CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 295/24

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 HARVEY BROADHURST N.O.	Fifth Applicant
ANNELISE JANSEN VAN RENSBURG-HATTINGH N.O.	Sixth Applicant
CLIFFORD OWEN KEET N.O.	Seventh Applicant
MICHELLE ANN WALLIS N.O.	Eighth Applicant
EDGAR GRONDEL	Ninth Applicant

and

HEROLD GIE AND BROADHEAD INCORPORATED	Respondent

Neutral citation: *Harris N.O. and Others v Herold Gie and Broadhead Inc.* [2026] ZACC 6

Coram: Madlanga ADCJ, Goosen AJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Theron J and Tshiqi J

Judgments: Goosen AJ (minority): [1] to [65]

Majiedt J (majority): [66] to [106]

Heard on: 13 May 2025

Decided on: 13 February 2026

Summary: Housing Development Schemes Act 65 of 1988 — section 6 — repayment of entrusted funds — remedy against errant attorneys

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ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is granted.
2. The appeal is upheld to the extent set out in paragraph 3 below.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   “1. The appeal is dismissed with costs.

   2. Save for the decision on the second question, the order of the High Court is set aside and replaced with the following:

      ‘2.1 The first question is decided in favour of the plaintiffs.

      2.2 The third question is referred back to the High Court for determination.

      2.3 The costs stand over for determination together with the remaining issues.’”
4. The matter is remitted to the High Court for further hearing on the remaining issues.
5. The respondent must pay the costs in this Court.

JUDGMENT

GOOSEN AJ (Kollapen J and Theron J concurring):

[1] The crisp issue raised in this application for leave to appeal concerns the meaning and effect of section 6 of the Housing Development Schemes for Retired Persons Act[1] (HDSA). Crisp though it may be, it brings into focus the vulnerability of elderly retired persons to the vagaries of the financial failure of housing schemes developed to cater for their housing needs.

[2] The first to eighth applicants are, respectively, the executors of the deceased estates of five retired persons who purchased rights of occupation in a housing scheme developed in terms of the HDSA. The ninth applicant is one of these purchasers. I shall, for the sake of clarity, refer to them all throughout as purchasers. The developer of the housing scheme, the St Leger Retirement Hotel in Muizenberg, Cape Town, was the St Leger Trust (SLT). It was sequestrated prior to fulfilling certain statutory obligations imposed by the HDSA. The respondent is Herold Gie and Broadhead Incorporated (HGB), a firm of attorneys into whose trust account the purchasers paid the purchase consideration due to SLT. The entrusted funds were paid over to SLT prior to its insolvency. The purchasers instituted action against HGB for repayment of the funds entrusted with HGB. The present application for leave to appeal arises in the context of that litigation.

Background

[3] In the period between 2009 and 2011 each purchaser entered into a written contract with SLT to acquire a right of occupation of a designated suite in the St Leger Retirement Hotel. The right of occupation entitled them to lifelong occupation of the

[1] 65 of 1988.

suite and the provision of a range of services to be provided by the management of the scheme. In exchange the purchasers were required to pay a determined purchase consideration in addition to certain fixed monthly levies. The purchase agreements stipulated that the purchase consideration be paid into the trust account of SLT's attorneys, HGB, in terms of section 3(a) of the HDSA. It is common cause that HGB subsequently released the funds to SLT.

[4] On 24 October 2014, the purchasers cancelled their "life rights" agreements and demanded a refund of the purchase consideration, alleging that they had not been furnished with the certificates of compliance contemplated by section 6(1)(a) of the HDSA. On 17 February 2016, SLT was placed under provisional sequestration. A final order was issued on 9 March 2016. The purchasers thereafter lodged claims against the insolvent estate for repayment of the purchase consideration paid to the developer. They were, in due course, each paid a concurrent dividend.

High Court

[5] In October 2017, the purchasers each commenced separate actions in the High Court of South Africa, Western Cape Division, Cape Town (High Court) against HGB for payment of the purchase consideration they had entrusted with HGB. They founded their claims on section 6(4) of the HDSA. HGB raised several defences to the claims. They pleaded that the purchasers had authorised payment by HGB of the amounts entrusted to it; that the purchasers had been furnished with certificates contemplated by section 6(1)(a) of the HDSA; and that HGB held no funds in trust at the time of SLT's insolvency.[2] HGB also raised a special plea of prescription on the basis that HGB had paid away the entrusted funds to SLT, to the knowledge of the purchasers, more than three years prior to the institution of the actions for recovery.

[2] These defences were pleaded by way of a series of amendments to the pleas. For present purposes the sequence of amendments is not relevant. It suffices to record the nature of the defences.

[6] The separate actions were consolidated for the purposes of the trial.[3] HGB abandoned its pleaded reliance upon an alleged authorisation to release the entrusted funds to SLT and the alleged provision of a certificate in compliance with section 6(1)(a) of the HDSA. Pursuant hereto, the parties agreed to separate three questions for determination by the High Court.

[7] The three questions, as formulated by the parties, read as follows:

(a) Whether section 6(4) of the HDSA can found an action by a purchaser (or executor of the estate of a deceased purchaser) of a housing interest from a developer for repayment by a practitioner of an amount contemplated in section 6(3)(a) by a purchaser to a practitioner by virtue of a contract in the absence of compliance with section 6(1) and prior to the developer having become an insolvent (as it did), the practitioner disbursed from its trust account to the account of the developer an amount equivalent to the amount entrusted to the practitioner as purported release to the developer of the amount.[4]

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

(c) Whether, if section 6(4) of the HDSA does not apply, the averments in the particulars of claim and those averments in HGB's plea admitted by the purchasers are sufficient to sustain an action.

[3] There were seven separate actions. The date of conclusion of each contract, the consideration paid and the date of occupation of the designated suite was agreed. So too was the date of termination of the agreements consequent upon the death of the person or persons entitled to exercise the lifelong right of occupation. The parties also agreed on the quantum of the concurrent dividend paid to each of the applicants. Save for what is set out later in this judgment it is not necessary to set out these agreed facts and details.

[4] This first question reads awkwardly. In essence the High Court was called to decide whether section 6(4) of the HDSA creates a cause of action against HGB who paid entrusted funds to SLT when the latter had not complied with its obligation to deliver certain certificates to the purchasers.

[8] The High Court answered each of the questions in the affirmative. It held that the purpose of the HDSA is to protect vulnerable retired persons from exploitation by a developer or the financial misfortune of the developer. The High Court reasoned that to construe section 6(4) of the HDSA as applying only to funds kept in trust at the time of the insolvency would be manifestly contrary to the purpose of the HDSA. It accepted that the "entrustment" of funds with an attorney in terms of section 6(3)(a) placed an obligation upon the attorney to retain sufficient funds in trust to meet the claims of trust creditors. The High Court held that a purchaser who entrusts funds with an attorney, in terms of section 6(3)(a) of the HDSA, is to be regarded as the trust creditor.

[9] The High Court further held that section 6(4) of the HDSA confers upon a purchaser a right of action to recover the purchase consideration notwithstanding that the attorney has paid away the entrusted funds. The High Court granted leave to appeal to the Supreme Court of Appeal.

Supreme Court of Appeal

[10] The Supreme Court of Appeal upheld HGB's appeal with costs. It held that section 6(4) did not create a cause of action against the attorneys for repayment of entrusted funds which were no longer held in trust by the attorneys. The second question was not before it on appeal, since HGB had not pursued that appeal. It found that determination of the third question required consideration of relevant evidence. It therefore set aside the High Court's determination and remitted the latter issue to the High Court for determination in conjunction with all remaining issues.

In this Court

Jurisdiction and leave to appeal

[11] The purchasers assert that this Court has jurisdiction to entertain the appeal on both jurisdictional bases. In relation to the Court's constitutional jurisdiction, they assert that the HDSA is in the nature of social security legislation enacted to protect

the proprietary, housing and social welfare interests of a vulnerable class of persons. Its interpretation therefore implicates the purchasers' rights to equality, dignity and access to housing. They contend that the interpretation favoured by the Supreme Court of Appeal increases the vulnerability of the persons the legislation seeks to protect. The Supreme Court of Appeal's choice of interpretation is, so they contend, a constitutional issue.

[12] In relation to this Court's general jurisdiction, the purchasers contend that the interpretation necessarily involves a question of law. In this instance the interpretation preferred by the Supreme Court of Appeal is not the only interpretation open to a court. An interpretation which extends the protection of retired persons as a class of vulnerable persons is available and is, therefore, an arguable point of law. Such interpretation raises a matter of general public importance, since the availability of a remedy in circumstances such as the present will impact a class of vulnerable persons.

[13] In opposing the application for leave to appeal, HGB denies that this Court's constitutional jurisdiction is engaged. It points out that the purchasers eschewed reliance upon any constitutional issue arising before the Supreme Court of Appeal. HGB also denies that this Court's general jurisdiction is engaged, contending that the interpretation does not involve an arguable point of law of general public importance. In oral argument before this Court this latter opposition was not pursued.

[14] I am not persuaded that this matter engages our constitutional jurisdiction. I take this view because the fact that legislation provides protection for a vulnerable class of consumers, even if it implicates access to housing, does not mean that a constitutional matter is necessarily raised in the interpretation of that legislation. As this Court observed in *Tembisa Hospital*:

> "To a greater or lesser extent, the rights guaranteed in the Bill of Rights cover the whole field of human existence. Almost any case could be framed as touching on one

> or other fundamental right. This is not enough to make the case a constitutional matter."[5]

[15] In this instance the interpretation of section 6(4) of the HDSA does not require consideration of a constitutional rule or principle.[6] In light of my conclusion regarding general jurisdiction, it is not necessary to decide definitively that this matter does not raise a constitutional issue.

[16] As far as general jurisdiction is concerned, the interpretation of section 6(4) is undoubtedly a question of law which must necessarily be decided to resolve the issue before the Court.[7] In my view the matter is arguable in light of the judgment in *Cierenberg*,[8] upon which the High Court relied, and the contrary finding of the Supreme Court of Appeal in this matter. The matter is arguable in the sense that it enjoys some prospect of success.[9] The meaning and effect of section 6(4) of the HDSA is of general public importance in the sense that it transcends the narrow interests of the litigants involved. The interpretation may bear upon comparable provisions which employ similar language in section 26 of the Alienation of Land Act,[10] section 5A of the Share Blocks Control Act[11] and section 7 of the Property

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[5] *NVM obo VKM v Tembisa Hospital* [2022] ZACC 11; 2022 (6) BCLR 707 (CC) at para 92.

[6] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at paras 38 and 44.

[7] *Big G Restaurants (Pty) Ltd v Commissioner for the South African Revenue Service* [2020] ZACC 16; 2020 (6) SA 1 (CC); 2020 (11) BCLR 1297 (CC) and *Clicks Retailers (Pty) Ltd v Commissioner for the South African Revenue Service* [2021] ZACC 11; 2021 (4) SA 390 (CC); 2021 (10) BCLR 1102 (CC).

[8] *Cierenberg v Rorich, Wolmarans and Luderitz and Van Wyk v Lamprecht* 2003 (1) SA 40 (T).

[9] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 21-2.

[10] 68 of 1981. The relevant portions of the section read as follows:

> "(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until—
>
> . . .
>
> (3) The provisions of subsection (1) shall not apply to any amount paid by way of consideration which—
>
> (a) the alienee, by virtue of a deed of alienation, entrusts to a practitioner or an estate agent in his capacity as such, to keep, for the benefit of the alienator in terms of that deed of alienation, in the trust account of the practitioner or estate agent; or

Time-sharing Control Act.[12] It is, accordingly, in the interests of justice that the

. . .

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

[11] 59 of 1980. The relevant portions of the section read as follows:

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

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

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

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

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

[12] 75 of 1983. The relevant portions of the section read as follows:

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

. . .

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

(a) which the purchaser, by virtue of a contract, entrusts to a practitioner or an estate agent in his capacity as such, to keep, for the benefit of the seller in terms of that contract, in the trust account of the practitioner or estate agent interpretation be resolved.[13] This Court therefore has jurisdiction to adjudicate the case.

[17] Whether leave to appeal ought to be granted need not be belaboured. It follows from what I have said above that the appeal enjoys some prospects of success and that the interests of justice favour the granting of leave to appeal.

The merits of the appeal

[18] It is appropriate to set out the full text of section 6 of the HDSA. It reads 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 utilization of the housing interest concerned;

> until the certificate referred to in subsection (1) has been issued and a copy thereof has been delivered to the purchaser; or
>
> (b) which by virtue of a contract is paid to the seller if, before such payment, the purchaser is furnished with an irrevocable and unconditional guarantee by a banking institution registered otherwise than provisionally under the Banks Act, 1965 (Act 23 of 1965), a building society registered otherwise than provisionally under the Building Societies Act, 1965 (Act 24 of 1965), or a registered insurer as defined in section 1 of the Insurance Act, 1943 (Act 27 of 1943), in terms of which the said banking institution, building society or insurer undertakes to repay the said amount to the purchaser if the certificate referred to in subsection (1) is not issued within the period referred to in section 4(1)(k).
>
> (4) If, in the circumstances contemplated in subsection (3), the seller becomes an insolvent before the certificate referred to in subsection (1) is issued, any amount kept in a trust account in terms of paragraph (a) of subsection (3) or the repayment of which was guaranteed in terms of paragraph (b) of that subsection, shall immediately become payable to the purchaser concerned by the practitioner, estate agent, banking institution, building society or insurer concerned."

[13] *Paulsen* above n 9 at para 17.

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

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

(2) 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 registered otherwise than provisionally under the Banks Act, 1965 (Act 23 of 1965), a mutual building society registered otherwise than provisionally under the Mutual Building Societies Act, 1965 (Act 24 of 1965), a building society registered otherwise than provisionally under the Building Societies Act, 1986 (Act 82 of 1986), or a registered insurer as defined in section 1 of the Insurance Act, 1943 (Act 27 of 1943), in terms of which the banking institution, mutual building society, building society or insurer undertakes to repay the said amount to the purchaser, if the provisions of subsection (1) are not being complied with.

(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."

[19] The approach to the interpretation of a statutory provision is well-settled. It involves a unitary exercise in which careful attention is paid to the language of the enactment, the context in which that language is used and the purpose of the provision(s) so as to come to a proper understanding of the meaning, and effect, of the provision(s).[14] The unitary exercise is undertaken in a manner that seeks to give effect to the purport, objects and values of the Constitution and, in particular, the rights conferred by it.

[20] The purchasers do not suggest that the Supreme Court of Appeal did not appreciate or apply these principles of interpretation. Their critique is confined to the consequences of the interpretation adopted by the Supreme Court of Appeal. They say that the Supreme Court of Appeal's finding that section 6(4) of the HDSA does not establish a cause of action for the repayment of funds not kept in trust at the time of the insolvency, renders retired persons "more vulnerable" to the financial risk of insolvency of the developer. This finding, they argue, is contrary to the overall purpose of the legislation.

[21] In developing their argument, the purchasers suggest that section 6(3)(a) contemplates the payment of the purchase consideration into trust so that the practitioner holds the funds as an agent of the purchaser. Emphasis is placed on the word "entrustment" used in subsection (3)(a). Since the purchaser "entrusts" the funds with the attorney (or estate agent), the funds are held at the instance of the purchaser albeit "for the benefit" of the seller. Upon this basis the purchaser is the "trust creditor" in relation to the entrusted funds. Accordingly, so the argument goes, upon the occurrence of the intervening insolvency, the practitioner is obliged to repay the funds to the purchaser as the trust creditor. In the event that the entrusted funds,

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[14] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at paras 47-52 and *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at para 65.

comixed with other funds held in trust, have been paid away by the practitioner, the practitioner is obliged to make good the funds to the trust creditor, in accordance with well-established principles.[15]

Purpose

[22] It is appropriate to begin by examining the purpose of the HDSA. This was described in *Eden Village* as follows:

> "The Act falls within the category of what might be termed 'social' or 'consumer protection' legislation. Its object is to protect elderly or retired persons investing their
> savings in a housing development scheme from possible exploitation by a developer. As an example of this one may have regard to sections 2-4 of the Act, which provide in considerable detail what a contract for the acquisition of a housing interest by a retired person should contain: details as to exactly what he is acquiring and what his obligations will be, and also what other facilities or services will be provided. These sections also bind the developer to provide the facilities promised; if the landed property is unencumbered to keep it unencumbered; and to give an estimate, for a period of three years in advance, of what the upkeep of the scheme is likely to cost. So, too, sections 4A, 4B and 4C give the holder of a right of occupation very considerable security by requiring the endorsement of that right against the title deed, and according that right priority over any other right, whether or not such other right has been registered or endorsed against the title deed, and irrespective of the time when such other right was registered and endorsed. The whole Act is designed to protect the rights and the interests of the retired persons, and recognises the fact that the residents have a vested interest in the housing development scheme in which they have chosen to stay."[16]

[15] See *Fuhri v Geyser N.O.* 1979 (1) SA 747 (N); [1979] 3 All SA 374 (N) at 749G-H where it was explained that:

> "It is immaterial that the money has or has not been deposited in the trust account or, if so deposited, that it has or has not been unlawfully withdrawn. In short, the availability of the money in the trust account is wholly immaterial to the client's right to payment of the full amount due to him. Naturally, amounts unlawfully withdrawn from the account may be recovered on the grounds of the very unlawfulness of their withdrawal, but that does not in any way affect the right to recover the full amount, i.e., the amount withdrawn as well as the amount not withdrawn, which exists in any event."

[16] *Eden Village (Meadowbrook) (Pty) Ltd v Edwards* [1995] ZASCA 47; 1995 (4) SA (A) at 44A-E.

[23] This description was endorsed in *Flower Foundation.*[17] The HDSA regulates a particular form of housing for retired persons. In essence, it provides for the acquisition of a "housing interest" in a collective development which does not involve the transfer of ownership of a portion of the property concerned. A retired person may "purchase" a right to occupy a designated housing unit on the property "for life". Such right is not transferable but, upon the death of the principal purchaser, the spouse of the purchaser may exercise the right for their natural life.

[24] The "life right" terminates upon the death of the occupier. The grantor of the life right may then sell the housing interest to another purchaser. The HDSA envisages that the right of occupation may be alienated in a variety of ways. It may be sold, or provided by rental, or even acquired in exchange for the provision of a loan to the developer. The term "consideration" is defined by the HDSA.[18] It does not include "occupational interest" payable in relation to the occupation of a unit which is subject to the "life right" (or housing interest) to be acquired.[19]

[25] The contract in terms of which the housing interest is acquired must conform to certain formalities[20] and must comply with the provisions of section 4 of the HDSA.[21] It may provide that upon termination of the life right the purchase consideration paid

[17] *Flower Foundation Pretoria Homes for the Aged NPC v Registrar of Deeds, Pretoria* [2022] ZASCA 8; 2022 (6) SA 99 (SCA) at para 17. See also *Boland Bank Bpk v Engelbrecht* [1996] ZASCA 42; [1996] 2 All SA 273 (A); 1996 (3) SA 537 (A) (*Boland Bank*) at 547E.

[18] The term is defined to mean "the purchase price and interest thereon (but excluding occupational interest), rent or other consideration which is payable or must be rendered in terms of the contract concerned". Consideration is so defined because the HDSA contemplates a variety of legal bases upon which a housing interest or right of occupation may be acquired. It may be purchased, rented, obtained by exchange or against provision of a loan to the grantor. See in this regard the definition of "right of occupation" and consider *Boland Bank* id at 544E-F where the transactions involved interest free loans which would be repayable upon termination of the life rights.

[19] The exclusion of occupational interest from the definition of consideration, when read with section 4(1)(m) (which permits the production of the certificates contemplated in section 6(1) within a period of two years from the date of signature of the contract), suggests that the scheme of the HDSA contemplates the exercise of occupation in accordance with a life right or housing interest after conclusion of the contract of purchase but before the certificates are produced. In the present case the facts establish that each of the purchasers exercised their rights of occupation notwithstanding the developer's failure to provide a valid certificate of occupation.

[20] Section 3 of the HDSA.

[21] The section sets out in considerable detail the required contents of the contract.

for the life right will be repaid to the estate of the purchaser. In the present case the contracts provided for repayment of the purchase consideration discounted by agreed percentages for each year of exercise of the right of occupation. This was subject to a maximum deduction of 30%, thus entitling each of the purchasers to repayment of 70% of the purchase consideration, less any costs to make good the property upon termination of the life right.

[26] The HDSA seeks to protect persons who purchase a "life right" in several ways. First, it confers statutory protection of the right of occupation as against other persons or parties who have or may acquire rights in relation to the property concerned. Thus, section 4A confers upon holders of a right of occupation the protection afforded by a registered lease.[22] Second, section 4B imposes restrictions upon the alienation of the property which is subject to a housing development scheme authorised by the HDSA. The property may not be alienated free of the rights of occupation unless 75% of the holders of rights of occupation consent thereto. In any event it confers on the holders of such rights of occupation preferent claims in relation to the proceeds of such alienation.[23] Third, section 4C requires that a registrable housing interest must be endorsed upon the title deed of the property. Its effect is to confer upon the purchaser a real right enforceable against subsequent title holders.

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[22] Section 4A provides:

> "The holder of a right of occupation shall for the purposes of any law have the same rights as those conferred on a lessee in terms of a lease as contemplated in section 1(2) of the Formalities in respect of Leases of Land Act, 1969 (Act 18 of 1969), registered against the title deed of the leased land, and such rights shall rank in priority over any other right whether or not such other right has been registered or endorsed against the title deed and irrespective of the time when such other right was registered or endorsed."

[23] Section 4B provides:

> "(1) Unless at least 75 per cent of the holders of rights of occupation in a housing development scheme consent thereto the land concerned may not be alienated free from such rights: Provided that the holders of the rights of occupation shall in the case of such an alienation have preferent claims in respect of the proceeds of the sale of land, which claims shall, notwithstanding the provisions of any other law—
>
> (a) rank in priority over the claim of any mortgagee; and
>
> (b) be equal to the amount paid in terms of paragraph (a) of the definition of right of occupation.
>
> (2) Any alienation taking place without the consent of the holders as contemplated in subsection (1) shall be null and void."

The endorsement on the title deed serves to "lock-in" the value of the life right and to secure its exercise for the duration of the life of the holder.[24] These protections are designed to provide security for the exercise of the rights of occupation and to protect the investment made by retired persons in such development schemes.

[27] The HDSA, however, also provides for the protection of the financial interests of retired persons *during the process of acquisition* of their housing interests and for the protection of their substantive right of occupation. These protections arise out of the obvious need to provide financial security to this vulnerable class of persons at a stage when the housing scheme is being developed. Here, a significant risk factor is the financial failure of the scheme and the consequences of the insolvency of the developer prior to the realisation of the right of occupation.

Text and context

[28] Section 6 is concerned with this latter form of protection. Section 6(1) prohibits the receipt of any "consideration" to be paid for the acquisition of a "housing interest" by the developer (or grantor) *until the developer furnishes to the purchaser the certificates contemplated by section 6(1)*. The receipt of any amount of such consideration payable in terms of a contract is visited with criminal sanction in terms of section 6(2).

[29] Section 6(1) provides for two certificates. Section 6(1)(a) requires a certificate issued by an architect which certifies that the development complies with building regulations *and* that it is fit for the exercise of the right of occupation. In the present matter, it is the failure to furnish this certificate which gave rise to the cancellation of the agreements. The second certificate, that required by section 6(1)(c), is one issued by a *practitioner* which certifies that the title deed of the property which is the subject of the development scheme *has been endorsed* where such endorsement is required by section 4C of the HDSA. The purchasers averred in their particulars of claim that the

[24] For a discussion of the interaction and effect of these measures, see *Boland Bank* and *Flower Foundation* above n 17.

provisions of section 4C had been complied with. The purchase contracts record that the title deed of the property concerned has been endorsed in terms of section 4C.[25]

[30] The section 6(1)(a) certificate serves, as the language plainly indicates, to provide professional assurance that the right to occupy may be lawfully exercised and that the development "is sufficiently completed for the purposes of utilization of the housing interest concerned". This is not merely a "certificate of occupancy". As was stated in *Eden Village*,[26] the HDSA "recognises the fact that the residents have a vested interest in the housing development scheme in which they have chosen to stay". In *Flower Foundation*, the Supreme Court of Appeal gave expression to this when it observed, in the context of that case, that:

> "The respondents . . . bought into [a] scheme retirement village which offered peace and tranquillity on a large property consisting of open lawns, with a sense of community for the elderly people residing in the flats and cottages. [They] . . . invested their hard-earned money in a lifelong right not only in the units they occupy, but also in the lifestyle which the housing scheme offered. They never anticipated that they were to spend a portion of what remained of their lives on the porch of a large commercial building site."[27]

[31] It is this vested interest in the scheme, embodied in the right of occupation for which the purchaser has bargained, that the provision of the section 6(1)(a) certificate seeks to protect. The prohibition upon receipt of any consideration until the certificate is provided serves to ensure that the developer performs its obligation to deliver a right of occupation which accords with the substance of the bargain.

[32] Subsection (3), however, provides for two exceptions to the prohibition contained in section 6(1) of the HDSA. The first, envisaged by subsection 3(a),

[25] Not every right of occupation granted in terms of the HDSA is registrable against the title deeds of the property. Section 4C, however, makes provision for the voluntary registration of such housing interest by the grantor. In that event the protection provided by sections 4A, 4B and 4C are available to the holder of the right of occupation. In this case, the endorsement of the title deeds occurred voluntarily.

[26] *Eden Village* above n 16 at 44D-E.

[27] *Flower Foundation* above n 17 at para 16.

permits receipt of consideration *by the developer* in the form of entrustment of the funds with an attorney or estate agent to be kept for the benefit of the developer. I shall refer to this as the entrustment-exception. The second, envisaged by subsection (3)(b), involves payment of consideration to the developer against the provision of a guarantee issued by a bank or other financial institution. I shall refer to this as the guarantee-exception. In both instances the permitted transaction involves the receipt of consideration which is otherwise prohibited.

[33] The guarantee-exception does not occasion any conceptual difficulty. An amount paid over by a purchaser to the developer, in exchange for a right of occupation, would plainly amount to a transfer of ownership of the funds by the purchaser to the developer. Such payment would discharge the purchaser's contractual obligation to pay the purchase price (or pay over the funds constituting a loan should that be the agreed form of consideration). In exchange the developer would be obliged to furnish the certificate within a time period stipulated in the agreement and to permit the exercise of the right of occupation. Upon payment in this manner, the funds would fall within the estate of the developer and the developer would be entitled to exercise full dominium or ownership of those funds and could, as matter of law, do with the funds as it pleases.

[34] It is worth observing that the guarantee-exception plainly balances the interests of parties to the purchase agreement. A receipt of funds under the exception would provide the developer with access to capital with which to undertake the development, while protecting the purchaser's interests by way of a third-party guarantee of repayment should the developer not meet or be able to meet its obligations. The language employed in subsection 3(b) is noteworthy. It stipulates that the guarantee must be an unconditional and irrevocable undertaking "to repay the [consideration] to the purchaser, *if the provisions of subsection (1) are not being complied with*"[28]. This suggests that the guarantee may serve to secure recovery of consideration paid to the developer even in the absence of the occurrence of insolvency. For present purposes

[28] Emphasis added.

what is relevant is the occurrence of insolvency of the developer prior to delivery of the certificate. In that event section 6(4) provides that the guarantee is immediately payable to the purchaser by the guarantor. I shall return, hereunder, to section 6(4) and its effect.

[35] The entrustment-exception stands upon a different footing to the guarantee-exception. The purchase consideration is entrusted to a practitioner "to be kept" for the benefit of the developer, *until the provisions of subsection (1) have been complied with*. The developer does not "receive" the consideration in the sense that it may apply those funds to the development or otherwise utilise the funds. Nevertheless, section 6 treats the entrusted funds as a receipt by the developer. Payment of funds to a third party cannot in law qualify as a receipt by the person who is entitled to receive payment, unless that third party is authorised to receive the funds on their behalf. This is a basic principle of agency. If the developer does not authorise a third party (the practitioner) to receive payment of the purchase consideration, then the purchaser's act of paying the consideration to the practitioner does not constitute payment to the developer. In such cases the developer does not receive any consideration at all, and is not in breach of the subsection (1) prohibition.

[36] Thus, for subsection (3)(a) to make any sense at all, the entrustment must be understood to be a payment to the developer, save that the developer may only claim payment from the attorney upon discharge of the obligation to provide the required certificate. In this instance, that is what the contracts required, namely that the full purchase consideration be paid to the developer by entrustment with HGB for the benefit of SLT. It is common cause that upon payment of the consideration to HGB, occupation of the respective suites was given to the purchasers. They accordingly exercised their rights to occupation notwithstanding that the required certificates were still to be provided.[29]

[29] It is important to bear in mind that section 4(m) contemplates that occupation may in fact be given prior to the provision of a section 6(1)(a) certificate. So too does the definition of "consideration", which permits the developer to receive "occupational interest" prior to provision of the section 6(1)(a) certificate.

[37] Upon payment into the trust account, the purchaser transfers to the developer the right to claim payment of the funds so deposited from the attorney. That is the legal effect of entrustment on behalf of the developer, as provided by subsection (3)(a). The funds paid into the attorney's trust account are owned by the bank. The attorney has the right to transact upon the trust account in accordance with duties owed to the trust creditor. That right to transact on the account is regulated by, amongst other statutes, the Trust Property Control Act 57 of 1988 and the Legal Practice Act 28 of 2014.[30] These statutory provisions define the ambit of the attorney's fiduciary duties owed to the trust creditor, on whose behalf and for whose benefit the entrusted funds are held.

[38] In this respect, the entrustment-exception also serves to balance the interests of parties to the purchase agreement. On one hand, the developer is placed in the position of a trust creditor to funds which in law accrue to it thereby guaranteeing immediate payment upon production of the required certificates. On the other hand, the purchaser is assured that the funds kept in trust will become repayable upon insolvency of the developer.

[39] The protection of the purchaser involves the interposition of a third party. The attorney or estate agent is subject to a statutory obligation to keep the funds in trust until the provisions of section 6(1)(a) have been complied with. Once that event occurs, the entrusted funds may be paid over to the trust creditor, for whose benefit the attorney holds the funds in trust. The purchaser has no claim against the practitioner for repayment of the funds kept in trust, pursuant to the section, except in the event of insolvency, as provided by subsection (4). In the absence of insolvency, any claim that a purchaser may have, arising from non-compliance with section 6(1)

[30] In the case of payment to an estate agent, the provisions of the Estate Agents Act 112 of 1976 would apply.

or any other breach of the terms of the purchase contract, is a claim that lies against the developer.[31]

[40] The operation of subsection (3)(a) may be illustrated in two examples. Assume a practitioner who is required to keep the consideration in trust, pays away the funds or misappropriates the funds prior to the developer complying with section 6(1) and there is no insolvency. At that point, the purchaser's contractual entitlement is for delivery of the section 6(1) certificate which might be claimed from the developer. In the event that the certificate can be provided and occupation thereby given, the developer would not be entitled to withhold it because of the attorney's malfeasance. The developer would have to pursue the attorney for the loss of the entrusted funds. Should the developer not be able to produce the certificate, the purchaser may cancel the agreement and claim repayment of the purchase consideration from the developer and the developer would be obliged to meet that claim.

[41] In such instance, it is the developer who suffers the loss arising from the practitioner's breach of their fiduciary duties, since the developer is obliged to deliver occupation but without actual receipt of the entrusted funds or to repay the purchase consideration upon cancellation. The claim for recovery of such loss lies at the instance of the developer.

[42] In the second example, assume that the practitioner pays away the funds *to the developer* prior to expiry of the period allowed for delivery of the certificates and there is (at that stage) no insolvency. The purchaser still only has a claim for delivery of the certificate from the developer when it is due. The purchaser cannot claim repayment of the entrusted funds from the practitioner. If the developer fails to deliver the certificates, the purchaser can cancel the agreement and claim repayment

[31] It is here that the difference in language between subsections (3)(a) and (b) is significant. As indicated in [34] above, the language employed in the former suggests that the guarantee is not confined to the occurrence of insolvency.

of the purchase consideration[32] in terms of section 8 of the HDSA. No claim would lie against the attorney for such repayment despite the fact that the attorney paid away the entrusted funds. The developer, on the other hand, will have been paid the entrusted funds and is no longer in the position of a trust creditor in relation to those funds.

[43] In this scenario it is certainly the case that the practitioner would have breached subsection (3) since they had not kept the consideration paid by the purchaser until subsection (1) was complied with. Both the practitioner and the developer may also have contravened subsection (2) and be liable to criminal prosecution. The purchaser, in this latter scenario, may very well be in a precarious situation because of the misconduct of the practitioner and the developer but will, at that stage, have suffered no cognisable loss recoverable from the attorney. The loss may only arise if the developer is unable to satisfy the claim for repayment by reason of insolvency.

The effect of section 6(4)

[44] Section 6(4) reads:

> "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." (Emphasis added.)

[45] The occurrence of insolvency of the developer prior to compliance with section 6(1) triggers repayment of the purchase consideration to the purchaser. Its manifest purpose is to protect the purchaser in the event of the developer's insolvency. Insolvency, by its nature, implies that the insolvent is unable to meet its ordinary

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[32] That is, in fact, what occurred in this case. The applicants cancelled their agreements because of SLT's failure to deliver the required certificates. The cancellation occurred prior to the insolvency of SLT.

financial obligations and that creditors are likely to suffer some financial loss. The process of liquidation of the estate is both costly and time-consuming. It occurs on the basis of ranked claims and, in relation to the general body of creditors, in accordance with a balancing of competing interests, the *concursus creditorum* (coming together of creditors). Retired persons who will have invested their hard-earned capital to secure a lifelong right of occupation of a housing unit in a scheme are especially vulnerable to the consequences of financial loss and the time-consuming process by which they might recover or mitigate such loss. When section 6(4) is read purposively within the context of the HDSA as a whole, it is apparent that this is the mischief it seeks to avoid.

[46] As indicated earlier, the provision of a section 6(1)(a) certificate provides independent professional assurance that the right of occupation may lawfully be exercised and that the substantive right of occupation may be exercised. Until that occurs the developer has not yet performed its essential contractual obligation. Insolvency at that stage means that, on balance, the developer is no longer capable of delivering that which it undertook to deliver. Insolvency does not bring about the termination of all contractual obligations to which the insolvent has bound itself. However, it precludes enforcement of such obligations by orders of specific performance.[33] It is against this legal background that the effect of section 6(4) must be viewed.

[47] The question to be answered is what the phrase "any amount kept in a trust account in terms of paragraph (a) of subsection (3)" means. In argument, counsel for the purchasers placed emphasis on the first part of the phrase, suggesting that the words "kept in a trust account" might denote funds which were kept (or were meant to be kept) and not only funds "still kept". In my view the whole phrase must be considered. This is so because the reference to paragraph (a) of subsection (3) serves to qualify the earlier phrase. Thus the amount kept is that kept "for the benefit of the developer". The ordinary grammatical meaning of the phrase suggests that only the

[33] *Lucas' Trustee v Ismail and Amod* 1905 TS 239 at 251.

amount which is kept or still kept in trust for the benefit of the developer at the time of insolvency shall be immediately payable. If it had been intended to refer to the amount that had been entrusted, the legislature would have provided for this in clear terms. It could have referred to *the amount entrusted* in terms of paragraph (a) of subsection (3) and taken the matter beyond doubt.

[48] A person or entity "becomes insolvent" upon the issuing of an order of insolvency. It is the date and time of the order of insolvency which serves to "lay the hand of the law upon the estate" and to fix the rights and interests of parties in the insolvent estate. The order of insolvency establishes the *concursus creditorum* and ensures that the affairs of the insolvent are from that moment managed and wound up, in the interests of the general body of creditors.[34]

[49] If, as I suggest, the entrustment is a sanctioned payment to the developer so that the developer acquires a right to claim payment of the funds as trust creditor when the certificate is provided, then upon insolvency the trustee would acquire the same right. The trustee could only receive the trust funds if the trustee could honour the obligation to deliver the certificate and honour the ongoing obligation to provide lifelong occupation rights. The insolvency of the developer renders it improbable that such rights could be honoured. For this reason, in order to protect the financial interests of the purchaser, insolvency terminates the entrustment-exception, making the funds kept in trust immediately repayable to the purchaser. But if the trust funds had already been paid to the developer prior to insolvency, the trustee would be obliged to meet a claim for repayment of the purchase price in accordance with the principles applicable to the *concursus creditorum*. Seen in this light the effect of section 6(4) is to terminate the entrustment in terms of section 6(3)(a) upon the occurrence of insolvency.

[34] *Walker v Syfret N.O.* 1911 AD 141 at 160.

[50] The purchasers placed great reliance upon the judgment in *Cierenberg*[35] which dealt with a comparable factual situation. Although the judgment addresses the import and effect of section 6(4), its finding that section 6(4) provides a statutory *causa* (reason) for immediate repayment of what was entrusted, was not based upon a detailed analysis and interpretation of the section. In *Cierenberg* it was suggested, though not expressly found, that the attorney with whom the purchase consideration has been entrusted may be regarded as a stakeholder, rather than as an agent for the seller.

[51] Subsection (3)(a) envisages that entrustment occurs pursuant to the contract of purchase concluded between the developer and purchaser. The section does not exhaustively deal with the nature of the entrustment. It provides only an essential form. The parties to the purchase contract *may* specify the terms of the entrustment, thereby placing the attorney or estate agent in the position of a stakeholder. Equally, the purchaser and the attorney, in giving effect to the requirement of entrustment of the purchase consideration, may conclude an agreement to regulate the entrustment. Whether that has occurred will depend upon the facts. If such a contract, express or tacit, is established, it may well justify a claim for immediate repayment of entrusted funds even if such funds are no longer kept in trust at the time of insolvency.[36]

[52] In this case, however, there is no question that the attorney acted as a stakeholder in relation to the entrusted funds. The purchase contracts which were concluded between the purchasers and the developer do not provide for the appointment of HGB as a stakeholder. The purchasers, understandably, did not rely upon a stakeholder agreement. Nor did the purchasers contend for any other form of contractual relationship between them and HGB. At best, they contend for a "statutory stakeholder" interpretation of the section. To the extent that *Cierenberg* suggests that this is what sections 6(3)(a) and 6(4) mean, it did so with reference to

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[35] *Cierenberg* above n 8.

[36] *EDS South Africa (Pty) Ltd v Nationwide Airlines (Pty) Ltd* [2011] ZASCA 16; 2011 (5) SA 158 (SCA) at para 14.

Sadie,[37] in which it was held that a stakeholder holds property as agent for neither party. However, in *Baker*[38] the Supreme Court of Appeal disagreed with the approach to stakeholding in *Sadie*. The Court explained it as follows:

> "The foregoing discussion of authorities relating to stakeholding leads me to the conclusion that nothing is to be found in them that militates against my view, expressed earlier, that the *prima facie* [(at first sight)] effect of clause 3 of the contract between the plaintiff and the defendant was to constitute York Estate the defendant's agent for receiving payment of the purchase price. I accordingly reject the contention on behalf of the defendant that York Estate was a stakeholder and not the agent of the defendant, to the extent that I hold that the second part of the contention is wrong. As to the first part, it seems to me that whether or not York Estate can aptly be described as a stakeholder is perhaps more a question of semantics than a matter of principle. If the word 'stakeholder' is used in a narrow sense, as being confined to a third party who receives and holds something not as the agent of either one of the two persons who have an interest in it, then it would be wrong to categorise York Estate in the present case as a stakeholder. On the other hand, if the word 'stakeholder' is used in a loose sense, without excluding the notion of agency, there would be no objection to calling York Estate a stakeholder. My personal preference is not to call a person in the position of York Estate in this case a stakeholder, but there is no need to pronounce a final judgment on the point.
>
> It is to be observed that in *Verbeek's* case *supra* Milne J did not decide that the third party in the position of York Estate here was not the agent of the seller (that was merely assumed), nor that it was a stakeholder (see at 68D-E). However, in a subsequent case, *Sadie v Currie's City (Pty) Ltd and Others 1979 (1) SA 363 (T)*, Margo J said (at 365H), with reference to the cases of *Verbeek*, *Sorrell* and *Burt* (*supra*):
>
> > 'In recent decisions, both in this country and in England, it has been pointed out that a stakeholder is not the agent of either of the parties, and it seems that his position is *sui generis* [(of its own kind)].'
>
> The contract in that case contained a clause similar in tenor to that in *Verbeek'*s case and clause 3 in the present case. To the extent that Margo J held that the

[37] *Sadie v Currie's City (Pty) Ltd* 1979 (1) SA 363 (T).

[38] *Baker v Probert* [1985] ZASCA 22; [1985] 2 All SA 263 (A); 1985 (3) SA 429 (A).

> 'stakeholder' receiving the purchase price in terms of such a clause is not the agent of the seller, I respectfully disagree, for the reasons already given."[39]

[53] The plain language of section 6(3)(a) accords with the principle enunciated in *Baker*. This does not mean that section 6(3)(a) does not impose upon the practitioner an obligation to keep the funds entrusted under pain of a criminal sanction. Nor does it mean that the section does not give rise to a statutory duty of care which the practitioner owes to the purchaser which, if breached, may found a claim for delictual damages. What the section does not do is to create a tacit contractual relationship between the purchaser and the practitioner.

[54] The suggestion, in *Cierenberg*, that upon insolvency section 6(4) imposes an obligation upon the attorney to pay the purchaser as trust creditor, was made in the context of the view expressed regarding the "stakeholder" status of the attorney. It accords with the concept of a stakeholder.[40] Some support for this conception of the payment mechanism is to be found in *Baker* where Botha JA said the following:

> "There is accordingly a fundamental difference between the position of York Estate in this case and the position of the stakeholder in the two contexts referred to above. It is true, of course, that if (as happened in this case) the contract was cancelled because of the defendant's breach, the defendant would cease to be a creditor vis-à-vis both the plaintiff and York Estate, and the plaintiff would possibly become a creditor as against York Estate for repayment to her of the purchase price, but I do not consider that such a possibility can serve to equate York Estate with the stakeholder in the instances referred to above."[41]

[55] In my view the simple effect of section 6(4) is to terminate the entrustment-exception provided by section 6(3)(a). Such statutory termination renders the *funds kept in trust at the time of insolvency* immediately payable to the purchaser. My reason for restricting the operation of section 6(4) to that which is kept in trust at the

[39] Id at 443F-444B.

[40] *Cierenberg* above n 8 at 50A-C.

[41] *Baker* above n 38 at 441H-I.

time of insolvency is based on the language of the section as understood in its proper context. It may be illustrated with reference to the second scenario example discussed above. In that instance, the practitioner's unlawful payment of the entrusted funds to the developer terminates the trust relationship between the practitioner and the trust creditor because there is no amount then kept in trust for the benefit of the developer. The attorney's breach of section 6(3) of the HDSA may render the practitioner liable to the purchaser upon a cause of action framed in terms of *that* section. Once the funds which were to be kept in trust are no longer kept in trust *at the time of insolvency* of the developer, there are no funds which can immediately be paid in terms of section 6(4). The purchaser's entitlement to claim payment from the attorney arises from the failure to keep the funds in trust pending fulfilment of the developer's obligation to provide the section 6(1) certificates. That is a claim based upon a breach of the terms of section 6(3)(a). It might be either delictual in nature or contractual, depending upon the particular circumstances of the entrustment.

[56] I have read the judgment of my Brother, Majiedt J, (second judgment) and I briefly deal with the approach favoured by him. He contends for the creation of a statutory "escrow agreement" by section 6(3). It is not immediately apparent what such an agreement might entail which is not otherwise explicable by the concepts and principles that apply to familiar features of our law, such as stakeholding and agency. An escrow typically refers to a bond or deed of grant or like-document which confers upon the grantee certain rights but which is held in the possession of a third party until the occurrence of some future specified event.[42] The relationship between the grantor, grantee and the third party who holds the escrow is regulated by principles which regulate the delivery of a tangible instrument. We are not here dealing with such a relationship. In this case money is entrusted with a third party. That is a transaction to which well-established legal principles of the law of trust apply.

[42] Onions et al "Shorter Oxford English Dictionary on Historical Principles" 3 ed (Claredon Press, Oxford 1944) gives the meaning of escrow as "a deed, bond, or other engagement delivered to a third party to take effect upon a future condition, and not till then to be delivered to the grantee".

[57] It seems to me that the reference to an “escrow agreement” adds no value to the meaning and effect of section 6(3). If the reference is intended to convey that the section creates a form of statutory stakeholder, then the contention is not supported by the jurisprudence which specifically addresses the concept of stakeholder agreements. If it was intended to suggest that section 6(3) must be read to create a tacit statutory agreement between the purchaser and the attorney, then the second judgment does not explain why my contrary interpretation of the text of the section is wrong.

[58] The purchasers argued that the interpretation adopted by the Supreme Court of Appeal renders retired persons more vulnerable than the statutory scheme envisages. It is not at all clear how this can be so. Section 6 serves to protect retired persons from the insolvency of a developer which occurs prior to the delivery of the security provided by the section 6(1) certificates. It does so by providing for repayment of the amount of consideration paid to the developer in the circumstances provided by subsection (3)(a).

[59] The second judgment contends that the purpose of section 6(4) is not to protect the purchasers from the *concursus creditorum*. Instead it is to make plain that the financial relationship between the developer and the purchaser comes to an end upon insolvency. I have some difficulty appreciating how this might differ from the effect I attach to section 6(4).[43] The ending of the “financial relationship” presumably does not mean that the contractual relationship between the purchaser and developer comes to an end. That is a matter which is regulated by the law of insolvency as it applies to the nature of the contract, which may be an executory contract partially fulfilled.[44] As I understand it, the second judgment suggests a termination of the “escrow agreement”

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[43] See [55].

[44] *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* [2014] ZASCA 46; 2014 (4) SA 22 (SCA) at para 12 where the Court approved the dictum in *Smith v Parton N.O.* 1980 (3) SA 724 (D) at 728H-729A that—

> “there is nothing in the law of insolvency which affects uncompleted contracts in general; the contract is neither terminated nor modified nor in any way altered by the insolvency of one of the parties . . . except in one respect, and that is, because of the supervening concursus, the trustee cannot be compelled to perform the contract.” (Footnote omitted.)

In the present case each of the purchasers had occupation and exercised those rights for a period prior to cancellation of their agreements and prior to the insolvency of the developer.

resulting in the "escrowed funds" being repaid. If this is so, then its effect is to protect the purchaser from having to compete within the *concursus creditorum*, as I suggest. Where we differ, plainly, is that I hold that only those funds kept in trust at the time of insolvency are immediately payable in terms of section 6(4).

[60] Section 6(4) proceeds upon the supposition that practitioners and developers will comply with the obligations and proscriptions imposed by the legislation. This is not an unreasonable supposition. Attorneys and estate agents, it must be accepted, will ordinarily act in accordance with statutory obligations and their fiduciary duties as befits the professional office they occupy. Remedies for the breach of these duties are to be found, amongst other places, in the legislation which applies to these professions.

[61] Section 6(4) was not intended to protect retired persons from breaches of the protective measures created by section 6(3). Had that been an adjunct purpose of the section, it would, no doubt, have said so in clear and unambiguous language. It is significant that the protective mechanisms employed by section 6 of the HDSA are mirrored in the Alienation of Land Act, the Share Blocks Control Act and the Property Time-sharing Control Act. In each instance insolvency renders the amount kept in trust immediately payable to the party in the position of the purchaser. In none of these Acts is express provision made for repayment in the event that the funds which were required to be kept were paid away.

Conclusion

[62] I accept that this case highlights the risks which retired persons continue to face despite the legislative attempts to mitigate or protect against those risks. In each instance the purchasers were given and exercised their rights of occupation notwithstanding that a valid section 6(1)(a) certificate was not provided. They continued to do so until the agreements were cancelled. We do not know what occurred thereafter, save that SLT was subsequently liquidated. The applicants pursued claims in the liquidation of SLT. They received a dividend payment.

Assessed globally, the total of the dividend paid to the purchasers is substantially less than the total purchase consideration paid by them. We do not know what the value of each of the claims would have been upon application of the repayment formula provided in the contracts and the reasonable compensation which might have been payable in terms of section 8 of the HDSA. Even so, we must accept that the applicants suffered significant losses.

[63] They are, however, not without a remedy in relation to such losses. HGB has admitted that its payment of the entrusted funds to SLT was in breach of section 6(3)(a) of the HDSA. As I have already stated, the statutory obligation to keep the funds in trust until section 6(1)(a) is complied with, imposes a duty to protect the interests of the purchaser. Its breach, therefore, may justify a damages claim at the instance of the aggrieved purchasers.

[64] In the circumstances, the Supreme Court of Appeal was correct in its determination of the first of the three separated questions. The answer provided by the High Court in relation to the second question was not before the Supreme Court of Appeal and is also not before this Court. Contrary to the second judgment I would express no view regarding the merits of the High Court order. The High Court provided an answer to the third question without any engagement with the issues relevant to the question, nor upon any explained reasoning. The Supreme Court of Appeal correctly considered that the question could not be answered without reference to relevant evidence. It therefore set aside the High Court's order and referred that issue back to the High Court. That order is not subject to challenge before this Court. It follows that the appeal must succeed. There is no reason why the costs of the appeal should not follow the result.

[65] Had I commanded the majority, I would have made the following order:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.

MAJIEDT J (Madlanga ADCJ, Mhlantla J, Opperman AJ and Tshiqi J concurring):

[66] I have had the pleasure of reading the strongly reasoned judgment of my Colleague Goosen AJ (first judgment). I agree that we have jurisdiction, although, in my view, both our general and constitutional jurisdiction are engaged (my Colleague holds a different view in respect of constitutional jurisdiction[45]). It is well-established that we must interpret a statute so that it is constitutionally compliant.[46] As will presently appear, in this instance we are required to have regard to the social aspect of the HDSA and give effect to its constitutional objective. That engages our constitutional jurisdiction.

[67] I agree that the interests of justice require us to hear this matter and that leave to appeal ought to be granted. On the merits, however, I disagree with Goosen AJ on his interpretation of section 6(4) read with section 6(3) of the HDSA and with the outcome proposed by him.

[68] I adopt the comprehensive narration of my Colleague and will repeat aspects thereof only insofar as it may be necessary to elucidate my divergent reasoning or for emphasis. While Goosen AJ does recognise that the HDSA is social legislation aimed at protecting vulnerable elderly people, his interpretation of the impugned provision does not lend credence to that recognition.

[69] Where I part ways with my Colleague's reasoning on the merits is that in my view, section 6(4) of the HDSA does establish a cause of action against a practitioner for the payment of funds, entrusted as contemplated in section 6(3)(a) of the HDSA,

[45] See the first judgment at paras [14] to [15].

[46] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O*. [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 23 and *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) at para 45. See also *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at para 20.

not kept in trust at the time of the insolvency. I reach this conclusion on the basis that, in my understanding of the HDSA, the provisions of the Act operate differently before and after the developer's insolvency.

[70] First, it is important to understand what exactly is before this Court in the application for leave to appeal against the judgment of the Supreme Court of Appeal. That enquiry, in turn, requires an anterior assessment of how the parties litigated in the High Court. In this regard, it is noteworthy that, pursuant to a request by the parties, the High Court had separated three questions for anterior determination as points of law in terms of rule 33(4) of the Uniform Rules of Court.[47]

[71] The first point of law was formulated as follows:

> "Whether section 6(4) of the [HDSA] can found an action by a purchaser of a '*housing interest*' from a '*developer*' for repayment by a '*practitioner*' of an amount entrusted as contemplated in section 6(3)(a) of the HDSA, by the purchaser to such '*practitioner*' by virtue of a '*contract*', where, in the absence of compliance with the provisions of section 6(1) of the HDSA and prior to the '*developer*' having become an insolvent, as it subsequently did, the '*practitioner*' disbursed, to or for the account of the '*developer*', from the trust account of such '*practitioner*', an amount equivalent to the amount so entrusted to the '*practitioner*', as purported released to the '*developer*' of the amount so entrusted to the '*practitioner*'."

[72] The second point of law was:

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

[73] The third question read thus:

[47] *Herold Gie and Broadhead Inc v Harris N O* [2024] ZASCA 125; [2024] 4 All SA 333 (SCA).

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

[74] The High Court found for the applicants on all three of these questions and, as the Supreme Court of Appeal remarked, HGB's special plea of prescription and the non-reliance on the authorisations to release the purchase price to repel the claim for repayment, as well as the applicants' pleaded cancellation of the life rights agreements were issues that all remained undecided in the High Court.[48] The Supreme Court of Appeal was right in expressing its reservations about the litigation choice of the parties to separate the three questions for anterior determination in terms of rule 33(4). The Court observed:

> "It seems to me that the separated questions *might be inextricably linked to these issues*. Furthermore, the first question is framed in a complicated manner. Apart from this, the factual context and the legal framework within which the identified points of law arise in this case are complex, and have not received much consideration by our courts. *It would have been more convenient to have all the issues fully ventilated in the same hearing.*"[49] (Emphasis added.)

[75] Rule 33(4) must be used with circumspection by litigants. This case illustrates why that is necessary. In *Denel*,[50] the Supreme Court of Appeal cautioned:

> "Rule 33(4) of the Uniform Rules which entitles a Court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly

[48] Id at para 19.

[49] Id.

[50] *Denel (Pty) Ltd v Vorster* [2004] ZASCA 4; 2004 (4) SA 481 (SCA); [2005] 4 BLLR 313 (SCA).

> where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But where the trial court is satisfied that it is proper to make such an order – and in all cases it must be so satisfied before it does so – it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like the 'merits' and the 'quantum' is often thought by all the parties to be self-evident at the outset of a trial but in my experience it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of rule 33(4) and when issuing its orders a trial court should ensure that the issues are circumscribed with clarity and precision."[51]

[76] This separation of issues, the outcome in the Supreme Court of Appeal and the applicants' *limited* application for leave to appeal in this Court all have repercussions for the outcome in this matter. Let me explain. In their application in this Court, the applicants state that they want to appeal *against only a part of the judgment of the Supreme Court of Appeal*.[52] Thus, only one question is in dispute before this Court – the first question above, regarding the meaning of section 6(4) of the HDSA where there is no cancellation of the contract. That is the issue on which Goosen AJ and I differ.

[77] A finding in favour of the applicants on that first question (which is the question on which the applicants base their entire application for leave to appeal) does not require a further determination of the question whether the applicants can sue HGB for the funds they had deposited into the trust account. This is because the Supreme Court of Appeal referred that issue back to the High Court for determination.

[51] Id at para 3. See also *Molotlegi v Mokwalase* [2010] ZASCA 59; [2010] 4 All SA 258 (SCA) at paras 20 and 24.

[52] At paragraph 1 of their Notice of Application for Leave to Appeal, the applicants state:

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

The applicants ask this Court to do the same in the event that it upholds the applicants' argument on section 6(4). Against that backdrop, I proceed to discuss that central (and only) issue.

[78] I accept the first judgment's reasoning that the attorney or estate agent is subject to a statutory obligation to keep the funds in trust until the provisions of section 6(1)(a) have been complied with, and, when that occurs, the entrusted funds may be paid over to the trust creditor, for whose benefit the attorney or estate agent holds the funds in trust.[53] It is also correct that the purchaser has no claim against the practitioner for repayment of the funds kept in trust, pursuant to the section, except in the event of insolvency, as provided by subsection (4). I accept further that, absent insolvency, any claim that a purchaser may have, arising from non-compliance with section 6(1) or any other breach of the terms of the purchase contract, is a claim that lies against the developer. This is so because the contract is concluded between the purchaser and the developer, and it is the developer's obligation to deliver a section 6(1)(a) certificate to the purchaser.

[79] Goosen AJ provides two examples to illustrate the operation of subsection (3)(a).[54] I do not agree with my Colleague's conclusion in the first example about the purchaser suffering no loss prior to the developer's insolvency. In the first example, my own view is that upon the developer's failure to meet the obligation, the developer commits the breach of *mora debitoris* (a debtor's culpable, unjustified delay to perform contractually) or repudiation. The purchaser would then be able to sue the developer for breach of contract. The purchaser can claim specific performance and damages (if any). Cancellation could also be claimed depending on the extent of the breach and the terms of the contract. Return of performance flows naturally from cancellation. This means that the developer must return the purchase price which had been paid by the purchaser restoring the *status quo ante*. This is what section 8 of the HDSA provides.

[53] See the first judgment at [39].

[54] Id at [40] to [42].

[80] In the case of cancellation, and concomitant return of performance, the funds unlawfully paid away by the practitioner become relevant. Failure to restore these funds would invariably result in loss to the purchaser. However, in that case, given that there is no insolvency, the purchaser would not be able to claim the misappropriated funds from the practitioner through section 6(4) of the HDSA. Alternative remedies may, however, be available to the purchaser in other areas of the law such as the law of delict. Even in the absence of insolvency, the purchaser cannot be left without recourse against a practitioner who has misappropriated funds kept in trust pursuant to a contract that has been cancelled. The upshot is that until the fulfilment of the conditions under section 6 of the HDSA, the entrusted funds can lawfully flow only in a single direction; that is back to the purchaser.

[81] Courts must interpret legislation in a manner which, where possible, favours constitutionality over unconstitutionality.[55] In that regard the social aspect of the legislation under consideration here is of paramount importance. Effect must be given to the HDSA's constitutional objective.

[82] The first judgment holds that if the trust funds had already been paid to the developer prior to insolvency, the trustee would be obliged to meet a claim for repayment of the purchase price in accordance with the principles applicable to the *concursus creditorum*.[56] I do not see the matter being quite so straightforward. Payment of the purchase price to the developer prior to their insolvency, and in contravention of the provisions of the HDSA, cannot mean that the purchasers must compete in the *concursus creditorum* upon the developer's insolvency. They cannot, as a class of vulnerable persons, supposedly protected by social legislation, be expected to "join the queue", as it were, of concurrent creditors. That approach appears to me to be grossly inequitable to purchasers, inasmuch as it exposes them to the risk of loss that comes with competing in the *concursus creditorum*. This denies a

[55] See cases cited at fn 46.

[56] See the first judgment at [49].

purchaser of the protection given under section 6(4) solely because there has been an unlawful pay away by the attorney. It is inconceivable to think that the legislature would have intended that an attorney's theft or wrongful payment would strip an elderly and vulnerable purchaser of the protection afforded by section 6(4).

[83] The first judgment makes light of my approach to the true purpose of the HDSA as social legislation.[57] It strikes me that it would serve no purpose to engage in a debate where the fundamental point of departure is as stark as it is here. The core difficulty I have with the approach in the first judgment is that it interprets the relevant section such that the supposed vulnerable beneficiaries of specially enacted social legislation for their protection must look outside of that legislation for relief. That can never be. As I see this matter, the purchaser should be able to proceed against the attorney for repayment of the funds pursuant to section 6(4). Any funds that should have been kept in trust when insolvency occurs, are plainly expected to be there. If not in trust at that time, it must be the attorney's responsibility to recoup the funds from elsewhere and reimburse the purchaser. It bears emphasis that HGB had in each instance pleaded that it had, on behalf of, *but without authority from*, the purchaser concerned made a request to Mr Dealtry Pickford, a trustee of the SLT, to issue a certificate as contemplated in section 6(1)(a) of the HDSA. It pleaded further that it had, in response, been provided with the certificates. There is no dispute that these certificates were defective.

[84] The entire scheme of section 6 rests on the regulation of the developer's receipt of consideration. While section 6(3) creates an exception which allows the developer to receive consideration prior to the fulfilment of the conditions set out in section 6(1), the section does not create an automatic right to claim the consideration received. Statutory conditions precedent must be fulfilled prior to entitlement.

[57] See the first judgment at [59] to [61] amongst others.

[85] The wording in section 6(1) is peremptory – "*no developer* may by virtue of a contract receive *any* consideration *or any part* thereof".[58] The inclusion of a criminal sanction (including imprisonment) under section 6(2) also illustrates the seriousness with which the Legislature views the prohibition against the premature receipt of the consideration by the developer.

[86] The use of the word "entrusts" in section 6(3)(a) is significant. It is strongly indicative of a special relationship, one built on fidelity and trust. Its dictionary meaning as used in "entrust" as a transitive verb is "to give someone a thing or a duty *for which they are responsible*";[59] "to *put* into the *care* or *protection* of someone";[60] "to give a task, duty, or *responsibility* to".[61] Thus, a high level of care must be exercised by the attorney or estate agent who receives the purchasers' money. This duty of care carries with it the responsibility not to unlawfully pay away entrusted funds and to make good any misappropriated funds. To require anything less would be to vitiate the very essence of what it means to "entrust".

[87] Prior to fulfilment of the conditions, the purchasers (or their estates) retain the right to lay claim to the funds entrusted if the contract is cancelled or the developer becomes insolvent. Section 6(3), in my view, creates a statutory escrow agreement between the practitioner and the purchaser. The funds paid over by the purchaser are escrowed until the conditions under section 6(1) have been met. That is the true nature of the carveout under section 6(3). Lawful payment to the developer can *only* take place upon the fulfilment of the statutory conditions.

[88] The statutory escrow agreement terminates upon insolvency of the developer prior to fulfilment of the conditions. It may also terminate upon agreement by all

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[58] Emphasis added.

[59] Cambridge Dictionary "entrust" (2026), available at https://dictionary.cambridge.org/dictionary/english/entrust?q=entrust+to at the first definition (emphasis added).

[60] Collins Dictionary "Definition of 'entrust'" (2026), available at https://www.collinsdictionary.com/dictionary/english/entrust at the second definition (emphasis added).

[61] Merriam-Webster "entrust" (2026), available at https://www.merriam-webster.com/thesaurus/entrust at the first definition (emphasis added).

parties concerned that the deal envisaged is no longer to continue for any agreed reason. Termination in these circumstances would presumably require an instruction to the practitioner from both the purchaser and the developer, indicating that the deal necessitating the escrow has collapsed. In the latter case, however, the funds held in trust can only legally flow in one direction: back to their rightful owner, the purchaser.

[89] My Colleague criticises my analogy with an escrow agreement and says that it is inapposite, because it is "not otherwise explicable by the concepts and principles that apply to familiar features of our law, such as stakeholding and agency".[62] The criticism is ill-founded. The authorities show that the way in which modern day "escrow" is understood has expanded. It includes not only deeds or documents but money and a whole range of items of property. It is therefore not wrong to describe this structure as an escrow arrangement.

[90] In Kerr's *The Law of Agency*, the nature of agency is described thus:

> "The aim of the appointment of an agent is the performance of a service for the principal: what the principal finds it impracticable, inconvenient or difficult to do for himself he proposes to do through another. In legal contexts, the word 'agent' is most commonly used of a person whose activities are concerned with the formation, variation or termination of contractual obligations, and 'agency' has a corresponding meaning."[63]

[91] This does not seem to fit the role played by the practitioner pursuant to section 6(3)(a) of the HDSA. The practitioner receives money for the benefit of the developer but nothing in the section suggests that the practitioner is authorised to act on behalf of the developer as their agent. The word "stakeholder" could be a fitting description if it is used in the narrow sense as explained by the Court in *Baker* "being

[62] See the first judgment at [56].

[63] Kerr *The Law of Agency* 4 ed (LexisNexis, 2006) at 3.

confined to a third party who receives and holds something not as the agent of either one of the two persons who have an interest in it”.[64]

[92] South Africa is no stranger to the concept of “escrow”. Here, attorneys often play a pivotal role as escrow agents, ensuring that complex transactions are conducted with utmost integrity. The concept of “escrow” has been described thus:

> “In simple terms, an escrow is a financial arrangement where a third party (the escrow agent) temporarily holds and regulates payment of funds required for two parties involved in a given transaction. It ensures that the transaction is completed smoothly, with both parties meeting their obligations.
>
> . . .
>
> In South Africa, while there are dedicated escrow services, attorneys are often chosen as escrow agents due to:
>
> (1) trustworthiness: attorneys are bound by strict ethical standards and a code of conduct, ensuring credibility in the process.
>
> (2) legal expertise: being well-versed in the law, attorneys can seamlessly navigate the legal intricacies of transactions.
>
> (3) neutral standpoint: as a neutral third party, attorneys can impartially handle disputes should they arise.
>
> . . .
>
> In the intricate web of transactions, trust is paramount. In South Africa, attorneys, with their legal prowess and ethical standing, have emerged as trusted escrow agents, safeguarding interests and ensuring that transactions are concluded harmoniously. Whether you’re diving into the world of real estate, mergers and acquisitions, or any transaction requiring an escrow, considering an attorney as your escrow agent in South Africa is a step towards security and peace of mind.”[65]

[93] The High Court in *Klerck* provided a definition for what an “escrow” arrangement is. The Court described the term thus:

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[64] See the first judgment at [52], quoting *Baker* above n 38.

[65] Barter “Attorneys as escrow agents in South Africa: a crucial intermediary” *Commercial Law Explained*, available at https://www.bartermckellar.law/commercial-law-explained/attorneys-as-escrow-agents-in-south-africa-a-crucial-intermediary.

> "An escrow, a term derived from English law, is a deed or agreement delivered to a disinterested third party *in trust* pending the fulfilment of a condition specified therein in favour of one or other of the parties to the agreement. If the condition is performed it becomes a binding obligation. Otherwise it fails."[66] (Emphasis added.)

[94] The Court in *Klerck* goes on to quote from the Canadian case of *Toonton v Atkinson*[67] in which the following was stated:

> "In early times escrow may have been used exclusively when delivering deeds. Today however, 'escrow', like many other words has acquired a much wider application. It may apply to *money*, company stock, securities and *other items of property*. The modern day application of the word is provided in Black's Law Dictionary, 5th ed, p. 489:
>
>> 'Escrow. A writing, deed, *money*, stock, or other property delivered by the grantor or obligator into the hands of a third party, to be held by the latter until the happening of a contingency or performance of a condition, and then by him delivered to the grantee, promisee or obligee. A system of document transfer in which a deed, bond, or *funds* is delivered to a third person to hold until all the conditions in a contract are fulfilled; e.g., delivery of deed to escrow agent under instalment land sale contract until full payment of land is made.'
>
> The Concise Oxford Dictionary states as follows:
>
>> 'Escrow. Written legal engagement to do something, kept in third person's custody until some condition has been fulfilled; *money or goods so kept.*'"[68]

[95] This definition, to me, seems to accurately capture the arrangement envisaged in section 6(3)(a) of the HDSA. We have a purchaser, a developer and an independent/neutral party being the practitioner who holds the purchase price in trust until the condition set out in section 6(1) has been fulfilled. If the condition is not

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[66] *Klerck v SA Metal and Machinery (Pty) Ltd* [2004] ZAECHC 12; [2009] 4 All SA 344 (E) at para 2.

[67] *Toonton v Atkinson* (1985) 52 Nfld 8 PEIR 167, 174. See also the Zimbabwean case of *Deputy Sheriff, Harare v Metbank Zimbabwe & Anor HH-230-13*.

[68] *Klerck* above n 66.

fulfilled, the underlying reason for which the funds are held in trust ends. This is the position explained in paragraph 22 of this judgment. The understanding is that the statutory escrow agreement lapses and is of no further force or effect, the escrow account ceases to be operated as an escrow account and the funds are thereafter held by the bank at the disposal and for the sole benefit of the purchaser, who may then in their sole discretion withdraw the full funds at any time.

[96] Section 6(4) provides a statutory remedy even where the practitioner has in the meantime unlawfully paid over the proceeds of the relevant "entrustment" in contravention of section 6(3)(a). Unlawful payment by the practitioner to the developer (or any third party) does not change the fact that the entrustment remains, *de jure* (by law), "kept" in the practitioner's trust account. Thus, the practitioner is under a legal obligation to retain the funds entrusted to it until the preconditions set out in the statute have been met. An unlawful disbursement does not satisfy these conditions and thus does not relieve the practitioner of their duty under section 6(4). Instances of unlawful payment by the practitioner serve to create a deficit in the practitioner's trust account, but that does not mean that the funds entrusted are no longer regarded as "kept" in the trust account.

[97] I agree with the applicants that the true purpose of section 6(4) is to provide for immediate and unconditional reimbursement to a purchaser of the proceeds of a section 6(3)(a) entrustment in the event of the developer becoming insolvent without having complied with the requirements of section 6(1). The purpose is not, as the first judgment holds, simply to exclude the proceeds of a section 6(3)(a) entrustment from the estate of a developer who becomes insolvent without having complied with the provisions of section 6(1). Had that been the purpose of section 6(4), the Legislature could simply have provided therefor expressly, in the same way as it has provided for exclusion of funds in the trust account of an attorney from the estate of

the attorney upon their insolvency under section 88 of the Legal Practice Act (previously section 79 of the Attorneys Act[69]).

[98] It follows then that the insolvency of the developer prior to fulfilment of the conditions under section 6(1) does not entitle the developer (or the trustee of their insolvent estate) to claim the consideration received. There is nothing in the legislation that suggests this. The insolvency of the developer, prior to satisfaction of the conditions under section 6(1), does not result in the proceeds falling into the developer's insolvent estate. The funds remain sealed off in protection of the vulnerable purchaser. The only circumstance in which a developer would ever be entitled to the release of such proceeds would be upon compliance with the provisions of section 6(1). Therefore, the trustee or liquidator of an insolvent developer company is in no better position and is not entitled to untrammelled release of the escrowed proceeds.

[99] The true purpose of section 6(4), in my view, is not to protect the purchasers from the operation of the *concursus creditorum*. It is, instead, to make plain that the financial relationship between the developer and the purchaser comes to an end upon the insolvency of the developer prior to fulfilment of the conditions under section 6(1). It makes clear that, at this point, there is no longer a legal reason for the funds to remain entrusted for the benefit of the developer because it is, at that point, manifestly plain that the developer will not be able to satisfy its obligations to the purchasers. It bears repetition that any payment of entrusted funds by the practitioner will be unlawful. That unlawful payment by the practitioner cannot absolve the practitioner of their duty to reimburse the purchasers.

[100] Thus viewed, the only sensible and constitutionally compliant interpretation of the impugned provision is that advanced by the applicants. Interpreted holistically, the purpose of section 6(4) is to create a statutory provision which establishes an unconditional right to repayment on the occurrence of a trigger event: the insolvency

[69] 53 of 1979.

of the developer. The first judgment's interpretation of the purpose adopts a narrow view of the section which is unsustainable in light of the overall purpose of the legislation. It also fails to promote the spirit, purport and objects of the Bill of Rights as courts are enjoined to do by section 39(2) of the Constitution. Therefore, the words "kept in a trust account" under section 6(4) of the HDSA do not have regard to the *de facto* (factual) state of affairs. They entail a *de jure* (legal) analysis. Monies which should have been kept in the trust account will be regarded as such.

[101] The purpose of the impugned provision is not, as the first judgment holds, simply to exclude the proceeds of a section 6(3)(a) entrustment from the estate of a developer who becomes insolvent without having complied with the provisions of section 6(1). Had that been the purpose of section 6(4), the Legislature could simply have provided therefor expressly, in the same way as it has provided for exclusion of funds in the trust account of an attorney from the estate of the attorney upon their insolvency.

[102] In sum then, section 6(4) of the HDSA does provide a statutory remedy for repayment of funds entrusted by a purchaser in terms of section 6(3)(a) even where the practitioner concerned has unlawfully paid away the proceeds of the relevant entrustment prior to insolvency of the developer.

[103] For these reasons, I would grant leave to appeal and uphold the appeal. That would mean that the matter must be remitted for further hearing in the High Court. I must add, though, that, unlike the High Court, I would decide the second question in favour of HGB. I hold the view that the most suitable remedy for these (and other similarly placed) applicants would have been under section 8 of the HDSA[70] instead

[70] Section 8 of the HDSA reads:

> "Consequences of contracts which are void or are cancelled
>
> (1) Notwithstanding any other law, but subject to any power that a court may have and subject to subsection (2), any person who has performed partially or in full in terms of a contract which is of no force or effect in terms of section 2(1) or which has been declared void or has been cancelled under this Act, is entitled to recover from the

of section 6. This is for two reasons. First, as appears from my Colleague's narration, the funds entrusted were paid over to the developer, SLT, prior to its insolvency. After payment, the purchasers took occupation of the units and cancelled their "life rights" agreements on 24 October 2014. The final sequestration order was only issued on 9 March 2016. By then, there had been partial performance by both parties.

[104] Secondly, the purchasers lodged claims against the insolvent estate for repayment of the purchase consideration paid to the developer. They were, in due course, each paid a concurrent dividend. It is arguable, then, that they have accepted falling within the *concursus creditorum*.

[105] Despite these potential findings for HGB, it did not appeal, *qua* (in the capacity of) defendant in the High Court, against paragraph 2 of the Supreme Court of Appeal's order which confirms the High Court's decision in respect of the second question. That question is, therefore, not before this Court. As stated, it is only the first question that is before us. In the absence of an appeal by HGB, this

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other party what he has performed in terms of the contract, and, if the seller concerned is a developer—

(a) the purchaser may in addition recover from the developer—

(i) interest at the rate prescribed by regulation on any payment that he made in terms of the contract, from the date of the payment to the date of recovery;

(ii) a reasonable compensation for—

(aa) necessary expenditure he had incurred, with or without the authority of the owner of the land concerned or of the developer, in relation to the preservation of the land; or

(bb) any improvement which enhances the market value of the land and was effected by him with the express or implied consent of the said owner.

(b) the developer may in addition recover from the purchaser—

(i) a reasonable compensation for the occupation or utilisation the purchaser may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the purchaser or any person for whose actions the purchaser may be liable.

(2) Any alienation which does not comply with section 2(1), shall in all respects be valid ab initio if the purchaser has in terms of the alienation rendered the full compensation and the land concerned has been transferred to the purchaser or the housing interest concerned has otherwise been vested in him."

Court does not have jurisdiction to decide the second question. That is an issue for the High Court to decide on remittal. The first judgment holds the same view.[71] And, as stated, the third question before the High Court is also not before us. This is because, as I have said, the question whether the applicants can sue HGB for the funds they had deposited into the trust account was referred back by the Supreme Court of Appeal to the High Court for determination. The applicants ask this Court to do the same in the event that it upholds the applicants' argument on section 6(4), which is the case.

Order

[106] I make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld to the extent set out in paragraph 3 below.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   "1. The appeal is dismissed with costs.

   2. Save for the decision on the second question, the order of the High Court is set aside and replaced with the following:

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

      2.2 The third question is referred back to the High Court for determination.

      2.3 The costs stand over for determination together with the remaining issues.'"
4. The matter is remitted to the High Court for further hearing on the remaining issues.
5. The respondent must pay the costs in this Court.

[71] See the first judgment at [64].

For the Applicants:	J Rogers instructed by Biccari Bollo Mariano Incorporated
For the Respondent:	S Olivier SC and JP White instructed by Clyde and Company