CANCELLING AN INSTALMENT SALE OF LAND

Merry Hill (Pty) Ltd v Engelbrecht 2008 2 SA 544 (SCA)
Van Niekerk v Favel 2008 3 SA 175 (SCA)

1 Introduction

Chapter II of the Alienation of Land Act 68 of 1981 ("the Act") governs instalment sales of land (as defined in the Act) where the purchase price is payable in more than two instalments over a period longer than 12 months. The Act affords the purchaser special protection, given the risks arising from instalment sale transactions. Perhaps the biggest risk is that the owner of the land may be sequestrated prior to transfer of the property to the purchaser, after the latter has paid the owner a portion of the purchase price by way of a deposit and/or instalments. At common law this would leave the purchaser with no more than a concurrent claim for damages against the insolvent estate, should the trustee decide to abandon the sale: *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corp Ltd* (1981 1 SA 171 (A)). Special provision is therefore made in the Act to safeguard the purchaser's interests in the event of the owner's insolvency. But there are also a number of other equally serious risks, including the unexpected implementation of a payment acceleration clause, cancellation of the agreement or a claim for damages, all of which could, depending on the wording of the agreement, be triggered by an isolated (even unknown) breach of contract on the part of the purchaser. Section 19 is aimed at curtailing this risk. Subsections (1) and (2) read as follows:

> "(1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled –
>
> (a) to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulated in the contract;
>
> (b) to terminate the contract; or
>
> (c) to institute an action for damages, unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.
>
> (2) A notice referred to in ss (1) shall be handed to the purchaser or shall be sent to him by registered post to his address referred to in s 23 and shall contain –
>
> (a) a description of the purchaser's alleged breach of contract;

(b) a demand that the purchaser rectify the alleged breach within a stated period, which, subject to the provisions of ss (3), shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post, as the case may be; and

(c) an indication of the steps the seller intends to take if the alleged breach of contract is not rectified."

The Afrikaans version of subsection (2)(c) reads:

"'n aanduiding van die stappe wat die verkoper voornemens is om te doen indien die beweerde kontrakbreuk nie herstel word nie".

Subsection (2)(c) has received the attention of the courts on a number of occasions, two of the key questions being (a) whether the clause is decisive or merely directory, and (b) whether a seller can indicate alternative remedies if the alleged breach is not rectified. Property practitioners will be relieved to know that these two issues have now been finally resolved by the Supreme Court of Appeal in *Merry Hill (Pty) Ltd v Engelbrecht* (2008 2 SA 544 (SCA)). At the same time practitioners should take note of another aspect relating to section 19(2)(c) that was decided in *Merry Hill,* namely that literal compliance with the wording of the section is not required; substantial compliance is sufficient. The court did not elaborate, other than to decide that the seller's notice did comply substantially with section 19(2)(c) even though the notice merely stated what the seller was *entitled to do* as opposed to indicating what the seller *actually intended to do* if the purchaser's breach was not rectified. What constitutes substantial compliance is clearly a factual question to be decided having regard to the facts and circumstances of each individual case. However, the dividing line between substantial compliance and no compliance may not always be easy to define, a point well illustrated by the SCA's decision in *Van Niekerk v Favel* (2008 3 SA 175 (SCA)), a case that followed shortly after *Merry Hill.* The SCA, reversing the judgment of the High Court, did not spell out what *would* constitute substantial compliance with section 19(2)(c) – for the purposes of the judgment it was unnecessary to do so – but left no doubt as to what type of notice would *not at all* constitute compliance with the section, substantial or otherwise.

The two SCA judgments deserve closer analysis. With respect, although certain issues relating to section 19(2)(c) were clarified, some uncertainties still remain. New questions have also arisen. These are:

(a) Must the notice itself contain an indication of the steps the seller intends taking, or can it simply refer to the relevant clause in the sale agreement stipulating the seller's remedies on breach of contract by the buyer?

(b) Can a seller mention one particular remedy in the notice and then later change his mind, or will he be bound to that remedy in terms of the doctrine of election?

(c) Can a seller state the four remedies referred to in section 19(1) and *in addition* refer to his other contractual remedies, such as a claim for specific performance?

To place the decisions in perspective it is useful to refer briefly to earlier cases concerning the interpretation of section 19(2)(c), illustrating the opposing views regarding the section's true meaning. This is dealt with next.

2 Early cases

The first reported judgment is that of Grosskopf J in *Oakley v Bestconstructo (Pty) Ltd* (1983 4 SA 312 (T)). The purchaser had complied with the instalment obligations in terms of the sale agreement, but had failed to settle the outstanding balance of the purchase price within 24 months of entering into the agreement, as the agreement required. He attempted to arrange bond finance, but before this could be finalized he received the following notice from the seller's attorney:

> "We have been instructed by our client, Bestconstructo (Pty) Ltd, to advise you as we hereby do, that unless we receive your payment of balance of the purchase price still due to our client within 30 days from date hereof, our client will in its sole and absolute discretion act against you in terms of para 9 of the Deed of Sale entered into with you on 14 January 1981 in respect of the above-mentioned property."

Paragraph 9 of the sale agreement set out a variety of steps that could be taken by the seller in the event of the purchaser's breach of contract.

On 8 March 1983 the purchaser was advised in writing that the seller had cancelled the contract. The purchaser thereupon sought an order declaring the cancellation invalid. The court found in his favour, *inter alia* on the grounds that the requirements of section 19(2)(c) had not been met. According to the court the seller's notice did not contain an indication of the steps that the seller intended to take in the event of the purchaser not remedying his breach. The notice merely referred to certain provisions in the contract which stipulated a number of steps to be taken by the seller in this regard, including the right to recover costs on the attorney and client scale. The court concluded that even if the provisions of the contract may legally be incorporated into a section 19(1) notice (which the court in any event doubted) then the notice still did not contain any meaningful indication of the steps which the seller intended to take. In arriving at its decision the court pointed out that section 19(2) in its entirety was peremptory. It nevertheless cautioned that one should guard against placing a heavier load on the shoulders of the seller than what the legislature actually had intended. Section 19 must therefore be interpreted strictly.

Miller v Hall (1984 1 SA 355 (D)) followed shortly after the *Oakley* matter. The applicant (purchaser) had purchased certain immovable property from the respondent (seller). In terms of the written deed of sale the purchaser had to pay an initial deposit and the balance of the purchase price in monthly instalments. However, he failed to pay two of the instalments, whereupon the seller sent him a letter of demand giving him 30 days' notice within which to remedy the breach. The letter stated that "as to the consequences

attached to your non-compliance with the terms of the notice, your attention is drawn to the relevant clause in the agreement of sale".

Despite the demand the purchaser failed to pay one of the instalments due. The seller consequently sent a further letter to the purchaser, purporting to cancel the sale. The purchaser refused to accept the cancellation and approached the court for an order declaring the sale agreement to be of full force and effect. His main argument was that the letter of demand did not comply with the requirements of section 19(2)(c) inasmuch as it did not indicate the steps which the seller intended to take if the purchaser failed to comply with the demand. The seller argued that the words "relevant clause in the agreement" as used in the letter of demand was a reference to clause 9 in the deed of sale which set out the steps available to the seller in the event of the purchaser's breach. These steps corresponded substantially with the steps stipulated in section 19(1). Accordingly, so the argument went, the letter did in fact indicate to the purchaser that if he failed to remedy his breach the seller intended to take any of the steps mentioned in section 19(1).

The court (Page J) rejected the seller's argument and held that the letter was defective, even if it could be construed as a reference to clause 9 in the deed of sale. All that the letter did was to draw the purchaser's attention to the relevant clause in the sale agreement specifying the seller's remedies. It did not contain any indication that the seller *intended to enforce* any of those remedies, either singularly or in the alternative. The letter did not expressly convey such an intention, nor did the terms imply such intention. In the circumstances the letter of demand did not comply with requirements of section 19(2)(c). Since the provisions of the section were peremptory, it followed that the purported cancellation of the sale agreement was of no force or effect.

Page J then proceeded to state that he was in any event of the view that the seller's interpretation of section 19(2)(c) was incorrect. The learned judge accepted the purchaser's argument that the purpose underlying the subsection would be defeated by a recital in the alternative of all the possible steps which the seller might elect to take at some future date. According to the judge section 19(2)(c) was designed to enable a defaulting purchaser "realistically to appraise the consequences of the various courses open to him" and that he would be able to do so "more effectively if he knows *precisely* what consequences will ensue if he persists in his breach" (362D) (my own italics). Page J rejected the seller's argument that such an approach would impose on the seller a duty to make a *final election* concerning which remedy he would utilize, before sending out the section 19(1) notice. The learned judge pointed out that section 19(2)(c) only requires an indication of the seller's intention to elect a particular course of action. The word "intend" in the subsection is "clearly defined by the context as meaning which of the steps available to him the seller proposes to take" 364H). If the seller eventually decides not to carry out the expressed intention, but wishes to take any of the other steps mentioned in section

19(1), he simply has to give a fresh notice. Page J described the requirements of section 19(2)(c) as follows (363E):

> "In my view, this argument of the respondent is based upon a false premise: viz that compliance with the requirements of ss (2)(c) necessarily involves an immediate election. What the subsection requires is an indication of the seller's intention to elect a particular course. That intention may be expressed in such a way as to manifest and convey not merely the seller's state of mind but also simultaneously the overt F act of actually making the election. (Cf *Kahn v Raatz* 1976 (4) SA 543 (A) at 548.) This was the interpretation placed (rightly or wrongly) on the notice in *Walker v Minier et Cie (Pty) Ltd* (1979 (2) SA 474 (W)). *It is, however, equally possible to express no more than an intention to make a specified overt act of election in the future: which is, in my view, all that the subsection requires."* (my own italics)

Referring to the fact that section 19(2)(c) uses the word "steps" (plural) and not "step" (singular) Page J said the following:

> "Some significance was sought to be attached to the use of the plural 'steps' and not 'step'. It was contended that this showed that it was permissible to indicate an intention to take all the steps enumerated in ss (1), albeit in the alternative. In my view the use of the plural does not justify this conclusion, since each of the courses enumerated in ss (1) could comprise more than one step."

2 1 Summary

It is useful to briefly summarise the law as it stood after the two judgments discussed above:

(a) A section 19(1) notice cannot simply refer to a clause in a sale agreement listing a variety of remedies available to the seller on the purchaser's breach, leaving it to the purchaser to guess which of those remedies the seller intends taking. The specific remedies need to be specified in the notice. It is doubtful whether the remedies may be incorporated by reference: *Oakley v Bestconstructo (Pty) Ltd.*

(b) A section 19(1) notice must specifically indicate which particular remedy referred to in the section will be pursued by the seller. The remedies cannot be stipulated in the alternative: *Miller v Hall.* However, the seller may change his mind later and choose another remedy; if the latter remedy is one of the remedies mentioned in section 19(1) a fresh notice meeting the requirements of section 19 is required: *ibid.*

(c) A section 19(1) notice cannot simply mention the seller's remedy without giving an indication that the seller *actually intends enforcing* the remedy: *Miller v Hall.*

(d) Section 19(2)(c) is peremptory: *Oakley v Bestconstructo (Pty) Ltd; Miller v Hall.*

3 *Van Niekerk v Favel*: High Court judgment

Some 22 years elapsed before section 19(2)(c) was again the subject-matter of a reported High Court judgment. Again there were two cases, in quick

succession. The first – *Engelbrecht v Merry Hill (Pty) Ltd* (2006 3 SA 283 (E)) – will be discussed later. The second was *Van Niekerk v Favel* (2006 4 SA 548 (W)), which concerned an application for the eviction of a purchaser who had bought a property in terms of an instalment sale agreement governed by chapter II of the Act. F (the seller) had sent the purchaser (V) a registered letter dated 18 January 2005 stating that the purchaser was in arrears with payments. The letter recorded that in terms of clause 26 of the sale agreement the purchaser was given 30 days from the date of receipt of the notice to rectify the breach, failing which the seller "sy keuse sal uitoefen wat hy regtens mag hê" ("exercise the election which he may have in law"). Clause 26 of the contract listed the remedies mentioned in section 19(1), but furthermore stated that the seller may take *any other step which he may legally take* ("enige ander stappe neem wat hy regtens mag neem").

The purchaser failed to respond whereupon the seller sent another registered letter dated 22 February 2005 notifying the purchaser that the contract had been cancelled. A demand was made that the property be vacated on or before 31 March 2005.

The purchaser failed to vacate and the eviction proceedings followed. Three arguments were raised in defence, one of them being that the letter of 18 January 2005 did not comply with section 19(2)(c) of the Act as it contained no indication of the steps which the seller intended to take if the alleged breach of contract was not rectified. Accordingly, the sale had not been validly cancelled and the eviction could not proceed.

A magistrate's court granted the eviction order, and an appeal to the High Court was unsuccessful. Referring to section 19(2)(c) Claassen J held that the decision in *Miller v Hall* was wrong in that the section was merely directory, not peremptory. The learned judge pointed out various differences between the wording of section 19 of the Act and its precursor, section 13(1) of the Sale of Land in Instalments Act 72 of 1971, and arrived at the conclusion that "a measure of leniency towards the seller is noticeable" (566C). Accordingly, an interpretation of section 19(2)(c) which amounts to "an over-protectiveness" in favour of the purchaser would fall foul of this "changed attitude" on the part of the legislature. According to Claassen J the section evidenced an intention on the part of the legislature that a seller need not be specific, but can indicate an intention of taking any of several alternative remedies:

> "In my view, if the Legislature intended to restrict the contents of the letter of demand to specifics, it could easily have done so by using stronger language, alternatively, demanded an express election of the remedies mentioned in section 19(1) to be stated categorically in the letter. This it did not do. In my view, the statutory requirement to give an 'indication' of the seller's future conduct, must be given a broad interpretation, more in line with the meaning of a 'hint' or 'suggestion' ... In my view, the Legislature intended to oblige the seller merely to inform the purchaser that he has *elected to act* upon any failure by the purchaser to rectify the breach. He is in effect saying to the purchaser: 'I have elected not to abide your breach any longer. Should you fail to remedy it, I will take steps against you. So beware!' In my view, the Legislature requires a seller to warn the purchaser, not only that he is in default, but that his continued default could lead to the seller taking certain steps." (568B)

The judge continued as follows:

> "It must have been within the contemplation of the Legislature that purchasers of immovable property in residential areas are sufficiently commercially sophisticated to read and understand written contracts of sale. This intention of the Legislature is manifest from the provisions of section 5 of the Act which allow a purchaser to choose the official language in which the contract is to be drawn up. It must have been contemplated by the Legislature that a defaulting purchaser will understand the clauses dealing with the consequences of any breach as he could read (them) in the language of his choice! A similar supposition underpins the legislative requirement for letters of demand to be sent to defaulting purchasers. In order for the protection to purchasers contemplated in section 19 to become effective, the Legislature assumed that a purchaser is able to and will read and understand letters of demand."

Pointing out that it was not the intention of the legislature to spoon-feed a purchaser with regard to the consequences of his breach of contract, Claassen J disagreed with Page J's view in *Miller v Hall* namely that s 19(2)(c) was designed to enable a defaulting purchaser "realistically to appraise the consequences of the various courses open to him". In this respect the learned judge expressed himself as follows (569E):

> "It is not for the seller to make it easy for the purchaser to decide whether the latter could get away with his breach or not. If the purchaser is in breach, he should remedy it! *Pacta servanda sunt* – contracts are to be observed. A purchaser is presumed to know the law. This doctrine still holds good of a person who, in a modern state, wherein many facets of the acts and omissions of legal subjects are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere."

On the facts the court held that the seller's letter of demand complied with the legislature's intention to place the purchaser on guard as to the seller's serious intention of exercising one or more of the remedies available to him. According to Claassen J, even if he was wrong in his view that section 19(2)(c) was not peremptory, substantial compliance with the goal of the enactment would still be sufficient. On this approach the learned judge held that the seller's letter of demand met the objectives of section 19(2)(c) "by indicating to the purchaser that the seller intended to take one or more of the steps mentioned in clause 26 of the contract, *and was not intending to claim specific performance*" (571H–I) (my own italics).

With respect, Claassen J may have overlooked the fact that section 26 of the contract referred to an array of remedies not mentioned in section 19(1), namely *any* other remedy which the seller may have in law pursuant to the purchaser's breach of contract. Specific performance is one of those remedies, and it begs the question how the purchaser would have known on receipt of the notice that the seller did not intend claiming specific performance. But that apart, what difference would it have made if the letter of demand also contained an indication that the seller was contemplating specific performance? Section 19(4) states expressly that section 19(1) is not to be construed so as to prevent the seller, after sending the section 19(1) notice, from claiming specific performance. Why should the purchaser complain if the seller's notice, in addition to mentioning the s 19(1) remedies,

also refer to the seller's right – reserved by section 19(4) – to claim specific performance?

Van Niekerk did not end there. An appeal to the SCA followed, but more about that later. It is convenient to first turn to *Engelbrecht v Merry Hill (Pty) Ltd* (2006 3 SA 238 (E), a case that preceded the *Van Niekerk* appeal.

4 *Engelbrecht v Merry Hill (Pty) Ltd*: High Court Judgment

The facts in *Merry Hill* were straightforward. M (first respondent) had sold two erven to E (the applicant) in terms of an instalment sale agreement governed by Chapter II of the Alienation of Land Act. Clause 9 of the agreement recorded that if the purchaser failed to fulfil any of his obligations under the agreement the seller could either (i) claim immediate payment of the balance of the purchase price (together with interest and other charges due by the purchaser, including the seller's legal costs and collection commission), or (ii) cancel the contract and claim payment of all arrear instalments.

E had paid some of the instalments due, but later fell into arrears. On 8 August 2005 M's attorney addressed a letter to E which read as follows:

> "In accordance with clause 9.1 of the deed of sale we have been instructed by the seller to demand from you, as we hereby do, payment in the sum of R22 534 at our offices at the above address within 32 days of the date of this letter. Should payment not be made as aforesaid then and in that event, the seller shall be entitled to claim immediate payment of the full balance of the purchase price and interest as due by you, as well as all costs and collection commission; or alternatively shall be entitled to cancel this contract."

E only discovered this letter in October 2005 amongst a pile of documents which had been left behind by his former bookkeeper after she had been dismissed. He asked his attorney to investigate the matter. The attorney in due course reported that M had subsequently cancelled the agreement and was in the process of selling the properties to other persons. The decision to cancel had been conveyed to the attorney by way of a letter, which simply stated:

> "We refer to our letter of 8 August 2005 and note that no payment had as yet been made in terms thereof. We are accordingly instructed to cancel, as we hereby do, the deed of alienation as referred to above."

Litigation followed. E sought an interim interdict restraining the transfer of the immovable properties to third parties. His case was that the notice of 8 August 2005 was defective and therefore invalid, in that the notice did not give an indication of the precise steps M intended taking: it merely referred to certain remedies, in the alternative, which M was entitled to pursue in the event of E not complying with the demand for payment. Since the notice was invalid, the purported cancellation had no legal effect.

M in turn argued that section 19 aimed at providing *reasonable* protection to a purchaser and that the requirements thereof need not be complied with to the letter; substantial compliance was adequate. On this approach, so it

was argued, the notice of 8 August 2005 was valid and the contract had been lawfully cancelled.

The trial court (Plasket J) found in E's favour. The reasoning was as follows:

- Section 19 is peremptory in its terms. Its purpose is to protect an instalment sale purchaser.
- The notice of 8 August 2005 had merely informed the purchaser of the choices available to M in terms of clause 9 of the contract; all it did was to remind the purchaser of what the contract said of the possible consequences of breach on the purchaser's part. To hold that this would suffice for the purposes of compliance with section 19(2)(c) would dilute the section to such an extent as to make it a meaningless formality, providing no protection, reasonable or otherwise, to a purchaser, as intended by the legislature.
- The requirement that the seller must give an indication of what he intends to do means more than the giving of a mere hint or suggestion. In the present case the notice did not disclose an election but rather mentioned the steps that were possible in terms of the applicable provisions of the contract. The purpose of conveying to the purchaser the remedy elected by the seller is to enable the purchaser "realistically to appraise the consequences of the various courses open to him", as was held by Page J in *Miller v Hall*.
- The aforesaid interpretation of section 19(2)(c) does not place too heavy a burden on the seller. As a general proposition, when a person gives notice to cancel any contract, the notice must be clear and unequivocal – section 19(2)(c) requires little more.

In the circumstances, no indication had been given to E of the step that M intended to take pursuant to E's breach of contract. Accordingly, the notice was invalid.

An appeal to the Supreme Court of Appeal followed.

5 *Merry Hill (Pty) Ltd v Engelbrecht*: SCA Judgment

Plasket J's decision in *Merry Hill* was reversed by the Supreme Court of Appeal. The SCA (per Brand JA) agreed with the judgments in *Oakley* and *Miller* to the extent that it was held that section 19(2)(c) was peremptory, but disagreed that a seller must in the notice identify the *precise step* that will be taken should the purchaser fail to remedy the breach within the 30-day notice period. Brand JA also disagreed with the view expressed by Claassen J in *Van Niekerk*, namely that section 19(2)(c) was merely directory. No reference was made to the fact that Claassen J expressly stated that, if he was wrong in saying that section 19(2)(c) was merely directory, substantial compliance would be required. Brand JA did, however, agree with what was

said in *Van Niekerk* with respect to stipulating alternative remedies in the notice, namely that the section allows a seller to indicate the steps he intends taking in the alternative and that it does not require an election between those alternative steps in the notice of demand. Brand JA expressly agreed with Claassen J's view that "the broader interpretation of section 19(2)(c) is supported by the wording of the section", in particular the use of the word "steps" (plural) which "supported the perception that the seller need not elect a single step" (551J). Dealing with the argument that the letter of demand referred only to the alternative steps the seller would be *entitled* to take and not to any steps that the seller in fact *intended* to take (as required by section 19(2)(c)), Brand JA conceded that if a section 19(1) notice was required to follow the exact wording of section 19(2)(c), the notice under consideration "would probably not make the grade". However, the learned judge of appeal proceeded as follows (par 23):

> "Does the answer to this difficulty lie in the notion endorsed in *Van Niekerk* (para 26), that s 19(2)(c) is merely directory and that its non-compliance can therefore be condoned? I do not believe so. In my view, the provisions of the section are peremptory in the sense that a notice which complies with the section is an essential prerequisite for the exercise of any one of the remedies contemplated in s 19(1). But it has been accepted by this court that, even where the formalities required by a statute are peremptory, it is not every deviation from literal compliance that is fatal. Even in that event, the question remains whether, in spite of the defects, there was substantial compliance with the requirements of the statute."

Taking this approach Brand JA concluded (552I) that the seller's notice did substantially comply with section 19(2)(c).

Brand JA's view that section 19(2)(c) does not prohibit a seller from indicating in his notice the steps he intends taking in the alternative, was informed largely by the consideration that an approach requiring a specific step to be specified would indeed place an additional burden on the seller, contrary to what Plasket J held in the trial court. Brand JA reasoned that the latter approach would require of the seller to make an election between alternative remedies, prior to sending out a section 19(1) notice, and that in terms of the doctrine of election "the seller would be bound by that choice; he or she will not be able to have a change of mind if the purchaser should fail to purge the default during the 30-day notice period". The judge of appeal found support for this view in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* (1996 2 SA 537 (C)), where it was held that on breach of contract the innocent party is faced with an election, namely to either cancel or claim specific performance, and that once he has made his election he is bound thereby and cannot resile from it without the consent of the other party. Brand JA considered it to be "indeed a substantial additional burden" on the seller to have to make this election prior to the 30-day notice period (551C).

In support of his view Brand JA referred to *Walker v Minier et Cie (Pty) Ltd* (1979 2 SA 474 (W)) as an "illustration of the finality of an election in the present context". The seller's attorney in that case had given the purchaser a 30-day notice to remedy his breach of contract, "failing which we have been instructed to proceed against you for payment … in terms of the aforesaid

deed of sale". Three weeks later the seller purported to cancel the agreement. Nestadt J held that in the first notice the seller chose to claim specific performance and

> "with full knowledge of its rights elected not to cancel *(at least for the moment)*". (480C) (my own italics)

Nestadt J then proceeded to point out (480D-H) that an instalment sale seller who has indicated an intention to claim performance of the contract can still claim cancellation at a later stage, provided a fresh 30-day notice is given to this effect. In the circumstances it was held specifically that "(t)he defendant (seller) would therefore in my opinion in no way be bound to the remedy of specific performance" (480H). Despite the notice claiming specific performance the seller was therefore entitled to cancel, but the purported cancellation was invalid since he had not given any notice of an intention to cancel.

With respect, *Walker* is no authority for the view that once an instalment sale seller indicates in a section 19(1) notice what step he intends taking should the purchaser not rectify his breach, he is considered to have made a *final election* in respect of his remedy. On the contrary, Nestadt J made it quite clear that cancellation may be claimed after notice has been given of an intention to pursue a claim for specific performance, provided a 30-day notice to this effect is given to the purchaser as contemplated in section 19(1). Brand JA considered these remarks by Nestadt J to have been made *obiter* and found it unnecessary to decide the point, for two reasons:

> "First, as I understand the position regarding election, the suggested solution (by Nestadt J) will operate one way only, ie where the seller threatens to demand specific performance. *If, by contrast, the seller threatens to claim cancellation he will be finally bound by that choice. He will not be able to change his mind if the purchaser persists in default, whatever the position may be where he threatened to claim specific performance instead* (see eg *Consol Ltd t/a Consol Glass v Twee Jongen Gezellen (Pty) Ltd* (2) 2005 (6) SA 23 (C) paras 35-36; Christie, *The Law of Contract in South Africa* 5 ed at 541). Secondly, the suggested solution will in any event require a further 30-day notice period while the financial position of the purchaser or the condition of the property, or both, may be deteriorating." (my own italics)

With respect, this approach does not take into account section 19(4) of the Act which states specifically that section 19(1) is not to be construed in a manner so as to prevent the seller, without *or after* a section 19(1) notice, from claiming specific performance. The legislature was obviously mindful of the fact that section 19(1) makes no mention of specific performance as such, but does refer to cancellation. What section 19(4) in effect states is that even if the purchaser has received a section 19(1) notice indicating that the seller intends cancelling the contract if the breach is not rectified, this does not prohibit the seller from claiming specific performance. It is submitted that section 19(4) can only be explained on the basis that the doctrine of election does not come into play in respect of a section 19(1) notice in which the seller merely indicates the steps he intends taking should the breach not be rectified. The reason why the doctrine is not applicable is

because such notice does not constitute the election of a remedy as contemplated in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd*. Section 19(2)(c) does not require of the seller to make any election at the time of drafting the notice; it merely compels the seller to indicate the steps he *intends* taking should the purchaser's breach not be rectified. Page J in *Miller v Hall* considered the word "intend" to be "clearly defined by the context as meaning which of the steps available to him the seller *proposes* to take" (my own italics). The Afrikaans text makes it even more clear: "'n aanduiding van die stappe wat die verkoper *voornemens* is om te doen". The word "voornemens" means "van plan wees, besluit om iets te doen" (Odendal *et al* HAT *sv* "voorneme"). In the context of section 19(2)(c) the word "intend" could also mean "contemplate" or "planning". The section does not require of the seller to state that he *will* take a certain step; it is sufficient to indicate that he *proposes* or *plans* or *contemplates* taking that step. As Page J put it in *Miller v Hall,* section 19(2)(c) requires "no more than an intention to make a specified overt act of election in the future". It is therefore respectfully submitted that a notice containing an indication of a particular step which the seller proposes or plans taking in future, cannot be construed as a notification by the seller that he has *in fact elected* to pursue that remedy. Accordingly, the doctrine of election does not apply (see too Van Rensburg and Treisman *The Practitoner's Guide to the Alienation of Land Act* 2ed (1984) 201; and Otto "Aanmanings by Afbetalingskoopkontrakte van Grond" 1982 *De Rebus* 253.

Brand JA found it unnecessary for the purposes of the judgment in *Merry Hill* to deal with all the views expressed by Claassen J in *Van Niekerk*. Although some of the *dicta* in *Van Niekerk* were endorsed by Brand JA, the learned judge nowhere expressed his actual support for the ultimate finding in *Van Niekerk*, namely that the seller's notice met with the requirements of section 19(2)(c). *Merry Hill* is therefore no authority for the proposition that *Van Niekerk* had been correctly decided.

It is respectfully submitted that it was correctly decided in *Merry Hill* that a seller need not in a section 19(1) notice state the *precise step* that will be taken should the purchaser fail to remedy the breach within the 30-day notice period. The seller may in the notice list the remedies mentioned in s 19(1) in the alternative. The wording of section 19(2)(c), read with section 19(1), makes this clear. However, it is also respectfully submitted that the SCA's decision in *Merry Hill* should not be interpreted to mean that, if a seller has in his notice referred to *only one* of those remedies and indicated that he proposes taking that step, he is not precluded by the doctrine of election to later change his mind and elect *another* remedy, provided a fresh notice is furnished to the purchaser if such other remedy is one mentioned in section 19(1). This is so even if the first notice mentioned cancellation as a remedy and the seller later wishes to claim specific performance. A seller would, however, in terms of the doctrine of election be precluded from changing his mind in situations where the first notice can be construed as an unequivocal statement by the seller that he has finally made up his mind, and that he not only intends pursuing a particular remedy but has actually

firmly elected that he will take that step and none other if the breach is not rectified.

6 *Van Niekerk v Favel*: SCA judgment

The appeal against Claassen J's judgment in *Van Niekerk* came before the Supreme Court of Appeal soon after the SCA's decision in *Merry Hill.* As could be expected, Brand JA's views in the latter judgment greatly influenced the *Van Niekerk* appeal. Hurt AJA considered Claassen J's approach to the "contextual setting and interpretation of the Act" to be "diametrically opposed" to the decision of Brand JA. The learned judge of appeal disagreed with Claassen J's view that a comparison between s 19 and its precursor, section 13(1) of the Sale of Land on Instalments Act 72 of 1971, demonstrated an intention on the part of the legislature to afford the seller "a measure of relief". The learned judge of appeal furthermore disagreed with Claassen J's views relating to the type of purchaser whom the legislature intended to protect by the statute, and more particularly the capabilities of such purchaser to deal with the exigencies which might arise in the event of alleged breaches by him of his contractual obligations. Hurt AJA stated the position in no uncertain terms (179H-180A):

> "As to the view that the Act evinces an intention to ameliorate the burdens which it places on the seller compared with those imposed by Act 72 of 1971, it is not without relevance to note that, of the twenty-two sections in Chapter 2 of the Act, no less than eleven either impose burdens on the seller or restrict the seller's ordinary contractual rights. So, in Chapter 3, do ss 27, 28, 29 and 29A. On that basis alone, there seems to be little justification to attribute, to the Legislature, the type of seller-oriented intention postulated by Claassen J".

Claassen J's statement that an instalment sale purchaser "is presumed to know the law" also did not find favour with Hurt AJA. In this regard the learned judge of appeal said the following:

> "Before turning to (s 19(2)(c)), it will be convenient to make a further comment about the hypothetical 'average purchaser' to whom the Legislature may be taken to have intended to afford protection by its enactment. Apart from being 'vulnerable' and possibly 'uninformed', I think that he should be considered unlikely to be acquainted with the law, or to have an attorney at his beck and call. He would presumably also be reluctant to incur the expense of retaining an attorney for the purpose of obtaining advice concerning the contract, except perhaps at a later stage. On this basis, there is plainly no room, in interpreting the subsection, for the application of the general presumption that 'the purchaser must know the law' when it comes to deciding precisely what the Legislature intended in the Act."

Turning to the central issue in the appeal, namely whether the seller's notice had met the requirements of section 19(2)(c), Hurt AJA had no difficulty in deciding that the notice was defective. The purchaser's appeal thus succeeded. The reasoning was as follows:

- The notice required in terms of section 19(1) is necessary only when the seller intends to enforce one or more of the four remedies referred to in that section, *ie* acceleration of the payment of any instalment, the enforcement of any penalty stipulation, termination of the contract or

payment of damages. If some other relief is sought, for example payment of the outstanding arrears or performance of what otherwise might be due under the contract, no notice in terms of section 19(1) is required (181I-182A). Section 19(2)(c) must be construed in that light.

- The steps referred to in section 19(2)(c) must be understood as referring to one or more of the drastic remedies mentioned in section 19(1) and not the remedies reserved to the seller in the contract (181C; 182B).
- The seller's notice in *Merry Hill* differed materially from the seller's notice in *Van Niekerk.* In the former case the letter of demand referred to the seller's contractual options if the purchaser failed to remedy his breach. Those options were equivalent to two of the remedies mentioned in section 19(1). In the latter case the mere warning that the seller would exercise the right he may have in law was "quite consistent with an intention on the part of the seller to do no more than sue for the outstanding instalments or rates" (182C).
- The purpose of section 19(2)(c) is to warn the purchaser – not simply that the continuing breach will not be tolerated – but that the seller proposes taking one or more of the drastic steps enumerated in section 19(1) (182C). The notice must alert the purchaser "to the seriousness of the consequences of his or her breach and that must be made clear in the notice itself" (182E). The notice under consideration failed to achieve that purpose.

It is respectfully submitted that the SCA's ultimate decision in *Van Niekerk* is correct. Section 19(2)(c) requires of a seller to be specific about the remedies he intends pursuing, not to leave it to the purchaser to guess or speculate what remedy the seller may have in law. The seller need not identify the *particular* remedy he will pursue to the exclusion of all others, but he must at least give *some* description of the steps he intends taking if the breach is not rectified. The seller's notice in *Van Niekerk* was too vague; there was no description as such of any steps, merely a broad reference to the remedies which the seller may have in law, whatever they were. This clearly fell short of section 19(2)(c).

An aspect of Hurt AJA's judgment requiring closer analysis, is the statement that the steps referred to in section 19(2)(c) must be understood to refer to one or more of the drastic remedies mentioned in section 19(1) *and not the remedies reserved to the seller in the contract*. This could perhaps be construed to imply that a section 19(1) notice cannot incorporate by reference the seller's remedies as recorded in the sale agreement, even if those remedies correspond with the remedies mentioned in s 19(1). As mentioned above, Grosskopf J in *Oakley v Bestconstructo (Pty) Ltd* doubted whether this could be done. It is respectfully submitted that much can be said in favour of the view that a section 19(1) notice itself must mention one or more of the remedies referred to in section 19(1), and that a notice would fall short of the requirements of section 19(2)(c) if it merely refers the purchaser to the sale agreement (or a clause therein) where those remedies are listed. The underlying intention is that the purchaser should, after

reading the notice, be aware of the steps that the seller intends taking. The notice itself must create that awareness. Merely referring the purchaser to the sale agreement would not achieve the same result.

Hurt AJA's statement also means that a notice mentioning a single remedy only would not meet the requirements of section 19(2)(c), if that remedy is not one of the remedies referred to in section 19(1). With respect, this cannot be faulted. However, it is respectfully submitted that this should not be construed to mean that a notice falls short of section 19(2)(c) if it mentions the remedies referred to in section 19(1) but then *in addition* refers to other remedies as well. As stated earlier, section 19(4) expressly reserves the seller's right to claim specific performance *after* a section 19(1) notice has been sent or delivered. Why could the notice not also refer to specific performance as an alternative remedy? Section 19(1), read with subsection (2)(c), does not limit the seller's choice of remedies; it merely says that the seller may not pursue any of the section 19(1) remedies unless the purchaser has been notified that the seller intends doing so. A purchaser is not misled if the notice records *all* the steps that the seller contemplates taking, including the steps contemplated in section 19(1). On the contrary, omitting a step that the seller contemplates taking may well have that result. The purpose of the notice is to warn the purchaser that unless he rectifies the breach he could be facing one of the drastic remedies referred to in section 19(1). Mentioning other (less drastic) remedies in addition to the drastic remedies would not mean that the purchaser has not been warned that the drastic steps are being contemplated. It merely means that the purchaser has been given the full picture of what he could be facing if the breach is not rectified. Restricting a section 19(1) notice to the remedies mentioned in the section, to the exclusion of all other remedies that the seller may be contemplating, would deprive the purchaser of the benefit of being fully informed of the consequences of his persistent breach of contract. This could never have been the legislature's intention.

7 Conclusion

Section 19(2)(c) of the Alienation of Land Act is worded in plain language, in one short sentence. It reads quite easily, and elicited relatively little comment from legal academics at the time when the Act was promulgated, or when the section was amended in 1983. In the circumstances a bystander may find it difficult to believe that sellers (let alone their legal representatives) could have had any difficulties in drafting a notice complying with the wording of the section. Yet, the true meaning of section 19(2)(c) has given rise to diametrically opposing views in the courts, and may still do so in future. It is safe to say that the last word on section 19(2)(c) has not yet been spoken.

Henk Delport
Nelson Mandela Metropolitan University, Port Elizabeth