the protections afforded to individuals who purchase life rights in retirement developments. This ruling overturns a prior decision by the Western Cape High Court, highlighting potential risks for retirees in the event of a developer's insolvency.

The case arose from the St Leger Retirement Hotel in Muizenberg, Cape Town, where six retirees sought refunds from a legal firm, Herold Gie & Broadhead Inc. (HGB), after the developer went into liquidation. The High Court had found in favour of the retirees, asserting that they were entitled to a refund under Section 6(4) of the Housing Development Schemes for Retired Persons Act (HDSA). However, the SCA determined that by the time the developer was declared insolvent, HGB had already released the entrusted funds to the developer, thereby nullifying the retirees' claims for reimbursement.

Judge Nambiha Dambuza, delivering the SCA's judgment, emphasised that the language of the HDSA does not support the notion that the retirees could claim a refund from HGB as trust creditors. This judgment raises critical questions about the legal standing of life rights holders and their security in ownership.

Implications for Buyers of Life Rights

The recent SCA judgment introduces legal uncertainty regarding the security of life rights. Traditionally, life rights have been viewed as a real right, granting buyers a lifelong occupancy within a retirement development. However, this ruling challenges the notion that life rights holders enjoy the same protections as other property owners, particularly during financial distress or liquidation of the developer.

The judgment raises concerns over the legal priority of life rights holders in cases of developer insolvency. Unlike registered property owners, life rights holders may face eviction or a complete loss of their investment, which underscores the urgent need for clarification and possible reform in this area."

As this situation develops, it is crucial for clients and real estate agents to understand the nuances of life rights agreements and the potential implications of this ruling. Anyone considering a life rights purchase should seek legal advice to navigate these complexities and ensure their investment is secure.

The SCA's decision serves as a wake-up call for those involved in retirement housing. The uncertainties it introduces may necessitate legal reforms to restore confidence in life rights as a secure option for retirees. As the landscape evolves, ongoing dialogue and clarity will be essential in safeguarding the interests of life rights holders.

For further advice and insights regarding this judgment and its implications, clients and real estate agents are encouraged to contact the Property and Conveyancing Team at Barnard.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Authors

Conri Botha