IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 295/2024

In the matter between:

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

and

HEROLD GIE AND BROADHEAD INCORPORATED	Respondent

ARGUMENT FOR THE APPLICANTS

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THE PARTIES

1. The applicants are:

1.1. Richard Timothy Harris, as executor of the estate of the late Renee Parry-Davies ('Mrs Parry Davies'), who died on 18 June 2013;

1.2. Christopher Alexander Scaife and Stephen John Early, as executors of the estate of the late Phyllis Mary Early ('Mrs Early'), who died on 22 October 2022;

1.3. Oscar Walter and Alan Leonard Harvie Broadhurst, as executors of the estate of the late Lionel Walter ('Mr Walter'), who died on 26 August 2015;

1.4. Annelise Jansen van Rensburg-Hattingh, as executrix of the estate of the late Ingeborg Maria-Luise Arndt ('Mrs Arndt'), who died on 16 April 2017;

1.5. Clifford Owen Keet and Michele Ann Wallis, as executor and executrix respectively of the estate of the late Michael Bosman Keet ('Dr Keet'), who died on 5 August 2015;

1.6. Edgar Grondel ('Mr Grondel').

2. The respondent is Herold Gie and Broadhead Incorporated, 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').

PURPOSE OF APPLICATION

3. The applicants apply for leave to appeal against part of a judgment and order[1] of the Supreme Court of Appeal ('the SCA') per Dambuza JA (Nicholls & Mabindla-Boqwana JJA and Tolmay & Mbhele AJJA concurring), which was handed down on 13 September 2024 following argument on 3 May 2024, in Case 602/2023.

4. The judgment and order of the SCA upheld with costs an appeal by HGA against parts of a judgment and order[2] of Le Grange J, which was handed down on 27 February 2023 following argument on 22 November 2022, in six similar consolidated[3] actions in the Western Cape Division of the High Court ('the WCC').

[1] Record: Volume 3 pages 273-291.
[2] Record: Volume 3 pages 292-314.
[3] Record: Volume 1 page 1.

5. The said judgments and orders reflect Mrs Early as a plaintiff in the actions in the WCC and as the second respondent in the appeal to the SCA. She was a plaintiff in the actions, but died shortly before the argument before Le Grange J. The second and third applicants had not been formally appointed as executors of her estate by the time of the argument before Le Grange J, and as a result she remained cited as a plaintiff in the actions and was cited as the second respondent in the appeal.

6. The judgment and order of Le Grange J answered in favour of the plaintiffs in the six consolidated actions in the WCC, i.e. affirmatively, three questions separated for prior determination in terms of Rule 33(4)[4], and granted applications by them for leave to amend their respective particulars of claim[5].

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

   7.1. In each case, whether s 6(4) of 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 *'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'*.

   7.2. 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

[4] Record: Volume 1 pages 2-4.
[5] Record: Volume 2 pages 145-147 (Parry-Davies case).

'contract'.

7.3. 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.

8. 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[6]. HGA was granted such leave by Le Grange J[7], but in the event it only pursued appeals in respect of the first and third separated questions.

9. 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.

10. 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.

THE HDSA AND RELATED LEGISLATION

11. 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;

[6] Record: Volume 2 pages 177-184.
[7] Record: Volume 2 pages 185-190.

(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.'

12. 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')[8], s 5A of the Share Blocks Control Act 59 of 1980 ('the

[8] Record: Volume 3 page 315.

SBCA')[9] and s 7 of the Property Time-sharing Control Act 75 of 1983 ('the PTSCA')[10].

BACKGROUND TO THE WCC LITIGATION

13. 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').

14. 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')[11], 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').

15. Pursuant to the LRAs, 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.

16. 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.

17. 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

[9] Record: Volume 3 page 316.
[10] Record: Volume 3 page 317.
[11] Record: Volume 1 pages 14-48 (extracts from the Parry-Davies LRA).

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[12].

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

THE WCC LITIGATION

19. 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.

20. The pleadings in all six cases were similar. The current record contains the current Parry-Davies pleadings[13], prior versions of the Parry-Davies pleadings[14] and schedules reflecting differences between the Parry-Davies pleadings on the one hand and the Early[15], Walter[16], Arndt[17], Keet[18] and Grondel[19] pleadings respectively on the other.

21. In each 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).

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[12] Record: Volume 1 pages 64-69 (Parry-Davies letter).
[13] Record: Volume 1 page 5 - Volume 2 page 111 (including particulars of claim as amended on 19/05/23 at Volume 1 pages 8-13, plea as amended on 23/09/22 at Volume 1 pages 49-69 and replication as amended on 11/10/22 at Volume 1 pages 70-76).
[14] Record: Volume 2 pages 112-143 (original particulars of claim dated 29/09/17 at pages 112-117, original plea dated 26/10/17 at pages 118-123, original replication dated March 2018 at pages 124-128, first amended plea dated 06/09/18 at pages 129-138 and first amended replication dated 06/09/18 at pages 139-143).
[15] Record: Volume 2 pages 191-195.
[16] Record: Volume 2 pages 196-200.
[17] Record: Volume 2 pages 201-205.
[18] Record: Volume 2 pages 206-210.
[19] Record: Volume 3 pages 211-219.

22. In each case it was pleaded *inter alia* that to the knowledge of HGA the relevant payments mentioned in 15 above constituted payments contemplated in s 6(3)(a) of the HDSA[20] 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[21].

23. In response, while admitting that to its knowledge the relevant payments mentioned in 15 above constituted payments contemplated in s 6(3)(a) of the HDSA[22], HGA pleaded that over the period June 2009 to November 2011 it lawfully effected payments of those amounts from the HGA Trust Account, to or for the account of the SLT, by way of release of those funds to the SLT[23].

24. 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[24] 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 [emphasis supplied][25].

25. 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 HDSA, HGA pleaded in each case that 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[26].

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[20] Record: Volume 2 page 116 para 16 (Parry-Davies case).
[21] Record: Volume 2 page 115 para 15 (Parry-Davies case).
[22] Record: Volume 2 page 121 para 8 & page 136 para 8 (Parry-Davies case).
[23] Record: Volume 2 pages 120-121 para 7 & pages 134-136 para 7 (Parry-Davies case).
[24] Record: Volume 2 page 119 para 4 & page 133 para 4 (Parry-Davies case).
[25] Record: Volume 2 pages 120-121 para 7 & pages 134-136 para 7 (Parry-Davies case).
[26] Record: Volume 2 pages 120-121 para 7 & pages 134-136 para 7 read with Volume 1 pages 82-83 paras 3-4 & pages 90-91 paras 3-4 (Parry-Davies case).

26. 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[27].

27. Mr Grondel's authorisation (which he denied having given) was alleged to have been given orally[28]. The rest were alleged to have been given in writing (although in the case of Mr Walter the document in question purported to relate to only R178,000 of a total of R1,03 million paid by him into the HGA Trust Account)[29].

28. On the question of the alleged s 6(1)(a) certificates mentioned in 25 above, the plaintiffs replicated that, apart from the fact that 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[30].

29. As regards the alleged written authorisations mentioned in 27 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 it was denied was the case - the HDSA serving a public purpose, with the consequence that purported authorisations to disregard it are legally invalid[31]), they 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[32].

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[27] Record: Volume 2 pages 120-121 para 7 & pages 134-136 para 7 read with Volume 1 pages 83-85 paras 5-6 & pages 91-94 paras 5-6 (Parry-Davies case).
[28] Record: Volume 3 page 212 paras 5-6.
[29] Record: Volume 1 pages 60-63 (Parry-Davies), Volume 2 page 194 (Early), Volume 2 page 199 (Walter), Volume 2 page 204 (Arndt) & 209 (Keet) (all provided as annexures to HGA's second amended pleas).
[30] Record: Volume 2 pages 125-126 para 2 & pages 140-141 para 2 (Parry-Davies case) read with Volume 1 page. 76 (Parry-Davies case) and Volume 2 page 153 (Early, Walter, Arndt, Keet and Grondel cases),
[31] Compare *ABSA Insurance Brokers (Pty) Ltd v Luttig & Another NNO* 1997 (4) SA 229 (SCA) 238F-241F,
[32] Record: Volume 2 pages 126-127 para 3 & pages 141-142 para 3 (Parry-Davies case).

30. 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 alleged in 23 above there had since the time of such payments been no funds kept in its trust account as contemplated in the section[33].

31. 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 of the purchasers as it had until then pleaded it had done[34] and to introduce allegations that the LRAs had all been cancelled by the time of the provisional sequestration of the estate of the SLT[35].

32. HGA's second amended pleas retained the alleged justifications aforesaid for the payments alleged in 23 above. However, HGA subsequently conceded that the alleged s 6(1)(a) certificates aforesaid did not in any instance meet the requirements for a s 6(1)(a) certificate, which concession was formalised on 21 November 2022[36].

33. These developments gave rise to formulation of the three questions set out in 7 above and 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 request he acceded.

REQUIREMENTS FOR LEAVE TO APPEAL TO THIS COURT

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

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

[33] Record: Volume 1 page 55 paras 5A-5B (Parry-Davies case).
[34] Record: Volume 1 pages 53-54 para 3A (Parry-Davies case).
[35] Record: Volume 1 page 55 para 5C (Parry-Davies case).
[36] Record: Volume 2 page 174 para 1.

constitutional matters.

35. It is submitted that the proposed appeal by the applicants engages the jurisdiction of this Court under s 167(3)(b)(i) of the Constitution in that it raises a constitutional matter which ought to be considered by this Court.

36. This matter concerns the interpretation of s 6(4) of the HDSA in the context of the HDSA as a whole and s 6 of the HDSA in particular

37. As mentioned below[37], the HDSA has been held to constitute *'social'* or *'consumer protection'* legislation, its object being protect elderly or retired persons investing their savings in housing development schemes from possible exploitation by developers.

38. As such, it is submitted that the interpretation thereof implicates at least the right to equality provided for in s 9 of the Constitution (as, for example, the interpretation of the National Credit Act 34 of 2005 has been held to do[38]).

39. Also implicated, it is submitted, is the right to housing provided for in s 26 of the Constitution, inasmuch as an *'entrustment'* under s 6(3)(a) of the HDSA will often constitute a substantial part of the savings of a retiree, the loss of which compromises his / her ability to access suitable housing.

40. Also implicated, it is submitted, is the right to healthcare and social security provided for in s 27 of the Constitution, inasmuch as loss of an *'entrustment'* under s 6(3)(a) of the HDSA will often compromise the ability of the retiree to access amenities such as health care, including frail care, which are common features of retirement developments, and

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[37] Para 76 below.

[38] *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]*.

involve loss of the proceeds of pension benefits, which will often have been utilised for the purpose of effecting the *'entrustment'*.

41. In terms of s 39(2) of the Constitution, the HDSA must be interpreted to promote the *'spirit, purport and objects of the Bill of Rights'*.

42. In this instance, the SCA's interpretation of s 6(4) diminishes the protection intended for a vulnerable class of people, namely retirees. It increases the risk that they will lose their savings and access to housing and healthcare. It passes a risk that should be borne by developers to the very people the HDSA is meant to protect.

43. By contrast, the applicants' interpretation, upheld by Le Grange J, provides better protection for vulnerable retirees. It does so by fully protecting their '*entrustments*' up until compliance with the provisions of s 6(1), reducing the risk that they will lose their savings, including proceeds of pension benefits, and access to housing and healthcare.

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

45. This Court should, it is submitted, prefer an interpretation of the HDSA that advances the clear objective of the HDSA to provide protection for vulnerable retirees and that promotes their constitutional rights over that of the SCA which has the opposite effect.

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

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

47. It is submitted that this Court's jurisdiction is also 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.

48. 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*[39]. Reference is made in particular to paragraphs [16] to [30] thereof.

49. In the tax context, these aspects were also considered in *Big G Restaurants (Pty) Ltd v Commissioner for the South African Revenue Service*[40]and *Clicks Retailers (Pty) Ltd v Commissioner for South African Revenue Service*[41].

Arguable Point of Law

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

51. 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.

52. As set out in *Big G*[42] and *Clicks*,[43] a question relating to the interpretation of a statute is quintessentially a question of law.

53. The fact that Le Grange J and before him the court in '*Cierenberg*'[44] on the one hand and the SCA on the other reached opposing conclusions thereon means, it is submitted, that the point of law is plainly arguable.

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[39] 2015 (3) SA 479 (CC).
[40] 2020 (6) SA 1 (CC).
[41] 2021 (4) SA 390 (CC).
[42] Paragraph [11].
[43] Paragraph [24].
[44] Discussed in paras 87-96 below.

54. It is submitted further that in any event the point of law is arguable for the reasons set out below as to why the appeal by HGA to the SCA on the first separated question should have failed, which reasons it is submitted are cogent.

General Public Importance

55. The point of law in question is, it is submitted, of significant public importance.

56. In his judgment granting HGA leave to appeal to the SCA, Le Grange J said that his judgement clearly involved a question of law of importance that warranted the attention of the SCA[45].

57. And 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[46].

58. Moreover, 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 of the HDSA is modelled as aforesaid.

59. 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.

60. An indication of the public importance of the point is that the SCA judgment immediately evoked public comment[47].

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[45] Record: Volume 2 pages 187-188 para 6.
[46] Record: Volume 2 page 182 para 20.
[47] Record: Volume 4 pages 318-324.

61. 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.

62. 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 is likely to facilitate the raising of finance for the relevant development.

63. If the effect of the SCA judgment is to inhibit purchasers from providing such *'entrustments'*, as 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.

64. 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 is likely to be costly and may involve providing security for the guarantees, which may be impractical.

65. On behalf of HGA it is now asserted that the interpretation of s 6(4) is not in fact of public importance, because the interpretation of s 6(4) (and the corresponding provisions of the ALA, the SBCA and the PTSCA) has allegedly arisen only once before, i.e. in *Cierenberg*, in the more than 40 years since the promulgation of the ALA[48].

66. The fact that there may not have been any other reported case on the point in question does not, of course, mean that the situation has not otherwise arisen. More likely, it is submitted, is that it has arisen and s 6(4) (or the corresponding provision of the ALA, the

[48] Record: Volume 4 page 356 para 97.

SBCA or the PTSCA) has been taken self-evidently to provide a remedy.

Interests of Justice

67. 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, it is submitted that it would be in the interests of justice for this Court to assume jurisdiction.

68. Moreover, the issue is one that primarily affects vulnerable retired persons. As previously 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 suitable housing and healthcare. By contrast, the applicants' interpretation, upheld by Le Grange J, would decrease their risk and promote the enjoyment of their constitutional rights.

69. With regard to the prospects of success, which is a factor in the '*interests of justice'* enquiry, the applicants' arguments on the first separated question are set out below. Those arguments prevailed before Le Grange J and it is submitted that they have a more than reasonable prospect of success on appeal to this Court.

SUBMISSIONS ON THE FIRST SEPARATED QUESTION

70. What follows in this section corresponds substantially with the argument advanced to the SCA on the first separated question on behalf of the applicants.

Attorneys' Trust Accounts

71. 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*[49], as follows:

[49] 1979 (1) SA 747 (N) 749C-E.

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

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

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

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

71.5. 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.

72. The above principles were approved on appeal by a full court in *Geyser NO v Fuhri*[50], and by the SCA in *Wypkema v Lubbe*[51].

73. In *S v Gathercole*[52] 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

74. The imperative to interpret statutes purposively was emphasised by this Court in *Cool Ideas 1186 CC v Hubbard & Another*[53].

75. According to *Silberberg and Schoeman's The Law of Property*[54], the HDSA was designed and introduced to provide protection for a particularly vulnerable group of investors in

[50] 1980 (1) SA 598 (N) 600A & 602B.
[51] 2007 (5) SA 138 (SCA) paras 4-7.
[52] 1964 (1) SA 21 (AD) 25E.
[53] 2014 (4) SA 474 (CC) paras 27-37.
[54] Sixth Edition, pages 602-603 para 20.7.1.

property, namely retired persons, its main object being to regulate the alienation of housing interests in schemes that qualify for protection under its provisions.

76. In *Eden Village (Meadowbrook) (Pty) Ltd v Edwards*[55], the then Appellate Division stated that the HDSA 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.

77. In *Flower Foundation Pretoria Homes for the Aged NPC v Registrar of Deeds, Pretoria & Others*[56] 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.

78. It is submitted 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

79. 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.

80. 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

[55] 1995 (4) SA 31 (AD) 44A-B.
[56] 2022 (6) SA 99 (SCA) paras 15-17.

any purchaser to make any payment to or for the account of SLT from the proceeds of any 6(3)(a) *'entrustment'*.

81. 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, as sought to be done in argument for HGA.

82. 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.

83. That, according to argument for HGA, was by reason of the language used in s 6(4), and because the purpose of s 6(4) was simply 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.

84. 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, as argued for HGA. It implied only unlawful payments by the practitioner from his trust account of amounts equivalent to such proceeds purporting thereby to pay them away.

85. Whether any such payment in fact constitutes payment away by the practitioner of the actual proceeds in question (as argued for HGA) or merely the creation by the practitioner of a shortage in his trust account which he is obliged to make good (as argued for the applicants and held by Le Grange J) was and remains disputed.

86. For the applicants it was and is again submitted 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'*.

Cierenberg

87. In *Cierenberg en Andere v Rorich, Wolmarans & Luderitz; Van Wyk en Andere v Lamprecht en 'n Ander*[57] (*'Cierenberg'*), retired persons had purchased housing interests in a housing 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.

88. 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).

89. 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[58].

90. 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[59].

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[57] 2003 (1) SA 40 (TPA).
[58] At 44I-46I read with 47E-F.
[59] At 46I-50F.

91. 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 commentary that s 6(4) does not provide a statutory remedy in circumstances such as those that pertained in *Cierenberg*.

92. It also does not appear to have been suggested in any judgment or 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'*.

93. An attempt has been made in argument for HGA to impugn the judgment in *Cierenberg* by contending that the practitioners there were regarded as stakeholders whereas on the authority of *Baker v Probert*[60] (*'Baker'*) they should have been regarded as agents for the developer in holding the proceeds of the relevant s 6(3)(a) *'entrustments'*.

94. 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.

95. 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

[60] 1985 (3) SA 429 (AD).

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.

96. 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 it is submitted that there is no reason to suppose that such finding would, or should, have been any different had the practitioners there been characterised as agents for the developer.

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

97. As to the contention referred to in 93 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, it is submitted that this is not the case.

98. In the first instance, it is submitted 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[61] was a far cry from the provisions of s 6(3)(a), is no bar to such characterisation.

99. However, if such a practitioner is not in effect a stakeholder, it is submitted 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).

100. The wording of s 6(3)(a), it is submitted, points to an intention on the part of the legislature that when funds are *'entrusted'* by a purchaser to a practitioner thereunder

[61] At 437D-E.

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).

101. 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).

102. 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.

103. It is entirely consonant with such purpose, it is submitted, 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).

104. The reference in s 6(3)(a) to funds to which it relates being kept *'for the benefit of the developer'* means no more, it is submitted, 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.

105. Thus *Van Rensburg & Treisman: The Practitioner's Guide to the Alienation of Land Act*[62] state, regarding the similarly-worded s 26(3)(a) of the ALA [emphases supplied];

'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

[62] Second Edition, page 89 para 2 2 3 (a)(ii).

practitioner or estate agent must pay the money out to the alienator when the conditions laid down in section 26(1) have been fulfilled.'

106. *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).

107. Mention has already been made of the fact that until the most recent amendments thereof in September 2022, the pleas by HGA in the actions in the WCC uniformly referred to funds paid into the HGA Trust Account as being held in trust by HGA for the purchaser concerned.

108. Moreover, it is 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[63], that HGA saw itself as agent for Mr Grondel in holding the amounts in question.

109. 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.

[63] Record: Volume 3 pages 214-218.

Purpose of s 6(4)

110. As to the purpose of s 6(4), it is submitted that it is not simply 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).

111. 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[64].

112. The true purpose of s 6(4), it is submitted, 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).

113. 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, it is submitted, in the fact that s 6(4) applies equally as regards payment under an institutional guarantee under s 6(3)(b).

114. Had the purpose of s 6(4) been simply 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 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.

115. 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

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

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.

116. Treating the purpose of s 6(4) as being simply exclusion of the proceeds of a s 6(3)(a) *'entrustment'* from the estate of an insolvent attributes to the legislature the intention to create an unnecessary 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.

117. 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).

118. It is submitted 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.

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

120. 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 it is submitted 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)

121. 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'*.

122. 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, it is submitted that there is no warrant for such a narrow interpretation of s 6(4).

123. Indeed, it is submitted 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.

124. The word *'kept'* can refer to past or present[65]. 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.

125. It is submitted 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 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.

[65] The New Shorter Oxford English Dictionary.

126. 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*[66] state regarding the similarly-worded s 26(4) of the ALA [emphasis supplied]:

> *'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; 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.'*

127. The reference in s 6(4) to *'any amount kept in the trust account in terms of paragraph (a) of subsection (3)'* could not, it is submitted, 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.

128. It could never have been the intention of the legislature, it is submitted, to exempt from the operation 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.

129. 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 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).

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[66] Second Edition, page 90 para 2 2 4 (a)(ii).

130. S 6(4) applies, it is submitted, 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.

131. The reference in s 6(4) to *'an amount kept in a trust account in terms of paragraph (a) of subsection (3)'* is, it is submitted, a reference to the full proceeds 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

132. It is submitted, 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.

133. 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).

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

135. 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.

136. 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.

137. 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

138. It has already been 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).

139. 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.

140. 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).

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

142. 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.

143. 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.

144. In the course of his judgment, Botha JA said the following [emphases supplied][67]:

> *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 ….'*

145. 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.

146. It is submitted 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 (if the developer were to be regarded as having been the trust creditor originally).

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[67] At 441H-I.

147. The fact that in such a case the practitioner may wrongfully have disposed of the funds in question or have purported to do so does not, it is submitted, serve to defeat the rights then accruing to the purchaser, including under s 6(4), in respect of such funds which should still have been in the trust account of the practitioner.

148. For the avoidance of misunderstanding, nothing herein should be taken to imply that if the developer is at any time the trust creditor of the practitioner in respect of a s 6(3)(a) *'entrustment'* that is determinative of interpretation of s 6(4) in the manner in which it was interpreted by the SCA.

149. It is submitted that the interpretation of s 6(4) contended for on behalf of the applicants, which was upheld by le Grange J following *'Cierenberg'*, should prevail irrespective of whether the developer is at any time the trust creditor of the practitioner in respect of a s 6(3)(a) *'entrustment'*.

Conclusion

150. For these reasons, which were advanced on behalf of the applicants before the SCA, it is submitted that the first separated question fell properly to be answered in favour of the plaintiffs in the WCC actions, as Le Grange J did, 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

151. The interpretation of s 6(4) is dealt with in paragraphs [20]-[30][68], but essentially only paragraphs [27], [29] & [30], of the SCA judgment.

[68] Record: Volume 3 pages 283-287.

152. Paragraph [27] holds that the repayment provision in s 6(4) exists to protect 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'*.

153. Paragraph [29] holds 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,

154. Paragraph [30] holds 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),

155. Paragraph [30] holds further 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).

156. That 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 in favour of the applicants as Le Grange J did.

157. 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.

158. They 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.

159. They 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.

160. 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'*.

161. The findings of the SCA on the first separated question were reached without any engagement with the contentions advanced before it on behalf of the applicants, as set out in the previous section hereof, *inter alia* the following:

    161.1. 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.

    161.2. 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).

161.3. 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).

161.4. Alternatively, the purchaser becomes 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).

161.5. 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.

161.6. 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).

161.7. 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.

161.8. 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 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).

161.9. 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.

161.10. 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.

161.11. 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.

162. It is submitted that the contentions and the reasons therefor advanced to the SCA on behalf of the applicants, as set out in the previous section hereof, were cogent and should have led to failure of the appeal by HGA on the first separated question.

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

164. What has been and is again 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).

165. 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.

166. The intention of the legislature, it is submitted, was 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.

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

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

169. It is submitted 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'*.

170. The SCA judgment overrules ***Cierenberg***, which it considers not to have undertaken a deliberate interpretative exercise of s 6(4) of the HDSA, and holds that the meaning and purpose attributed by it to s 6(4) within the context of s 6 is clear.

171. It is submitted that the court in ***Cierenberg***, in holding it to be clear that in the circumstances there prevailing s 6(4) provided a statutory cause of action[69], did in fact undertake a deliberative interpretative exercise of s 6(4).

172. As previously mentioned, the senior counsel for the *'practitioners'* in ***Cierenberg***, appears to have relied on other grounds for resisting the merits of the claims against them,

[69] At 47E-F.

which suggests that he read s 6(4) in the same way as the court there did.

173. As also previously mentioned, there does not appear to have been any academic criticism of the finding in *Cierenberg* on the merits of the claims under s 6(4), which suggests that the reading of s 6(4) by the court there was a natural one.

174. Moreover, HGA and its counsel did not contend for the interpretation espoused by the SCA until nearly five years into the litigation in the WCC, so presumably they also read s 6(4) in the same way.

175. Le Grange J, in arriving at his decision on the first separated question, cited *Cierenberg* 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.

176. It is respectfully submitted 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.

CONCLUSION

177. In the premises, it is respectfully submitted that the applicants have made out a proper case to satisfy the requirements the grant leave to appeal to this Court on the basis that:

177.1. The matter engages the jurisdiction of this Court; and

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

178. It submitted further that if leave to appeal is granted the appeal should be upheld.

179. The Court is therefore respectfully requested to grant the application for leave to appeal and, having done that, to uphold that the appeal, with costs.

180. In that event, the Court is respectfully requested to vary the judgment and order of the SCA to provide for dismissal of the appeal by HGA on the first separated question and for HGA pay the costs of the applicants in connection with its appeal to the SCA.

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