

Unlawful sale of state-subsidised houses by the Cape Town Community Housing Company

by

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Abstract

This dissertation clarifies the protections available to housing subsidy beneficiaries who purchase houses through credit agreements. I look at the legislative framework that protects the right to access to housing in terms of section 26 of the Constitution. I consider a Constitutional Court case *Amardien and Eleven Others v Cape Town Community Housing Company* 2019 (2) BCLR 193 (CC) which established that sections 19 of the Alienation of Land Act and 129 of the National Credit Act give the procedural steps that a developer needs to take before it can lawfully cancel sale agreements with subsidy beneficiaries while giving effect to the right to housing.

The case study determined that where disputes arise, both the National Credit Act and Alienation of Land Act provisions apply in the enforcement of the agreements. The beneficiaries' purchases of their houses must be registered to protect them from the seller selling their properties to third parties. The seller does not remain the property owner and is precluded from repossessing the houses and selling them to third parties without a court order.

I argue that such conduct amounts to an unjustified infringement of their housing rights and constitutes an arbitrary deprivation of property. Judicial oversight is required in determining whatever enforcement mechanisms that are appropriate in the circumstances of default by the beneficiaries.

I discuss the State's obligations in terms of the Housing Act and international law in the enforcement of the subsidy agreements by the Company relating to the beneficiaries' right to housing. I discuss how the State breached its obligations by failing to fulfil its obligations and the impact of such failure on the beneficiaries.

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Chapter 1: Introduction

In this dissertation, I intend to address a newfound challenge to communities who found themselves facing losing their government subsidised homes and eventual evictions. I consider the consumer protections available to recipients of affordable housing provided through a government-funded subsidy scheme where the beneficiaries have an additional partial obligation to fund the building of their homes. In doing so, the beneficiaries entered into instalment sale agreements in terms of which they were to pay the balance of the construction costs over a period. The dissertation clarifies the protections available to such beneficiaries to protect their right to access to housing in terms of section 26 of the Constitution. It further gives the procedural steps as explained by the court that a private developer needs to take before it can cancel the sale agreement with a beneficiary to give effect to the right to housing and comply with consumer protection legislation.

Brief Background

The City of Cape Town (the City) had a housing waiting list backlog, and delivery of houses to people in need in Cape Town was unsatisfactorily slow. In 1999, the City devised a plan to expedite housing delivery.¹ This plan called applications for housing that were open to all people eligible to receive social housing.² For the City to rapidly realise their rights to housing, the City and the National Housing Financing Corporation created a joint venture company, the Cape Town Community Housing Company (the Company).³ The Company was established as a special purpose vehicle to expedite low-cost housing within the City's jurisdiction.⁴ The company has a long history. However, I will only give sufficient detail about the core issues raised in the case study below and to provide some context of the subject matter of this dissertation.

¹ [News | City launches plan to fix low-cost houses | L2B](#)

² *Id.*

³ *Id.* notes 2 above.

⁴ *Id.* notes 2 above.

The Company is a private company initially owned in equal shares by the City and the National Housing Finance Corporation (NHFC).⁵ The company developed a housing scheme in terms of which people who qualified for low-cost housing, initially people who earned between R3500 – R7500 per month, participated in the scheme to realise their right to access to housing.⁶

The application process was twofold; first, the person would have to apply to be admitted into the scheme. The applicant had to be within the target gap market; they could not have previously owned property, nor had they received housing subsidies.⁷ Once that occurred, the applicant then had to show affordability. The applicants needed to save an amount that is equivalent to the envisaged costs of purchase plus municipal accounts for three months to demonstrate that they could afford the monthly instalments.⁸

Between 1999 – 2002 the City funded the Company; it committed the amount of R25 million annually in its budget for the project. This funding was start-up capital and running costs; the rest of its funding came from the department of human settlements via the subsidies paid by the NHFC.⁹

The NHFC made payments to the Company of the subsidies in terms of a subsidy agreement. In 2002, the Company was paid a total amount of R92 million in subsidies, from which it planned to build the first eight phases of the project.¹⁰ Each beneficiary was liable to the Company for the balance of the purchase price once the subsidies were paid to the Company over four years. Once the individual subsidy and costs were determined, the beneficiaries were meant to start paying instalments on taking occupation.¹¹ The beneficiaries contended that the Company informed them that the monthly instalment

⁵ <http://www.ctchc.co.za/?controller=pages&view=load&id=home>

⁶ <http://www.ctchc.co.za/online.asp?controller=news&view=all&id=1>

⁷ <http://www.ctchc.co.za/online.asp?controller=news&view=all&id=1> or the <https://www.westerncape.gov.za/dept/human-settlements/services/852/17479>

⁸ Founding affidavit and replying affidavits para 9-10.

⁹ Clause 4 of the ISAs.

¹⁰ The first eight phases of the project were houses built in two sites Mitchell's plain, one in Phillipi, three in Hanover Park, one in Heideveld and Gugulethu.

¹¹ Clause 4 of the ISAs.

would be the same as their savings. The purchase amounts had a six percent interest per annum over four years.¹²

However, there were issues with the houses that were delivered to the beneficiaries. The houses had, in some instances, severe latent and patent defects.¹³ The first beneficiaries who took occupation during 2000 complained about the defects. The houses were poorly and hastily built without any checks and compliance with the National Building Standards regulation.¹⁴

The company substantially increased the instalment payments, for which the beneficiaries were liable. These new instalments were vastly different from the saving amounts the beneficiaries were told would be their instalments for four years until their houses were paid off. This, amongst other reasons, resulted in many beneficiaries defaulting on their payments.¹⁵

The Company depended on the payments of the instalments from the beneficiaries to continue its operation. To solve this problem, it developed an affordability programme. The Company asked beneficiaries to enter into affordability agreements. The terms were that the beneficiaries agreed to increase the outstanding balance amounts, instalments, and payment period by four years. However, the Company also imposed additional obligations on the beneficiaries, such as levies.¹⁶

In addition to this, the beneficiaries were faced with poorly built houses that required extensive repairs and maintenance. The beneficiaries from as early as 2000 when they took occupation of the houses had complained about this problem. During 2004 and 2008, through intervention from the National Home Building Regulation Council, the Provincial

¹² Clause 5 of the ISAs.

¹³ In 2002 the National Home Building Regulation Council compiled a report which documented the extent of the defects and made recommendations including a repair programme. The defects and complaints were extensively publicised see also <https://www.property24.com/articles/shoddy-building-fails-cape-housing/5078> and <https://www.l2b.co.za/Construction-News/City-launches-plan-to-fix-low-cost-houses?Id=848f42fe-cbd0-4830-9f09-c98aada9f0a4&strLength=long>.

¹⁴ [Shoddy building fails Cape housing - Construction, News](#)

¹⁵ *Amardien and 11 others v The Registrar of Deeds and 4 Others* CC217/17; WCHC5283/16 at para 11 (*Amardien* CC Judgment full citation note 139 below).

¹⁶ [Shoddy building fails Cape housing - Construction, News](#).

Department of Human Settlements, and the City's MEC for Local Government and Housing, there were two rounds of attempts to repair the structural defects of the houses. Although these repairs occurred, the beneficiaries were still displeased about the remedial work that was undertaken and, in some cases, contended that there was no remedial work conducted as their houses still have defects. The beneficiaries themselves had to pay for the repair and maintenance of the houses to make them liveable.¹⁷

In terms of the agreement, the Company was liable to remedy patent and latent defects that the beneficiaries identified within a certain period of occupation.¹⁸ However, the Company took as long as four years to remedy the defects, during which time beneficiaries had to do the work themselves at their expense.¹⁹ Some beneficiaries got tired of not getting responses and remedial work from the company, and they withheld payment to the company.²⁰

The Company sent letters of cancellation to beneficiaries who had defaulted at different stages.²¹ It then sold some of the defaulting beneficiaries' houses to third parties without giving them any further notice.²² Beneficiaries whose houses were sold began to receive eviction notices from different third-party investors notifying them for the first time that their contracts with the company had been cancelled; the Company had sold their houses to third parties, and the beneficiaries were now in illegal occupation of the houses and must vacate. These third-party notices were followed by some eviction proceedings and litigation challenging the lawfulness of the cancellations of the agreements and subsequent sale of the houses, which I will deal with below.²³

¹⁷ *Id.*

¹⁸ Clause 7.2.1 of the ISAs states that the seller shall at its own cost and expense remedy any within three (3) months after the occupation date all patent defects in the house. In clauses 7.2.2 - 3 the seller provided a warranty that it will remedy all latent defects manifesting themselves in the house within 2 years of occupation, and all leaks in the roof which appeared within 1 year of occupation.

¹⁹ *Awardien* at para 12.

²⁰ *Id* above n 3.

²¹ *Awardien* at para 14.

²² *Id* at para 15.

²³ *Id* at para 17.

The applicable legislative and policy framework for social housing subsidies agreements

I will look at the right to access to adequate housing in terms of section 26 of the Constitution. The Constitution mandates all three spheres of government to provide access to adequate housing to everyone who needs housing and security of tenure. It requires the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right. It also provides that no one may be evicted from their home or have their home demolished without an order of court made after considering all relevant circumstances.

Section 26(3) of the Constitution further provides that no legislation may permit arbitrary evictions. Additionally, section 7(2) of the Constitution provides that the state must promote, protect, and fulfil the rights in the Bill of Rights, including the right to access to housing. I will consider the government's role in these disputes and evictions.

I will consider the legislative and policy framework in terms of which the housing scheme and the implementation of the development is regulated. The Housing Act 107 of 1997 sets out general principles for housing development. It requires that housing developments that are consultative with the communities affected; prioritise the needs of the poor, administered in a transparent, accountable, and equitable manner, upholds the practice of good governance, and complies with and observe the requirements of the applicable legislation.²⁴ It defines the functions of all spheres of government in the development process for the provision of housing in sections 3, 7 and 9 of the Housing Act. It requires a National Housing Code²⁵ and the establishment of a South African Housing Development Board.²⁶ The Housing Code²⁷ elaborates the principles set out in the Housing Act.

I will briefly discuss international instruments relevant to access to housing of which South Africa is a signatory. Section 39(1) of the Constitution provides that courts must consider

²⁴ Section 1 of the Housing Act.

²⁵ Section 4 of the Housing Act.

²⁶ The National Housing Development Agency Act 108 of 1998.

²⁷ National Housing Code 2009.

international law when interpreting any provision in the Bill of Rights. The Universal Declaration of Human Rights²⁸ and the International Covenant on Economic, Social and Cultural Rights²⁹ provides for everyone to have the right to access to socio-economic rights, including housing. The African Charter for Human and Political rights also provides socio-economic protections.

Our law has protections for consumers, such as the National Credit Act 34 of 2005 (NCA), which regulates credit agreements, including instalment sale agreements³⁰. Section 129(1) of the NCA provides that if the consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.³¹ Section 3 of the NCA explains the objects of the Act, which include the promotion and advancing the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.³²

²⁸ UDHR General Assembly Resolution 217A article 25 (1): Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care.

²⁹ General Assembly resolution 2200A (XXI) of 16 December 1966 article 11: recognises the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.

³⁰ Sections 4 and 8 NCA.

³¹ In *Sebola and Another v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC) (Sebola)* the Constitutional Court held that although the requirement to send notice is framed in permissive terms, it is in fact a mandatory pre-litigation step as the credit provider cannot proceed to court unless the notice has been sent.

³² Section 3 of the NCA provides:

'The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

- (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
- (b) ensuring consistent treatment of different credit products and different credit providers;
- (c) promoting responsibility in the credit market by-

The Alienation of Land Act 68 of 1981 (ALA) is another consumer protection legislation that regulates the agreements between the Company and the beneficiaries. Section 1 provides that the purposes of the ALA include the need to protect vulnerable purchasers, imbuing of good faith and fairness into contractual relationships, and the importance of recordal of the agreements with the registrar of deeds. Section 19(2) of the ALA requires the notice of a breach by the purchaser to afford them 30 days to cure the alleged breach. To protect purchasers' section 26 requires that a sale in land be recorded within 90 days of its conclusion and prohibits the seller from receiving any payment or interest on the sale until it is recorded. (more on this below)

Case study: Amardien v Cape Town Community Housing Company³³

In this matter, the applicants challenged the lawfulness of the Company's cancellations of their instalment sale agreements; the subsequent deregistration of those agreements and the sale of their houses without notice to S&N trust.³⁴

I will further discuss how the government's duties in terms of the Constitution do not end when the houses are delivered to the beneficiaries. The applicants here argued that the

-
- (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
 - (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
 - (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-
 - (i) providing consumers with education about credit and consumer rights;
 - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
 - (f) improving consumer credit information and reporting and regulation of credit bureaux;
 - (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
 - (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
 - (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

³³ *Amardien and 11 Others v The Registrar of Deeds and 4 Others* CC217/17; WCHC5283/16.

³⁴ The Trustees of S&N were cited as the second to fourth respondents in the application.

duties did not end when the houses were delivered. In this case, the State must protect and promote the established right to housing. Although the contractual relationships are governed by the NCA, ALA and private law of contract, the State has certain legal duties to ensure that the subsidy beneficiaries do not lose their realised right to access to housing and security of tenure.

The applicants contended that the Company was not entitled to cancel their agreements without notice of the cancellation. They further contended that it was required in terms of the ALA to notify them when their agreements were registered with the registrar of deeds which triggered their obligation to make payments to the company.³⁵ Lastly, the Company was not entitled to sell their houses without notice to them and the Department of Human Settlements that provided the subsidies.

The purpose of this dissertation is to determine in these types of disputes what the obligations of the State are and whether it has fulfilled those obligations. I will also determine what obligations the Company has concerning the beneficiaries right to housing and whether it has breached its obligations. I will discuss the factors courts are required to consider in terms of the Constitution, legislation and decided cases on the issue of protecting the right to housing.

Methodology

This is a desktop research dissertation that looks at the experiences and ultimate case study of a group of individuals whose court case was decided by the Constitutional Court. The main clarification in this matter is which consumer protection legislation applies to the cancellation of the instalment sale agreement to purchase residential properties where the sale is partially government subsidised. The Court looked at the lawfulness of the cancellation of the subsidy agreements when the beneficiaries failed to pay on their instalments and consequently defaulted on the subsidy agreements. It outlines the procedure that is to be followed in the enforcement and the event of a cancellation of the agreements.

³⁵ *Awardien* Founding affidavit paras 65-69.

I was part of the legal team that represented beneficiaries with the constitutional matter. As far as I can remember, I have had conversations with clients and engaged with media articles about the issues relating to the Company. This dissertation discusses some of the most serious difficulties the beneficiaries had in engaging with the Company over the long period until the Constitutional Court brought a level of finality.

The beneficiaries for many years had been attempting to engage with the Company to try to resolve various issues; however, their pleas fell on seemingly deaf ears as the Company's attitude was that should they be in default of payments due to it, they no longer were bearers of any rights, therefore, were not entitled to any fairness, dignity, and respect. The research focuses on court affidavits and heads of arguments in the High Court and Constitutional Court. I also look at other dissertations, and media articles which reported on the Cape Town Community Housing Company and made factual findings.

Due to my involvement and engagement as a legal representative with the beneficiaries as clients and the Company, I have consulted the court pleadings, access to the agreements, correspondence, legal documents, and more. Although I attempt to provide a balanced academic analysis on the issue, I acknowledge that my view and approach to this research are from my experience and focus on the beneficiaries' rights. In this legal analysis I draw on my own practical knowledge of the cases at hand, approaching the research with an insider's perspective as a legal representative of the beneficiaries, which inevitably means that I have a particular bias to the research.

Literature review

I have not come across academic writing on this issue.³⁶ The comparative literature focuses on interpreting section 129 of the NCA on the cancellation of mortgage bond agreements and sale in execution of immovable property.

There has been extensive commentary of the implication of the jurisprudence on section 129 of the NCA on cancellation of mortgage bond agreements and the impact of

³⁶ Apart from Aronstam P. J. ' *The Alienation of Land: Being a Supplement to the Law of Credit Agreements and Hire-Purchase* ' Juta, 1985 which considers the ALA and its regulations before 1985 before is amendments in 1998 and 2005 by the NCA. The legal landscape was completely different at that stage.

such cancellations on the rights to access to housing in terms of section 26 of the Constitution. However, this dissertation focuses on the cancellation of subsidy agreements that ought to be treated slightly differently to mortgage bond agreements. Although they are the sale of property by credit agreements, they are also credit agreements entered into in fulfilment of a constitutional obligation by the State and a poor beneficiary who qualifies to obtain a State subsidy. An ordinary mortgage agreement has certain consequences which will emanate from the breach these consequences can either be delayed, mitigated, or prevented in terms of NCA and ALA on a case-by-case basis. This is so because the NCA and ALA provide for procedural protections that are now recognised as applicable to beneficiaries of partial subsidy agreements.

However, the basis of entering into a subsidy agreement is a certain level of earnings that banks do not fund. The state has appointed the developer to contract with poor beneficiaries targeting them only. There is a huge power disparity between the beneficiary and the Company. The beneficiary cannot access any other creditor because of the market; therefore, their negotiation power is limited. Later I will discuss useful submissions by the Department of Human Settlements and the Woman's Legal Centre, which articulate the context of these agreements as credit agreements premised on the State obligations and funding which is not conditional to the fulfilments or payment of the credit portion of the purchase arrangement.

I look at the obligation that the state has in enforcing and cancelling subsidy agreements where the Constitutional Court determined that both the obligations imposed to creditors and sellers of immovable property apply to the sale, enforcement, and cancellation of subsidy agreements. Both the provisions of the NCA and the ALA has been held to apply. The protections therein apply to these types of sales, and the State is not permitted to cancel subsidy agreements without following both the provisions of these acts. I deal with the regulatory framework, which governs instalment sale agreements.

In the following chapter, I consider the legislative framework under which the housing scheme was established and operated. The Housing Act is the enabling legislation and policies thereunder which regulate the development of housing and management,

oversight, implementation, and support/funding to housing institutions such as the Company. The Company as a credit provider and seller of land has certain duties under the NCA and the ALA. It also outlines the respective government duties in housing development and delivery. I will also discuss the right to housing and states duties in terms of international law.

Chapter 2: Regulatory framework for the right of access to adequate housing.

Introduction

The Cape Town Community Housing Company (the Company) is an affordable housing institution funded and wholly owned by the National Housing Finance Corporation, a Development Finance Institution established and financed by the Human Settlements Minister in terms of the Housing Act. The Company implements housing development aimed at giving access to housing to poor members of society resident in Cape Town. It is a vehicle through which the State fulfils its obligations to give access to housing in terms of section 26(3) of the Constitution.

The government has various legal obligations relating to the provision of housing under the Constitution and international law. The role and responsibilities of the different spheres of government in housing development are delineated in the Housing Act and Housing Code. Here I look at the exact roles and responsibilities attendant to the different spheres of government in the disputes and evictions faced by Cape Town's poor citizens.

First, I look briefly at the right to access to adequate housing in terms of Section 26 of the Constitution. Secondly, I discuss the legislative framework in terms of which the housing scheme and the implementation of the development are regulated and relevant consumer protection laws. Thirdly, I briefly look at international instruments relevant to access to housing to which South Africa is a signatory.

Right to housing

The Constitution mandates all three spheres of government to provide access to adequate housing to everyone who needs housing and security of tenure. It requires the

State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.

It also provides that no one may be evicted from their home or have their home demolished without an order of court made after considering all relevant circumstances. Additionally, section 7(2) provides that the state must promote, protect, and fulfil the rights in the Bill of Rights, which includes the right to access to housing.

Section 26 of the Constitution provides that everyone has the right to have access to adequate housing.³⁷ It requires the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.³⁸ It prohibits evictions from homes or demolition of homes without an order of court made after considering all relevant circumstances. Section 26(3) further provides that no legislation may permit arbitrary evictions.

In the *Grootboom*³⁹ case, the CC explained section 26 of the constitution, saying that it 'first confers a general right of access to adequate housing⁴⁰. The second establishes and delineates the scope of the positive obligation imposed upon the State to promote access to adequate housing and has three key elements⁴¹. The State is obliged: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of this right.⁴² Lastly, it prohibits unlawful evictions and demolition of homes without a court order.'⁴³

The right of access to adequate housing imports an inhibitory duty not to impede or impair access to housing that rests not only on public bodies but also on private parties.⁴⁴

³⁷ 26(1) of the Constitution.

³⁸ 26(2) of the Constitution.

³⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). (*Grootboom*)

⁴⁰ Section 26(1) of the Constitution.

⁴¹ Section 26(2) of the Constitution.

⁴² Id at para 21 *Grootboom* case.

⁴³ Section 26(3) of the Constitution.

⁴⁴ *Maphango v Aengus Lifestyle Properties (Pty) Ltd (Inner City Resources Centre as Amicus Curiae)* 2012 5 BCLR 449 (CC) (*Maphango*) at para 32.

Furthermore, it has been shown how the progressive realisation of the right of access to housing may impinge on both the state and private parties⁴⁵. The courts have held that the right to housing binds private parties in instances such as debt recovery, where it is subjected to judicial consideration of the right before creditors may levy execution on a debtor's home.⁴⁶ Moreover, while a private landowner cannot be expected to house unlawful occupiers indefinitely, its right not to be arbitrarily deprived of property must be interpreted in conjunction with the constitutional requirement that every eviction is made by court order after considering all the relevant circumstances.⁴⁷

Another way in which the right of access to adequate housing ripples out to private rights is when the state itself takes measures to fulfil the right. These may affect private law agreements for the sale of housing, such as in the case of the State using private companies to sell subsidised or low-cost housing to poor beneficiaries.

Legislative framework relating to housing development.

The Housing Act 107 of 1997 sets out general principles for housing development. It requires housing developments that are consultative with the communities affected; prioritise the needs of the poor; are administered in a transparent, accountable, and equitable manner; uphold the practice of good governance and comply with and observe applicable legislative requirements.⁴⁸ It defines the functions of all spheres of government in the development process for the provision of housing in sections 3, 7 and 9 of the Act. It requires a National Housing Code and the establishment of a South African Housing Development Board. Although I do not discuss it here, the Housing Code elaborates the principles set out in the Housing Act.

In light of the State's constitutional obligation to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to housing, the Housing Act gives effect to section 26(3) of the Constitution and the States obligation under international law.⁴⁹ It is the legislative framework in terms of which the

⁴⁵ See *Grootboom, PE Municipality, Olivier Roads, Bluemoon light, Maphango*.

⁴⁶ See also *Sebola*.

⁴⁷ *Maphango* para 33

⁴⁸ Section 2 of the Housing Act.

⁴⁹ Preamble of the Housing Act.

housing subsidy scheme and the implementation of the Cape Town Community Housing Company developments are regulated. It recognises that housing, as adequate shelter, fulfils a basic human need and requires prioritising the needs of the poor in respect of housing development.⁵⁰

Housing Act

The Housing Act 107 of 1997 (the Housing Act) aims to give effect to the constitutional right to housing by providing for the facilitation of a sustainable housing development process. It does this by laying down general principles applicable to housing development in all spheres of government. It also defines the functions of national, provincial, and local governments in respect of housing development.⁵¹

It requires a National Housing Code (Housing Code) and the establishment of a South African Housing Development Board.⁵² The Housing Code elaborates the principles set out in the Housing Act.⁵³

Section 2 of the Housing Act states the general principles applicable to housing development in the national, provincial, and local government spheres. The relevant part states that housing developments must prioritise the needs of the poor in respect of housing development. It also requires meaningful consultation with individuals and communities affected by a housing development. The state must ensure that the housing development provides as wide a choice of housing and tenure options as is reasonably possible. It must further ensure that the housing development is economically, fiscally, socially, and financially affordable and sustainable; is based on integrated development planning; and is administered in a transparent, accountable, and equitable manner, and upholds the practice of good governance.⁵⁴

National Government

The functions of the National Government are stated in section 3 of the Housing Act. It provides that the national government acting through the Minister must, after consultation with every MEC and the national organisation representing municipalities, establish and

⁵⁰ Preamble to the Housing Act.

⁵¹ Sections 3, 7 and 9 of the Housing Act.

⁵² Section 4 of the Housing Act.

⁵³ Section 4(2) of the Housing Act.

⁵⁴ Section 2 (a) – (c) Housing Act.

facilitate a sustainable national housing development process. The Minister⁵⁵ must determine national policy, including national norms and standards, set broad national housing delivery goals and facilitate the setting of provincial and local government housing delivery goals in support thereof. She must monitor the national government's performance and, in cooperation with MECs, provincial and local governments' performance against housing delivery goals and budgetary goals. The Minister must further determine housing development procurement policy. She must assist provinces in developing the administrative capacity required for the effective exercise of their powers and performance of their duties regarding housing development and support and strengthen the capacity of municipalities to manage their affairs, exercise their powers, and perform their duties in respect of housing development. Lastly, she must promote consultation and effective communication on housing development matters between the national government and all the housing development sector stakeholders.⁵⁶

To do the above, the Minister in terms of Section (4) may institute and finance national housing programmes. Section 3(4) permits her to establish and finance national institutions for the purposes of housing development and supervise the execution of their mandate. For these purposes, she may establish an institutional and funding framework for housing development, negotiate the state budget for housing development, and obtain and allocate funds for housing development programmes. Furthermore, she may institute and finance national housing programmes; supervise the execution of the institution's mandate; evaluate the performance of the housing sector against set goals and equitableness and effectiveness requirements. The Minister must take any steps reasonably necessary to create an environment conducive to enabling provincial and local governments, the private sector, communities, and individuals to achieve their respective goals in respect of housing development; and promote the effective functioning of the housing market.⁵⁷

⁵⁵ Nomaindia Mfeketo was the incumbent Minister.

⁵⁶ Subsections 2 (a)-(f) Housing Act.

⁵⁷ Section 3(4) (a) – (j) Housing Act. Also discussed in *Grootboom* supra at para 50.

Subsections 5 and 6 deem some housing assistance measures and national institutions approved for financing in terms of the Housing Act of 1966 to be national housing programmes and national institutions established and financed by the Minister. The relevant ones for this dissertation are the Housing Subsidy Scheme and the National Housing Finance Corporation which are included on the lists. Section 7 provides the functions of provincial governments; it states that the provincial government must do everything to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy. When provinces cannot or do not fulfil an obligation in terms of the Act, the Minister may intervene by taking any appropriate steps per section 100 of the Constitution to ensure fulfilment of that obligation.⁵⁸

Provincial legislation

The MEC determines provincial policy for housing development. They must promote the adoption of provincial legislation to ensure effective housing delivery and take all reasonable and necessary steps to support and strengthen the capacity of municipalities to effectively exercise their powers and perform their duties in respect of housing development. Provinces must coordinate housing development in the province. When a municipality cannot or does not perform a duty imposed by the Act, the MEC must intervene by taking any appropriate steps per section 139 of the Constitution to ensure the performance of the municipalities' duties. The MEC must prepare and maintain a multiyear plan in respect of the execution in the province of every national housing programme and every provincial housing programme, which is consistent with national housing policy and the guidelines that the Minister approves for the financing of such a plan with money from the Fund.⁵⁹

A MEC must administer every national and provincial housing programme consistent with national housing policy and the Act. They, for this purpose, may, under that programme and the prescripts, approve any projects and the financing thereof out of money paid into the provincial housing development fund. He/she may determine provincial housing development priorities in accordance with national housing policy; apply procurement

⁵⁸ Subsection 9 Housing Act.

⁵⁹ Subsection 2(a) – (g) and section 3 (2) (b Housing Act).

policy in respect of housing development determined by the Minister and administer the assets.⁶⁰

Municipalities Functions

Municipalities have their roles and responsibilities relating to housing development. Section 9 of the Housing Act sets out municipalities' roles. The CC first explained these roles in the *Grootboom* case,⁶¹ where it said that municipalities have responsibilities regarding the fulfilment of the right to access housing under section 26 of the Constitution.⁶²

Section 9 of the Housing Act states that municipalities, as part of the municipality's process of integrated development planning, must take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis. They must ensure conditions not conducive to the inhabitants' health and safety of its area of jurisdiction are prevented or removed. They must provide services in an economically efficient manner.⁶³ Municipalities must set their own housing delivery goals. This includes identifying and designing land for housing development; creating and maintaining a public environment conducive to housing development that is financially and socially viable.

Additionally, municipalities must promote the resolution of conflicts arising in the housing development process. Municipalities must initiate, plan, coordinate, facilitate, promote, and enable appropriate housing development. Lastly, they must provide revenue-generating services and plan and manage land use and development.⁶⁴

The CC in the *Grootboom* case explained the different roles and responsibilities of municipalities in the development of housing in terms of the Housing Act under the

⁶⁰ Subsection (3)(a) – (d) Housing Act.

⁶¹ *Supra* note 39.

⁶² *Grootboom* at para 95.

⁶³ Sub 9(1)(a) Housing Act.

⁶⁴ Section 9(1)(b)-(h) Housing Act.

national government. The CC held that the national government bears the overall responsibility for ensuring that the State complies with its obligations under section 26 of the Constitution.⁶⁵

The CC opined that the nationwide housing program falls short of obligations imposed upon the national government to the extent that it fails to recognise that the State must provide relief for those in desperate need. Saying that they are not to be ignored in the interests of an overall program focussed on medium and long-term objectives.⁶⁶

Municipalities to fulfil their section 26 obligations needs to have more than a land program. Municipal programs must cater precisely for people's needs, especially the vulnerable, appropriately, and sustainably. It must have more than legislative measures, but its programme must be implemented with due regard to the urgency of the situations it is intended to address. Municipalities must take all reasonable steps that are necessary to initiate and sustain it.⁶⁷

Within the nationwide housing program, municipalities are required to plan, budget, and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief. Municipalities planning requires proper co-operation between the different spheres of government.⁶⁸

While the national roles include setting the medium and long-term objectives and budget of the housing development programme, municipalities have their duties they must fulfil. The CC said in *PE Municipality*⁶⁹ that municipalities bear a major role in the fulfilment of the rights of all to have access to adequate housing in terms of section 26 of the Constitution. Municipalities have a duty systematically to improve access to housing for

⁶⁵ *Grootboom* at para 66.

⁶⁶ *Id* at para 68.

⁶⁷ *Id* para 67.

⁶⁸ *Id* para 68.

⁶⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*PE Municipality*).

all within their area. They must do so on the understanding that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country. They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes to treating those within their jurisdiction with respect. Where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required.⁷⁰

While the Company is a private company, it was performing a public function of providing housing. The Company is a wholly state-owned private company, which the Minister is tasked in terms of the housing act to administer. The Department duties in terms of section 8 of the constitution cannot be released⁷¹ from its responsibilities to assist the beneficiaries of the scheme and be allowed to turn their backs toward them, or worse, allow third parties to exploit not just the beneficiaries but the public funds while the beneficiaries are left dispossessed helpless and homeless with no recourse.

The Housing Act also regulates the alienation of subsidised housing. It regulates how houses can be sold, returned to the Department, or sold to third parties. These processes were not complied with in the sale of the beneficiaries' homes. This was not dealt with in the litigation of the Amardien matter; however, from the record, it appears that none of the protections afforded to beneficiaries and the Department to ensure that state-subsidized housing is not sold to third parties at a loss to the department or the beneficiaries themselves was not utilised.

Sale of subsidised housing

The Housing Act also regulates the sale of subsidised housing voluntarily and involuntarily. A homeowner may sell their house that is the voluntary sale of the property,

⁷⁰ Id *PE Municipality* at para 56.

⁷¹ Cora Hoexter *Administrative in Law South Africa* 2nd Ed (2012) p160.

or they may be for a reason forced to sell the property, which is the involuntary sale of the property.

Section 10A provides restrictions on the voluntary sale of state-subsidised housing. It states that it shall be a condition of every housing subsidy granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site that such person shall not sell or otherwise alienate his or her dwelling or site within eight years from the date on which that person acquired the property unless the dwelling or site has first been offered to the relevant provincial housing department.⁷² That is, a subsidy beneficiary may sell her property to another party after 8 years of acquiring her property. Should she want to sell it within the 8 years, she must first offer the property to the Department and obtain consent from the Department to sell the property.

The provincial housing department to which the dwelling or site has been offered shall endorse in its records that the person wishes to vacate his or her property and relocate to another property and is entitled to remain on a waiting list of beneficiaries requiring subsidised housing.⁷³ When a person vacates his property, the relevant provincial housing department shall be deemed to be the owner of the property, and an application must then be made to the Registrar of Deeds by the provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of that property.⁷⁴

In the case of involuntary sale of state-subsidised housing, section 10B states that it shall be a condition of every housing subsidy that such person's successors in title or creditors in law, other than creditors in respect of credit-linked subsidies, shall not sell or otherwise alienate his dwelling or site unless the dwelling or site has first been

⁷² Section 10A(1) of the Housing Act.

⁷³ Section 10A(2) of the Housing Act.

⁷⁴ Section 10A(3) of the Housing Act.

offered to the relevant provincial housing department at a price not greater than the subsidy which the person received for the property.

The objects of the Act include promoting and advancing the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective, accessible credit market and industry, and protecting consumers.⁷⁵ It recognises the need for a housing development that is responsive and cognisant of the needs of the poor. The Company was established to meet these objects.

Consumer protecting legislation.

It is also important to know that although the housing scheme in terms of which the Company operates aims to fulfil the States obligation to provide housing for the poor, these transactions are also the sale of immovable property through partial credit and thus are governed by the National Credit Act 34 of 2005 (NCA) and the Alienation of Land Act 68 of 1981 (ALA) and must be understood in light of the provisions thereof.

I now discuss further obligations imposed in terms of legislation on the Company as a seller of the houses and creditor. The housing recipients are not only protected by the Housing Act as there are further protections in terms of the NCA an ALA applicable to their ISAs. Other consumer protection laws further regulate their agreements.

When consumers default on their payments and/or breach the agreements and disputes arise between them and the creditors, the NCA regulates credit agreements, including instalment sale agreements.⁷⁶ In this regard, the NCA and ALA prescribe fair processes and procedures which must be fulfilled in the implementation of credit agreements. These Acts regulate the operation, enforcement, or cancellation of credit agreements.

⁷⁵ Section 3 of the Housing Act.

⁷⁶ Sebola above n29 at para 38.

National Credit Act

When the consumer is in default under a credit agreement, the credit provider may draw the default to the attention of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.⁷⁷

The purpose of the NCA is to promote and advance the social and economic welfare of citizens, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective, and accessible credit market and industry, and protect consumers.⁷⁸

⁷⁷ Section 129(1) of the National Credit Act. See also van Heerden C., & Coetzee H. (2017). *Marimuthu Munien V BMW Financial Services (SA) (PTY) LTD* Unreported Case No 16103/08 (KZD). Potchefstroom Electronic Law Journal, 12(4), 332-360. <https://doi.org/10.17159/1727-3781/2009/v12i4a2748>.

⁷⁸ Section 3 provides "Purpose of Act.

The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective, and accessible credit market and industry, and to protect consumers, by-

- (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions.
- (b) ensuring consistent treatment of different credit products and different credit providers;
- (c) promoting responsibility in the credit market by-
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
- (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-
 - (i) providing consumers with education about credit and consumer rights;
 - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
- (f) improving consumer credit information and reporting and regulation of credit bureaux;
- (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
- (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
- (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

A credit provider must offer to deliver to each consumer periodic statements of account⁷⁹ regarding an instalment agreement. The statement of account must be issued at least every two months.⁸⁰ A credit provider must deliver the statement of the amount owing and related matters at the request of a consumer within 10 business days of the request.⁸¹ Section 129 provides that creditors may not commence any legal proceedings to enforce credit agreements before first providing notice to the consumer and meeting any further requirements set out in section 130.⁸² This precludes any action to either enforce or cancel a credit agreement unless the steps under section 129(1) have been taken. This halts the creditor's rights to exercise certain common law remedies until the prescribed procedural steps have been observed which promote fairness in the credit relationships.

Alienation of Land Act

The Alienation of Land Act 68 of 1981 (ALA) is another consumer protection legislation that regulates the alienation of land. The agreements between the Company and the beneficiaries also fall within its ambit. Section 1 provides that the purposes of the ALA include the need to protect vulnerable purchasers, imbuing of good faith and fairness into contractual relationships, and the importance of recordal of the agreements with the registrar of deeds.

The ALA regulates the agreement between the Company and the beneficiaries. Section 19(2) of the ALA requires the notice of a breach by the purchaser to afford them 30 days to cure the alleged breach. To protect purchasers, section 26 of the ALA required that a

⁷⁹ Section 108(1) of the NCA.

⁸⁰ Section 108(2)(b) of the NCA.

⁸¹ Section 110 of the NCA.

⁸² Section 130 provides debt procedures in a Court: states that "(1) a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer ..., (b) in the case of a notice contemplated in section 129(1), the consumer has (i) not responded to that notice; or(ii) responded to the notice by rejecting the credit provider's proposals; and (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

(2) In addition ..., in the case of an instalment agreement ... a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if all relevant property has been sold pursuant to an attachment order; or surrender of property in terms of section 127; and the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement."

sale in land be recorded within 90 days of its conclusion and prohibits the seller from receiving any payment or interest on the sale until it is recorded.

Section 19 limits the seller's right to take action to enforce the agreement until it takes certain procedural steps. It provides that no seller is, because of any breach of contract on the part of the purchaser, entitled to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract; to terminate the contract; or to institute an action for damages,⁸³ unless he has by letter notified the purchaser of the breach of contract concerned and made the demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.

It further requires that the above notice be handed or sent to the purchaser and shall contain a description of the purchaser's alleged breach of contract; a demand that the purchaser rectifies the alleged breach within a period, not be less than 30 days from the date on which the notice was handed to the purchaser or sent to him by registered post. The notice must further indicate the steps the seller intends to take if the alleged breach of contract is not rectified.⁸⁴

To protect purchasers of property, section 26 required a sale in land to be recorded within 90 days of its conclusion and prohibits the seller from receiving any payment or interest on the sale until it is recorded.⁸⁵ If 90 days from the date of the contract or the land becoming registrable; expires without the seller recording the contract the purchaser may within 14 days after such expiry cancel the contract or apply to the registrar to record the contract.⁸⁶

Instalment sale agreements must be recorded at the relevant registrar of deeds office. Section 20 states that a seller, whether he is the owner of the land concerned or not, shall

⁸³ Section 19(1)(a)-(c) of the ALA.

⁸⁴ Subsection (2) of the ALA.

⁸⁵ *Katshwa v Cape Town Community Housing Co (Pty) Ltd and Four Similar Cases 2014 (2) SA 128 (WCC)*

⁸⁶ Section 20(1)(b) of the ALA.

cause the contract to be recorded by the registrar of deeds concerned in the prescribed manner provided a prior contract in force in respect of the land has not been recorded or is not required to be recorded in terms of that section.⁸⁷

Section 26 restricts the receipt of consideration under certain deeds of alienation. It provides that no person shall under a deed of alienation relating to an erf or a unit receive any consideration until such erf or unit is registrable, and in case the deed of alienation is a contract required to be recorded in terms of section 20, such recording has been effected.⁸⁸ Like the NCA, the ALA, in terms of sections 19, 20, 26, prescribes steps that a creditor needs to take before exercising common law remedies when there is an alleged breach of an agreement.⁸⁹ The purpose of sections 19 and 20 of the ALA 'is to afford protection, in addition to what the contract may provide, to a particular type of purchaser - a purchaser who pays by instalments - of a particular type of land - land used or intended to be used mainly for residential purposes.'⁹⁰

International Law Obligations

Section 39(1) of the Constitution provides that courts must consider international law when interpreting any provision in the bill of rights. South Africa has ratified the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter for Human and Political Rights (African Charter), which impose further obligations under international law regarding the provision of access to housing. In terms of these instruments, the State must provide for everyone to have the right of access to socio-economic rights, including housing.⁹¹

⁸⁷ Section 20(1)(a) of the ALA.

⁸⁸ Section 26(1) of the ALA, subsection (2) criminalizes the receipt of payment in terms of the contract; it provides that any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

⁸⁹ Astron supra at p113, seller may claim specific performance or cancellation with other remedies stipulated in the agreement.

⁹⁰ *Katshwa* at para 12, see also *Merry Hill (Pty) Limited v Engelbrecht 2008(2) SA 544 (SCA)*.

⁹¹ SA ratified the African Charter 9 July 1996; UDHR 10 December 1996; and ICESCR January 2015.

The Universal Declaration of Human Rights⁹² (UDHR) provides that everyone has the right to a standard of living adequate for the health and well-being of himself and his family. This includes food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in the circumstances beyond his control.⁹³ Article 12, in turn, provides that no one shall be subjected to arbitrary interference with his home, amongst others, and everyone has the right to the protection of the law against such interference or attacks.

Article 11 of the International Covenant on Economic, Social and Cultural Rights⁹⁴ provides that the States parties to the Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right. Article 17 provides citizens with the right not to be subjected to arbitrary or unlawful interference of their homes and the protection of the law against such interference or attacks.

Although the African Charter for Human and Political Rights⁹⁵ does not expressly provide for a right to housing, it provides in Article 12 that every individual shall have the right to freedom of movement, residence, and the right of equal access to the public service of the State. Article 13(3) provides that every individual shall have the right of access to public property and services in strict equality of all persons before the law. Article 14 provides that the right to property shall be guaranteed. The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the Covenant provisions may be a guide to an interpretation of section 26. In so far as they relate to housing, these differences are that the Covenant provides for a right to adequate housing while section 26 provides for the right of access to

⁹² UDHR Adopted by General Assembly Resolution 217(III) A of 10 December 1948.

⁹³ Article 25 (1) UDHR.

⁹⁴ ICESCR General Assembly resolution 2200A (XXI) of 16 December 1966.

⁹⁵ ACHPR Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), went into force 21 October 1986.

adequate housing. The Covenant obliges states parties to take appropriate steps, including legislation, while the Constitution obliges the state to take reasonable legislative and other measures.⁹⁶ Although the African Charter does not expressly provide for the right to adequate housing, the right is recognized through the interdependency of rights. The African Commission has held that the right to housing or shelter forms a part of the rights to property, health, and protection of the family, read together because property, health and family life are all adversely affected when housing is destroyed.⁹⁷

The right to adequate housing also includes a right to protection against forced evictions. The African Commission held that the Charters implicit protection of the right to adequate housing also encompasses the right to protection against forced evictions. Thus, the right to protection from forced evictions is a derivative of the right to housing, which is itself a derivative of other rights.⁹⁸ The African Commission has stated that the right to adequate housing refers to the right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity. It extends to embody the individual's right to be let alone and to live in peace. Thus, the African Commission drew from the (CESCR), which defines the right to adequate housing as the right to live somewhere in security, peace, and dignity, which goes beyond a right to have a roof over one's head.⁹⁹

These instruments do not simply require the State to give effect to the right of access to housing. In the case of persons whose housing rights have been realised, the State is also required to protect them from arbitrary or unlawful interference with their established right to housing. Under international law, the State must protect socio- economic rights. The state must take steps to protect the rights of vulnerable people such as the

⁹⁶ Id at para 28.

⁹⁷ Lilian Chenwi "The right to adequate housing in the African regional" Law Democracy & Development Volume 17 (2013) p 345.

⁹⁸ Id, citing Chirwa DM "African regional human rights system: The promise of recent jurisprudence on social rights" in Langford M (ed) *Social rights jurisprudence: Emerging trends in international and comparative Law* (2008) 323 at 323; Viljoen F *International human rights law in Africa* (2007) at 236-237; Nwobike JC "The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria" (2005) 1 *African Journal of Legal Studies* 129 at 140.

⁹⁹ Id, see also Committee on Economic, Social and Cultural Rights, General Comment No. 4 The right to adequate housing (article 11(1)) E/1992/23, adopted on 13 December 1991 (General Comment 4.)

unemployed, sick, widowed, old aged, those with disabilities, or who are unable to sustain their livelihood due to circumstances beyond their control. In terms of both international law and domestic law, South Africa has certain duties relating to protecting the right to housing. It has both positive and negative obligations relating to housing rights.¹⁰⁰ The positive duty includes the progressive realisation of the right to housing.

The African Commission has recognised the principle of progressive realisation, stating that States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social, and cultural rights, which include the right to housing.¹⁰¹ Echoing the Constitutional Court in the *Grootboom* case, the African Commission notes that some progressive realisation obligations are immediate, i.e., the obligation to take concrete and targeted steps to realise and prioritise economic, social, and cultural rights.¹⁰² States have an obligation to respect, protect, promote, and fulfil housing rights.

States and their organs and agents are required to abstain from carrying out, sponsoring, or tolerating any law or conduct violating or infringing upon human rights. This obliges states to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and landowners. Where such infringements occur, it should act to preclude further deprivations and guarantee access to legal remedies.¹⁰³ These four levels of obligations are recognised in the African Commission, and section 7 read together with section 26 of the Constitution.

¹⁰⁰ Id p 349.

¹⁰¹ Id 348 citing African Commission Principles and Guidelines para 13. Art 61 of the African Charter requires the African Commission to consider international law in the interpretation and application of the Charter. Art 62 places an obligation on States to report every two years on measures taken towards implementing the rights and freedoms in the Charter. Art 60 is also of relevance, as it requires the Commission to draw inspiration from international human rights law as well as human rights instruments adopted by African countries.

¹⁰² Id at p 348 citing African Commission Principles and Guidelines para 13.

¹⁰³ Id p 349 citing *SERAC* case para 61; the African Commission Principles and Guidelines.

The African Commission has also noted that a state does not bear the sole responsibility concerning housing provision.¹⁰⁴ States must undertake comprehensive reviews of relevant national legislation and policies to ensure their conformity with international human rights provisions and privatise public services, inheritance, and cultural practices to ensure that they do not lead to or facilitate forced evictions.

The Constitutional Court has recognised the importance of regular review of legislation and policies for compliance with international standards and to ensure consistency of policies with the realisation of rights.¹⁰⁵ National plans and policies must protect tenure security, including that of tenants, and ensure affordability, habitability, cultural acceptability and appropriateness, and access to social amenities and services.¹⁰⁶ States have certain obligations concerning housing in the context of evictions.

The CESCR has stated that all persons should possess a degree of security of tenure, which guarantees legal protection against forced eviction, harassment, and other threats.¹⁰⁷ The African Commission has set down substantive and procedural obligations in relation to the right to protection against forced evictions.¹⁰⁸ Eviction is an exceptional measure that must be authorised by law. Similarly, in the South African context, to ensure that eviction is legal, a court order must first be obtained.¹⁰⁹ States and other agents seeking to evict people must adhere to procedural and substantive requirements. Like the South African context, the African Commission requires consultation with those likely to

¹⁰⁴ Id P 349 The African Charter's recognition of individual duties in Articles 27 to 29.

¹⁰⁵ Id p 350; citing African Commission Principles and Guidelines paras 79 (iv-xiii).

¹⁰⁶ Id p 350 citing African Commission Principles and Guidelines para 79(vii and ix-xii).

¹⁰⁷ Id p 352 citing General Comment 7, The right to adequate housing: Forced evictions, E/1998/22 (1997), annex IV. elaborates on the obligations of states in the context of evictions.

¹⁰⁸ Id citing African Commission Principles and Guidelines para 79(xxiii) provides that the eviction process should include the following elements: (a) appropriate individual notice to all potentially affected persons; (b) effective dissemination by the authorities of relevant information in advance; (c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan; (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and (e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities. Prior to any decision to initiate an eviction, authorities must demonstrate that the eviction is unavoidable and consistent with international human rights commitments protective of the general welfare.

¹⁰⁹ Id p352 citing General Comment 4 para 8(a) & 7 The right to adequate housing: Forced evictions, E/1998/22 (1997), annex IV.

be affected by the eviction. Meaningful engagement is a key requirement in the housing planning and development process.¹¹⁰

Analysis and Conclusion

The Company is a vehicle for housing delivery to poor members of society. It is owned by the NHFC, which obtains its mandate from the Human Settlements Minister. The Minister has the duty to facilitate, oversee, monitor, and supervise the execution of the Company's mandate.¹¹¹ Where there are problems with implementing the housing development plan and/or failures by the other spheres to fulfil their mandates under the Housing Code, the Minister must assist and support the other government spheres and institutions.¹¹² Where there are disputes between the Company and the individual consumers, the Department must intervene and facilitate a conducive environment to enable the parties to meet the goals and promote meaningful engagement.¹¹³

Provinces are required to take reasonable steps to support and strengthen municipalities to effectively exercise their powers and perform their duties in respect of housing development.¹¹⁴ The province is meant to adopt legislation and policy to ensure effective housing delivery.¹¹⁵ It is also required to supervise and monitor the implementation of housing development and, to the extent of its competency, assist and strengthen the Company in executing its mandate.¹¹⁶ Additionally, once housing subsidies agreements are cancelled due to voluntary sale by the beneficiary or non-voluntary where the department or a creditor seeks to cancel the agreement due to there being a breach of the agreements, the Provincial department is required to get the first option to purchase the houses in order to give it to the next needy person on the list or beneficiary.¹¹⁷ The province is required if it chooses not to purchase the houses to give reasons for its election because it has a financial responsibility to provide housing and to protect against

¹¹⁰ Id p352.

¹¹¹ Sections 3- 9 of the Housing Act.

¹¹² Section 3(2)(d)&(e) of the Housing Act.

¹¹³ Section 2(1)(b) & 3(j)(i) of the Housing Act.

¹¹⁴ Section 7(2)(c) read with Preamble of the Housing Act.

¹¹⁵ Section 7(2)(b) of the Housing Act.

¹¹⁶ Section 7(2)(c) – (g) of the Housing Act.

¹¹⁷ Section 10A of the Housing Act.

third parties who do not qualify for state subsidies housing from unduly benefiting from state subsidies.¹¹⁸

The government's local sphere is constitutionally mandated to deliver housing under the national and provincial development policy and legislation. The municipality must ensure the progressive realisation of access to housing by its residents. The municipality is required to take steps to create and maintain a conducive environment for housing development. Where there are disputes in implementing housing development, the municipality must promote the resolution of conflicts between the Company and the subsidy recipients.

The implementation of housing development and the scheme is required to be consultative, socially viable and cognisant of the need of the poor being vulnerable members of society.¹¹⁹ The entering, interpretation and enforcement of the instalment sale agreements must be in line with the state's and, by extension, the Company's obligations in terms of this legislative framework.¹²⁰

It is required to ensure that it extends credit responsibly and reasonably, ensuring that it is financially feasible and efficient. It must ensure that it provides a socially viable credit.¹²¹ The Company caters for poor members of society; it must negotiate and enter into these instalment sale agreements considering its consumers' income level and social needs.

When it comes to the enforcement of the agreements, the objects of the agreements and the Housing Act cannot be disregarded. In addition to the procedural requirements under the NCA and ALA, the Company must ensure that its enforcement procedures are in line with the Housing Act and its mandate. It is required to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective, and accessible credit market and protect consumers. It needs to ensure that it is responsive and cognisant of the poor's

¹¹⁸ Section 10B(1) – (3) of the Housing Act.

¹¹⁹ Preamble of the Housing Act.

¹²⁰ Clause of ISA; section 2 of the Housing Act.

¹²¹ Preamble read with Section 3 of the NCA.

needs at all stages of the housing development.¹²² The Company has failed to adhere to a significant amount of the above provisions. It seemed to misconstrue its obligations and operates from the misconception that the relationship between itself and its consumers is simply private law agreements between itself as a property developer and the beneficiaries as customers. However, the above provisions show that the nature of the agreements between the Company and the beneficiaries is fundamentally premised on the governments need to secure the right to housing for the poor.

The Company is one of the tools which the government uses to fulfil this need speedily and efficiently. The company is meant to have regard the Housing Act, the NCA, and ALA, in implementing and enforcing the ISAs, which it has failed to do so, to the detriment of the beneficiaries. The first of its issues relate to its misadministration of the housing scheme and its implementation. The second is how it failed to adhere to the requirement of registering the ISAs with the Deeds Registrar. The last is its unlawful conduct of selling beneficiaries houses without following any procedural steps to enforce the agreements.

The unlawful sale of the beneficiaries' homes was then followed by the eviction applications from a third party who bought the houses from the company. The following chapter discusses these unlawful sales and eventual evictions and the beneficiaries' long litigation to correct the Company's unlawful conduct.

¹²² African Commission Principles and Guidelines para 79(vii and ix-xii).

Chapter 3: Evictions of the subsidy beneficiaries

In this chapter, I discuss the Constitutional Court case related to 12 beneficiaries of the Company housing scheme. I first briefly discuss the *Katshwa* matter, the Western Cape High Court's first case in 2013. These matters illustrate some of the issues that have arisen in the implementation of the housing scheme. Although individual beneficiaries brought them, the outcomes of both these matters have implication for all the beneficiaries of housing subsidies under this scheme and subsequent projects of the Company.¹²³ The matters concluded that the Company was meant to take certain steps in enforcing the ISAs. It was concluded that the Company acted unlawfully in 1 not registering the ISAs (*Katshwa*); and 2 in enforcing the ISAs by failing to follow the procedural steps in cancelling the agreements (*Amardien*).

The Cape Town Community Housing Company housing scheme initially delivered houses across eight sites around Cape Town. There were different challenges in running the project; quantity surveyors did not survey the sites; the City of Cape Town did not transfer the land the houses were built on to the Company; the company, in turn, could not transfer the houses to the beneficiaries; it also did not register the sale agreements with the Deeds Registrar.¹²⁴

Among the many challenges and failures of the Company in complying with the above legislative prescripts and internal challenges, there were external ones too; the Company increased the instalments payable by the beneficiaries, and the beneficiaries could not afford the repayments; they were defaulting on their payments; the houses were substandard; there were latent defects; there were disputes relating to the agreements and amounts of indebtedness, and then litigation followed.¹²⁵

In both these matters, the Court established that these beneficiaries must be recognised as consumers of credit. Therefore, consumer protection laws that protect consumers from unlawful behaviours by creditors apply equally to them. They demonstrate how the

¹²³ The Company has undertaken 10 more project sites.

¹²⁴ *Amardien* CC Judgment at para 11.

¹²⁵ *Id* at paras 12 – 13.

Company ought to enforce credit agreements. These cases explain what protections are available to the beneficiaries against unlawful and unfair enforcement practices by the Company. They reinforce the provisions on the NCA and ALA in line with their respective purposes. The Courts have held that the Company is required to follow certain procedural steps before it could enforce the agreements and provide guidance on implementing the agreements in light of the beneficiaries' rights in terms of the Constitution.

Katshwa v Cape Town Community Housing Company¹²⁶

The Western Cape High Court decided this matter. It was a consolidated appeal of 5 beneficiaries against the decisions of the Wynberg Magistrates' Court.

The undisputed facts in the matters were that the appellants bought houses by instalment sale agreement with the Company in around 2001. The Company alleged that they fell into arrears in payment of their instalments; it issued letters of demand asking them to rectify their alleged breach. When the appellants did not do so, the Company purported to cancel the agreements.¹²⁷ The Company then started eviction applications in the Magistrates' Court asking to remove the beneficiaries from their houses and evictions in terms of the PIE Act.¹²⁸

The Magistrate found the beneficiaries were unlawful occupiers in terms of section 4 of the PIE Act and ordered the City to file a report under subsections 4(7) and (9) of the PIE Act informing the court whether it can provide the appellants with alternative accommodation and when and where such accommodation could be made available.¹²⁹ On 30 September 2011, the Magistrate issued an order of eviction to be carried out by the sheriff on or before 13 December 2011.¹³⁰

¹²⁶ *Katshwa v Cape Town Community Housing Co (Pty) Ltd and Four Similar Cases* 2014 (2) SA 128 (WCC). (Katshwa)

¹²⁷ *Katshwa* above at para 5.

¹²⁸ The Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1988 (PIE Act).

¹²⁹ *Katshwa* above at para 7.

¹³⁰ *Katshwa* above at para 8.

The beneficiaries appealed against that order in the High Court. In the High Court, the issues were whether sections 19, 20 and 26 of the Alienation of Land Act¹³¹ (ALA) are applicable in this matter¹³². The beneficiaries argued that the company failed to comply with sections 19 and 20 of the ALA.¹³³ The Company alleged that its failure to record the ISAs did not excuse the beneficiaries from paying the instalments. Later in the High Court appeal proceedings, they argued that the Company is an organ of State under section 4 of the ALA.¹³⁴ The Magistrate's Court had found that under the agreement, even if the Company failed to record, the agreements were lawfully cancelled; therefore, the beneficiaries were unlawful occupiers.¹³⁵

In relation to sections 19 and 20 of the ALA, the High Court relying on the observations made in *Merry Hill (Pty) Limited v Engelbrecht* 2008 (2) SA 544 (SCA) that the purpose of the sections is to afford protection in addition to what the contract may provide to a purchaser of land who pays by instalments.¹³⁶ The reason for this protection is that this type of purchaser has been shown generally to be vulnerable, uninformed buyers of residential property who are no match for the enormous bargaining power of the developer.¹³⁷

The High Court considered whether the Company is an organ of State and whether by virtue of that it is included in the definition of State under the ALA and therefore exempted from the application of sections 19 and 20 of the ALA. The ALA does not define the meaning of State. Section 4¹³⁸ exempts the State, Community Development Board, and the National Housing Commission. The High Court looked at the definition of organ of

¹³¹ Act 68 of 1981.

¹³² Section 20(1)(a) requires the recordal of the agreements by the registrar. Section 26 makes it a criminal offence to receive consideration in terms of a sale agreement if recordal has not taken place.

¹³³ *Katshwa* above at paras 11 – 13.

¹³⁴ Section 4 exempts the State from the provision of section 19 and 20.

¹³⁵ *Katshwa* above at para 7.

¹³⁶ *Katshwa* above at para 12.

¹³⁷ *Katshwa* above at para 12.

¹³⁸ Section 4 reads "Application of Chapter – this Chapter shall not apply in respect of a contract in terms of which the State, the Community Development Board established by section 2 of the Community Development Act 3 of 1966, the National Housing Commission mentioned in section 5 of the Housing Act 4 of 1966, or a local authority or the seller."

State in section 239 of the Constitution¹³⁹. It held that in its evidence, the Company maintained that it was a private company and only belatedly in the appeal did it argue that it was an organ of State. The High Court found that the Company is a private company, although it was established by the City of Cape Town and the National Housing Finance Corporation.¹⁴⁰ The Court held that even on the text of the ISAs, the Company was required to record the ISAs in terms of section 20 of the ALA. Considering that the Company was not an organ of State.¹⁴¹

In interpreting section 4, the High Court found that the purpose of the ALA is to regulate the alienation of land in certain circumstances. Chapter I deals with the formalities required: therefore, Chapter II deals with the provisions relating to the sale of land on instalments and Chapter III the general provisions.

The High Court confirmed that section 26 applies to the appellants ISAs entered into with the Company. It also held that the Company, as seller, is not entitled to any consideration if it fails to register the ISAs as required by section 20 of the ALA.¹⁴²

Amardien and Eleven Others v Cape Town Community Housing Company¹⁴³

This matter was an appeal against the Western Cape High Court's judgment and order delivered on 30 March 2017. The Constitutional Court (CC), on 28 November 2018, in a unanimous judgment, upheld the appeal against the High Court order. The Amardien CC judgment deals with two main issues - the first is the legal effect of a late recordal of an instalment sale agreement upon a seller and purchaser in terms of sections 20 and 26 of the ALA. The second issue is whether notice in terms of section 129(1) of the

¹³⁹ Organ of State is defined as any department of State or any other functionary exercising or performing a function in terms of the Constitution or Provincial Constitution or exercising a public power or performing public function in terms of legislation.

¹⁴⁰ Relying on the definition of organ of state.

¹⁴¹ *Katshwa* above at Paras 28-30.

¹⁴² *Katshwa* above at Para 19.

¹⁴³ *Amardien and Others v Registrar of Deeds and Others [2018] ZACC 47; 2019 (2) BCLR 193 (CC)*. (*Amardien CC Judgment*)

National Credit Act¹⁴⁴ (NCA) must indicate the amount that a creditor alleges is owed by a debtor.¹⁴⁵

Brief factual background

Like the appellants in the *Katshwa*¹⁴⁶ and the thousands of indigent people who bought into the Company's housing scheme, the applicants in this matter entered the ISAs for the purchase of their subsidised houses with the Company between 2000 and 2001. The ISAs required the Company to record the ISAs and the applicants to pay monthly instalments initially over four years. The applicants paid irregularly because of unexpected instalment increases, inferior quality of building standards, the Company's failure to fix the defects, among other reasons. The Company also failed to record the ISAs, as required by section 26 of the ALA, which prohibits it from receiving payments until the ISAs are recorded. Despite this, it continued to receive payments from the applicants.

The Company only recorded the ISAs in April 2014, over ten years after their conclusion. Within a month after that, the Company issued notices in terms of section 129(1) of the NCA, stating that the applicants were in arrears which must be remedied within 20 days, failing which the ISAs would be cancelled. The applicants failed to pay. On 23 June 2014, the Company sold the applicants' homes to S&N Trust.¹⁴⁷ The Company cancelled the ISAs' recordal at the Registrar of Deeds on 4 May 2015 and transferred the properties to the S&N Trust on 5 May 2015. The S&N Trust then instituted eviction proceedings against 5 of the applicants in the Mitchells Plain Magistrates Court and expressed an intention to evict the others.¹⁴⁸

¹⁴⁴ 34 of 2005.

¹⁴⁵ *Amardien* above at Para 2.

¹⁴⁶ *Katshwa* above n1.

¹⁴⁷ S&N Trust is a private third-party purchaser of the applicants' homes from the Company. The trustees elected to abide the decision of the High Court and did not participate in proceedings in the CC.

¹⁴⁸ *Amardien* above at Paras 15&17.

The applicants instituted proceedings in the High Court, challenging the lawfulness of the Company's cancellation of the ISAs and later by the Registrar of Deeds, and sought that the sale of their properties to the S&N Trust be declared void.¹⁴⁹

High Court

The High Court considered three issues: (a) whether the applicants had been in breach of their payment obligations under their respective agreements; (b) whether the applicants had been given notice in terms of section 129(1) of the NCA; and (c) assuming notice had been given, whether the extent of arrears had been indicated.

On the first issue, the High Court held that section 26 of the ALA prevents a creditor from receiving consideration until recording the ISAs. However, such amounts nonetheless become due under the credit agreement.¹⁵⁰ It rejected the applicants' arguments that they were not in breach of the ISAs because the Company was not entitled to receive their instalment payments until they were duly recorded at the Registrar of Deeds. It also rejected the argument that the Company's letter of demand for payment of the instalments in terms of the ISAs was premature. The applicants argued that instead of the Company sending the section 129 notices, it ought to have notified them that the ISAs were duly registered and their obligations to pay in terms of the agreement had now been triggered.¹⁵¹

The High Court found that the applicants did not pay the instalments, which became due in terms of the ISAs, although the Company could not receive the payments. It concluded that the applicants had breached the ISAs, and therefore the Company was entitled to cancel the agreements. Therefore, the High Court concluded that the Company's cancellation of the ISAs was valid as the applicants were in arrears at the time of recordal.¹⁵²

¹⁴⁹ *Amardien* above at para 18.

¹⁵⁰ *Amardien* above at para 20.

¹⁵¹ *Id* at para 30.

¹⁵² *Amardien and Eleven Others v Registrar of Deeds and Others (5283/2016) [2017] ZAWCHC 14; [2017] 2 All SA 431 (WCC). (High Court Judgment)* at para 8.

In relation to the issue of a conflict between section 19 of ALA and section 129 of the NCA, the applicants argued that the provision of section 19 of the ALA protects a purchaser of land through an instalment sale agreement by providing certain mandatory steps that must be followed should a seller wish to terminate the agreement.¹⁵³ They argued furthermore that they were not in default, as the section 129 notices were premature and defective in that they failed to specify the amounts that were being demanded; therefore, the Company did not comply with the requirements of both sections 19 of the ALA and 129 of the NCA.¹⁵⁴

The Company argued that both sections 19 of the ALA and 129 of NCA require notification of a breach, the only difference between them was the number of days required. The former required 30 days' notice, and the latter requires 20 days' notice. It contended that this was the conflict, and applied section 172(1) of the NCA to resolve this conflict. Section 172(1) of the NCA provides that where there is a conflict between the provisions of the NCA and Chapter II of ALA, the provisions of the NCA prevail.¹⁵⁵

The High Court found section 129(1) of the NCA substantively overrides section 19 of the ALA. It noted that while section 19 of the ALA is plainly equivalent to section 129 read with section 130 of the NCA, they inconsistently provided for notice to be given as the sections required different numbers of days' notice before cancellation for breach of agreement can be effected. Thus, the Court held that section 172(1) of the NCA read with Schedule 1 provides that where there is a conflict, the NCA prevails over those of Chapter II of the ALA. In conclusion, the High Court held that the Company was permitted to cancel the agreement subject to compliance with only section 129(1) of the NCA and not section 19 of the ALA.¹⁵⁶

On the third issue, the High Court also held that the Company fulfilled its obligations under section 129(1) of the NCA by providing evidence of delivery of notices to the applicants;

¹⁵³ Para 52 heads of argument in the High Court.

¹⁵⁴ Para 58 heads of argument in the High Court.

¹⁵⁵ *Amardien above* at para 21. See also *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC) (*Kubyana*); *Nkata v FirstRand Bank of South Africa Limited* [2016] ZACC 12; 2016 (4) SA 257 (CC) (*Nkata*).

¹⁵⁶ High Court judgment paras 14 and 15 of & para 21.

and that, for section 129(1), notices need not state the amount of the arrears, but rather applicants can themselves determine the amount or if uncertain, ask the Company to determine the amount.¹⁵⁷

The High Court relied on *Phone-A-Copy*¹⁵⁸ and held that “the applicants were, notionally at least, in as good a position to determine for themselves how much they owed under the agreements”.¹⁵⁹ Furthermore, if the applicants were uncertain about the amounts, the notice afforded them the opportunity (directly or through an intermediary) to make the necessary enquiries or engage with the substantive issue. If the notice lacked information that the applicants required, the Company would have been bound to provide it upon request.¹⁶⁰

On the question of whether the extent of the arrears had been indicated, the High Court held that it was not essential for the section 129 notices to set out the amounts in which the applicants were in arrears. The High Court held that the applicants’ counsel did not refer to any authority in support of the argument that particulars of the arrears were an essential ingredient of a section 129 notice, nor were there any provisions in the NCA or the regulations thereto that required this. The Court further held that the legislative purposes set out in section 3 of the NCA would not be frustrated if the particulars of the arrears were not included.

Thus, the High Court dismissed the application with costs and refused leave to appeal, as did the Supreme Court of Appeal.

Constitutional Court

The applicants applied to the CC for leave to appeal against the High Court’s judgment, arguing that the matter impacts on their right to housing. They submitted that, in terms of

¹⁵⁷ Para 42 High Court judgment.

¹⁵⁸ *Phone-A-Copy Worldwide (Pty) Ltd v Orkin* 1986 (1) SA 729 (A) (*Phone-A-Copy*). In this case, the seller had sent a letter of demand which did not specify the amount. The Appellate Division held that the absence of the specific amount was not fatal to the notice and the seller merely had to inform the purchaser of the failure to pay the balance of the purchase price and interest. The balance was readily capable of ascertainment by both the purchaser and the seller.

¹⁵⁹ Above note 113.

¹⁶⁰ Para 42 High Court Judgment.

section 26 of the ALA, they could only default after the Company recorded the ISAs. They also submitted that the proper interpretation of section 129 of the NCA is that a credit provider must state the arrear amount owing in a notice to a consumer.

In granting leave to appeal, the CC held that this matter required the Court to interpret section 129(1) of the NCA and sections 19, 20 and 26 of the ALA, which raises a constitutional issue directly about section 26 of the Constitution and has a significant effect on the applicants' right of access to housing.¹⁶¹ The CC previously held that the interpretation of section 129(1) of the NCA raises a constitutional issue.¹⁶² It held that this matter raises arguable points of law of general public importance, with reasonable prospects of success and the interests of justice require that leave to appeal be granted.¹⁶³

Issues and parties' submissions

The CC considered what the effect of the late recordal of the ISAs is. In doing so, it looked firstly, at what point are the purchaser's obligations, in relation to late recordal of agreements in terms of section 20 of the ALA, activated? Secondly, can notice of recordal and cancellation of the agreement be provided at the same instance? Thirdly, which provisions of the NCA and ALA govern cancellation as a remedy?¹⁶⁴ The CC upheld the appeal and set aside the HC order, the cancellation of the ISAs, and the cancellation of the recordal of the ISAs by the Registrar of Deeds

The applicants submitted that they could not have been in arrears or default when they were informed that the instalment sale agreements had been recorded because the Company was only entitled to receive consideration after the recordal of these agreements. The Company failed to inform them of the exact date of the recordal until service of the section 129 NCA notices, and the applicants were thus unable to ascertain

¹⁶¹ *Amardien* at para 28. Relying on Section 167(3)(b)(i) of the Constitution. See also *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC) at paras 13-9; and *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2004 (5) SA 460 (CC) at paras 27-8.

¹⁶² *Id.*

¹⁶³ *Amardien* above at para 28.

¹⁶⁴ *Amardien* above at Para 29.

when the debt became due and payable and therefore unable to make payments as required.¹⁶⁵

The Company supported the High Court's decision, submitted that the payments are due retroactively where an ISA is recorded late. It submitted that the effect of the late recordal of an instalment sale agreement is that it constitutes the fulfilment of a suspensive condition. Further, when the condition is fulfilled, the payment of the instalments become unconditional. When the condition is fulfilled, a notice of recordal need not be given because this condition's fulfilment does not create a new obligation but causes contractual obligations created under the instalment sale agreement to become due retroactively.¹⁶⁶ Regarding the section 129(1) notices, Company submitted that they contained the arrear amounts, but regardless, section 129(1) does not require the inclusion thereof. The company submitted that the cancellation of ISAs was thus valid and that section 129(1) notices were sufficient.¹⁶⁷

Women's Legal Centre Submissions

The Women's Legal Centre Trust (WLC) was admitted as *amicus curiae*. It submitted that section 129 of the NCA must be interpreted in line with the right to housing in section 26 of the Constitution, and regard must be had for how the cancellation of the ISAs would adversely impact women and their right to access housing.¹⁶⁸

The WLC submitted that the late recordal and subsequent cancellation diminishes women's access to security of tenure and infringes their right of access to adequate housing. Furthermore, it impacts on the ability of women to access alternative subsidies under the government's housing scheme.¹⁶⁹

¹⁶⁵ *Amardien* above at Para 30.

¹⁶⁶ *Amardien* above at para 31.

¹⁶⁷ *Amardien* above at Para 53.

¹⁶⁸ *Amardien* above at Paras 7 & 54.

¹⁶⁹ *Amardien* above at Para 32.

When are the purchaser's debt obligations activated?

The CC first determined when a purchaser's debt obligation is activated. It held that "debts become due when they are immediately claimable or recoverable".¹⁷⁰ It held that where there is no additional statutory protection offered, like the requirement for an agreement to be recorded before payment of any instalment, the debt becomes due and payable automatically upon the conclusion of the agreement. It is only subject to the terms of the agreement or being placed in mora for the purposes of the cancellation of the agreement.¹⁷¹

Then it considered whether a notice of the recordal is necessary before a section 129 NCA notice. Here the Court held that the answer to this question depends on what the seller relies on as the default. If it is non-payment to claim proper payment as specific performance. In that case, the instalments are immediately due and payable, and the notice in respect of that default will not be premature.¹⁷² However, if the purpose of the section 129 NCA notice is not to claim payment but cancellation, it is premature.¹⁷³

It held that where there is a statutory requirement that an agreement must be recorded, the correct position is that the payments become due and payable only upon recordal of that agreement. The Court reasoned that section 26¹⁷⁴ of the ALA provides a clear textual statutory bar to the seller receiving payments ("consideration") in the event of non-recordal of the agreement, in the form of criminal liability.¹⁷⁵

It explained that although the purchaser is under a natural obligation to make payment, that obligation cannot be enforced until the recordal takes place.¹⁷⁶ The responsibility to

¹⁷⁰ *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) at para 188.

¹⁷¹ *Amardien* above at para 36.

¹⁷² *Op sit* at para 37, relying on *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited (Trinity Asset Management)* [2017] ZACC 32; 2018 (1) SA 94 (CC) at paras 160-3.

¹⁷³ *Id.*

¹⁷⁴ It reads: "(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until such erf or unit is registrable; and in case the deed of alienation is a contract required to be recorded in terms of section 20, such recording has been effected.
(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

¹⁷⁵ *Amardien* above at para 38.

¹⁷⁶ Relying on *Allison v Massel and Massel* 1954 (4) SA 569 (TPD) at 576C-D.

record primarily rests with the seller. Therefore, it is incumbent upon the seller to notify the purchaser when the agreement is recorded so that the purchaser can make the necessary payments. When making the demand for payment, the seller must also allow the purchaser to pay what is due within a reasonable time.¹⁷⁷ It concluded that only if the purchaser fails to make payment after the debt becomes due and payable, the seller will also be entitled to claim cancellation of the agreement.¹⁷⁸

How to cancel the ISA under the NCA and ALA?

The CC held the purpose of the ALA is to regulate the alienation of land, fulfil the need to protect vulnerable purchasers, and imbue good faith and fairness into contractual relationships relating to land. It sets out requirements for the cancellation of credit agreements for the sale of land through instalment sale agreements.¹⁷⁹ Section 19 limits the seller's right to take immediate and unilateral action by providing for certain steps to be taken before it can cancel an agreement.¹⁸⁰

¹⁷⁷ *Amardien* above at para 39.

¹⁷⁸ *Amardien* above at para 40.

¹⁷⁹ *Amardien* above at para 41 In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA (*Wary Holdings*), this Court held that statutes must be interpreted with due regard to their purpose and within their context 337 (CC); 2008 (11) BCLR 1123 (CC) at para 61. See also *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1; 2006 (3) SA 305 (CC) at paras 21-8; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC) at para 91.

¹⁸⁰ Section 19 of the ALA provides:

"(1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled—to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract;

to terminate the contract; or

to institute an action for damages, unless he has by letter notified the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand.

(2) A notice referred to in subsection (1) shall be handed to the purchaser or shall be sent to him by registered post to his address referred to in section 23 and shall contain—
a description of the purchaser's alleged breach of contract;

a demand that the purchaser rectify the alleged breach within a stated period, which, subject to the provisions of subsection (3), shall not be less than 30 days calculated from the date on which the notice was handed to the purchaser or sent to him by registered post, as the case may be; and
an indication of the steps the seller intends to take if the alleged breach of contract is not rectified.

(3) If the seller in the same calendar year has so handed or sent to the purchaser two such notices at intervals of more than 30 days, he may in any subsequent notice so handed or sent to the purchaser in such calendar year, make demand to the purchaser to carry out his obligation within a period of not less than seven days calculated from the date on which the notice was so handed or sent to the purchaser, as the case may be.

The NCA regulates and seeks to improve relations between consumers and providers of credit. It aims to ensure that credit is available to vulnerable sections of society who would not otherwise be able to afford it.¹⁸¹ In line with its purpose of providing consumers with adequate knowledge of debt management, it affords debtors further protection before cancellation or other legal remedies can be enforced in the courts by creditors.¹⁸²

The Court found that section 19 of the ALA limits the seller's right to take legal action. On the other hand, section 129(1) of the NCA specifies certain obligations the creditor must fulfil before proceeding to the stage of legal enforcement or unilateral cancellation. Further adding that purchaser must be afforded an opportunity to consider certain steps. The Court differed from the High Court, holding that the ALA requirements and the NCA do not conflict, and there is no need to have recourse to Schedule 1 of the NCA. It held that in instances where they both apply, they can and should be read together: A seller must comply with the NCA in informing the purchaser of the default, and they must inform a purchaser in terms of section 19 if they are going to rely on the remedies in terms thereof if entitled to do so. The CC concluded that the two pieces of legislation, specifically section 19 of the ALA and section 129 of the NCA, serve different purposes.¹⁸³ That is, section 19 requires the seller to first notify the purchaser of the alleged breach within 30 days of taking any action, including cancelling the agreement. The notice must describe both the breach and the action that the seller intends to take, such as cancellation and the consequence thereof.

(4) Subsection (1) shall not be construed in such a manner as to prevent the seller from taking steps to protect the land and improvements thereon or, without or after notice as required by the said subsection, from claiming specific performance.”

¹⁸¹ *Amardien* above at para 42 see also *Sebola* above n 29 at paras 39-41 for purpose of the NCA.

¹⁸² Section 129(1) of the NCA reads—

“(1) If the consumer is in default under a credit agreement, the credit provider— may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and subject to section 130(2), may not commence any legal proceedings to enforce the agreement before first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and meeting any further requirements set out in section 130.”

¹⁸³ *Amardien* above at para 43.

In this case, the CC found issue with the Company's cancellation of the instalment sale agreement in the same letter as the notice of default of payments to the purchasers. The CC held that this bypasses compliance with section 19 of the ALA and does not afford the purchasers a reasonable time to manage their debts.¹⁸⁴ The seller simply complied with section 129 of the NCA by issuing a notice in terms thereof, and no notice was issued in terms of the ALA.

The High Court found no issue with this as it found that section 19 of the ALA and section 129 of the NCA are the same textually apart from the number of days that the seller must give the purchaser to fix their breach the ALA requiring 30 days and NCA 20. The High Court then held that section 172 of the NCA was evoked to resolve its perceived conflict, which provides that where there is a conflicting provision between the NCA and ALA, the provisions of the NCA must prevail.

With the CC's interpretation of the meaning and purposes of sections 19 and 129 of the ALA and NCA, there is no conflict between the provisions, and they work together to achieve their respective purposes. No provision is rendered redundant to the detriment of purchasers. The CC gives effect to both provisions and requires that they both be complied with as they address different needs and arise at different stages in the enforcement of credit. The debtor needs to be first told of their breach. They must fix it within initially 30 days. Should they fail to do so, the enforcement procedures will follow together with a description and the possible consequences of the imminent enforcement procedures.

The CC found that the Company failed to record the instalment sale agreements with the Registrar of Deeds timeously within the prescribed 90 days of concluding the agreements with the applicants. It eventually recorded the agreements, but more than ten years after their conclusion.¹⁸⁵

It held that because the Company was statutorily barred from accepting payment, the applicants could not have been in breach of the agreements at the time of receipt of the

¹⁸⁴ *Amardien* above at para 44.

¹⁸⁵ *Amardien* above at Para 45.

NCA section 129 notices, as they had not been aware of the recordal of the instalment sale agreements until then. The CC held that the Company should have alerted the purchasers of the recordal before issuing the NCA section 129 notices and claiming cancellation of the agreements. The Company should have advised the applicants of the recordal, informing them that the debt would then be due and payable, and given them a reasonable opportunity to pay before moving to enforce and subsequently cancel the agreements.¹⁸⁶

The Court consequently found that section 129 NCA notices were premature and invalid. It declared the subsequent cancellation of the instalment sale agreements and the cancellation of the recording of these agreements as invalid.¹⁸⁷

Must a section 129(1) notice state the amount owed?

The CC held that the amount and nature of the default must be specified in a section 129 NCA notice.¹⁸⁸

The applicants argued that section 129(1) of the NCA must be interpreted harmoniously with section 19 of the ALA. They contended that the text of section 129(1) mentions “the default”, which refers to a specific debt that the consumer owes to the creditor, and it is the notice of this default that must be brought to the consumer’s attention. They asserted that this is not an onerous obligation upon the creditor, whereas it is difficult for the debtors to determine how much they owe to exercise their rights fully.¹⁸⁹

The Company contended that not having the arrear amount on a section 129 notice would not invalidate it. It argued that it is not a legal requirement that notices issued in terms of section 129(1) of the NCA must indicate the amount of alleged indebtedness. The NCA requires that the default must be “sufficiently” drawn to the consumer’s attention; that it is only logical that all a debtor needs to do is to contact the creditor to establish the amount

¹⁸⁶ *Amardien* above at para 46

¹⁸⁷ *Amardien* above at para 48.

¹⁸⁸ *Amardien* above at para 61.

¹⁸⁹ *Amardien* above at para 52.

outstanding, bearing in mind that the NCA does not purport to come to the aid of reckless or irresponsible consumers.¹⁹⁰

The WLC submitted that the purpose of a section 129(1) notice is to explore alternative mechanisms for the payment of a debt. An overly technical approach to interpretation works to the detriment of the rights of vulnerable women. The WLC submitted that the intention of social housing schemes such as those implemented by the Company cannot be to leave the beneficiaries in a worse off situation.¹⁹¹

The CC held that Section 129(1) of the NCA refers to a situation where the consumer is “in default”. Read in conjunction with section 130(4), which provides an opportunity to the debtor to remedy the default. Section 129(1) should be interpreted to include the amount so that the debtor knows how much to pay to avoid cancellation. The CC explained the text of section 129(1) explicitly refers to “the default” that must be drawn to the notice of the consumer by the creditor – and not just the fact that the consumer is “in default”. It further held that the same applies to the notice under section 19 of the ALA. It explained, to provide consumers with adequate disclosure of standardised information to make informed choices, they must be informed of the extent of their arrears in the NCA section 129 notice to decide how to move forward regarding the management of their debt.¹⁹²

The CC correctly added that if the consumer is not advised of the arrear amount, she will be left none the wiser. The referral by the consumer of the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction presupposes that the consumer has been apprised of the facts to enable her to, amongst others, develop and agree on a plan to bring the payments under the agreement up to date.¹⁹³ A consumer who is not given enough information about the alleged breach cannot assess whether they need to take any of the steps mentioned in the notice. They cannot know whether debt review, going to court, or referral to the ombud is the correct steps. The notice should put the debtor in a position to assess their rights and the seller’s rights

¹⁹⁰ *Amardien* above at para 53.

¹⁹¹ *Amardien* above at para 54.

¹⁹² *Amardien* above at para 60.

¹⁹³ *Amardien* above at para 62.

with full knowledge of the consequences of failing to act once she receives the notice. The notice cannot be ambiguous in any way; it must give the receiver sufficient information for them to become fully informed about what is going to happen after they receive the notice; they must know that they can have the debt rearranged, or reviewed and set aside, or they can be declared overindebted, and be placed under administration, or that the contract could be cancelled, and their property could be sold in execution.¹⁹⁴

The court concluded that the cancellation of the instalment sale agreements was premature. Therefore, the subsequent cancellation of the instalment sale agreements and the cancellation of the recording of these agreements are also invalid. The applicants appeal succeeded, and the order of the High Court was set aside.¹⁹⁵

The main issues in these matters were whether these kinds of consumers must be afforded the same kind of protection available to other consumers of credit. These cases demonstrate how the Company had misconstrued its powers and its rights to summarily terminate agreements without following due processes in terms of the NCA and ALA infringing the beneficiary's rights in terms of the Constitution. While the State, which is the authority under which the Company operates and derives funding and powers, failed to take any steps to assist the beneficiaries.

Conclusion

These cases demonstrate the Company's misunderstanding of its obligations as a housing developer on behalf of the State. First, they show how the Company thought of itself to be the State for a long time and misunderstood the State's role in housing development for the poor. It seemed to think that as the State, it did not need to register the agreements between it and its (subjects) and/or that the sales to the beneficiaries were hire-purchase sale where the Company remained the property owner until the last instalment payment was made.¹⁹⁶ However, the sale and cancellation thereof in respect

¹⁹⁴ Elmien du Plessis "*Judicial oversight for sales in execution of residential property and the NCA*" 2012 De Jure p 537.

¹⁹⁵ *Amardien* above at Para 73.

¹⁹⁶ Mostert, Pope et al '*The Principles of The Law of Property in South Africa*' Oxford university Press Southern Africa 2010 at p 206 in the case of instalments sale of immovable property ownership thereof remains with the seller until the last payment is received.

of the immovable property is different. When you sell immovable property, you cannot simply repossess and sell the property without a court order. The property can only be sold after a court order allows the property to be sold after considering the circumstances.¹⁹⁷

The Company mistakenly understood that it or the State remained the property owner until a condition has been fulfilled. This was the incorrect interpretation of the agreements and the law as it is required that the purchases of the properties be registered, that is, the purchasers be registered¹⁹⁸ as owner and the debts outstanding be registered to secure the creditor's debt over the outstanding amount.¹⁹⁹ Registration evidences delivery of the properties and a real right to protect the owner against other claims to the property. It does not amount to the transfer of the property but only provides prima facie evidence of a real right in property.²⁰⁰

Having regard to the structure of the credit itself, most of the properties were substantially paid for by the subsidy alone; therefore, the beneficiaries were meant to receive transfer of the properties upon registration of the ISAs.²⁰¹ The Company did not register the ISAs, and the beneficiaries did not get their purchase registered over their houses while the Company received payments in respect of the agreements unlawfully.²⁰²

Furthermore, the Company seemed to understand the registration of the ISAs as transfer of the properties. In terms of the ISAs clause 8, the Company undertook to record the ISAs in compliance with section 20 of the ALA; however, during the argument of the matter, it took the approach that registration is one of the conditions of the agreement which triggers a reciprocal duty of payment by the purchaser. That is not the case;

¹⁹⁷ Above note 184 at p 541 relying on *Jaftha* at para 55.

¹⁹⁸ *Katshwa* above note 116.

¹⁹⁹ *Op sit* note 191 at p 299-301.

²⁰⁰ *Op sit* note 191 at p212-3. See also real estate and finance & banking alert blog 25 November 2019 by M Z Gattoo, B King and N Edris '*How Instalment Sale Agreements could provide a creative finance solution for deals banks turn away*' <https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Real/real-estate-and-finance-and-banking-alert-25-november-2019-how-instalment-sale-agreements-could-provide-a-creative-finance-solution-for-deals-banks-turn-away.html>

²⁰¹ Section 27(1) of the ALA. See also S supra note 35 p107.

²⁰² *Id.*

however, registration is a legal requirement in terms of the ALA and not simply a term or condition in an agreement. It creates an obligation only on the seller to protect purchasers from unlawful conduct by sellers of property who are usually poorer and have less power than the seller.²⁰³ It is the transfer of the properties that was conditional on the fulfilment of the terms and conditions of the ISAs. Registration of the ISAs is a right that the purchaser can demand without making a single payment in terms of the agreement, and the seller is barred from receiving any payment or interest in terms of the agreement before registration.²⁰⁴

By not registering the ISAs, the Company prevented the beneficiaries from obtaining security of tenure and other benefits that emanate from ownership, such as obtaining indigency grants from the municipality as some of the beneficiaries qualified for such indigency grants. They could not obtain other finance forms as they could not use their properties for security to obtain the finance as the company remained the owner of their properties.²⁰⁵

After it was ordered to register ISAs by the High Court, the Company anxiously sought a way to recover its investment in the quickest manner possible by unlawfully selling off the houses to a third party. In doing so, it bypassed many procedural steps which it ought to have taken before it was permitted to sell the properties. (more on this in the next chapter). Thus, they infringed on the beneficiaries right to housing which would have eventually rendered them homeless. Below I will discuss what steps the Company was meant to follow considering its obligations in terms of the relevant law to enforce the agreements properly. The ISAs are credit agreements in terms of the NCA. In terms of the ALA, they are sale of land by instalment agreements. There are obligations and procedural steps required to be complied with before the agreements are cancelled, and the unpaid balances are enforced by way of sale of the properties.

²⁰³ Id see also *Merry Hill (Pty) Limited v Engelbrecht 2008 (2) SA 544 (SCA)*.

²⁰⁴ Section 26 of the ALA, *Katshwa*.

²⁰⁵ *Op sit* note 191.

Chapter 4: What are the respective obligations of the Company and State.

Introduction

In conclusion, I consider the above-mentioned obligations in the enforcement of the subsidy agreements by the Company and the State in relation to the beneficiaries' right to housing. I consider what the procedural steps that the Company was meant to follow in enforcing the agreements and the procedural protections available to the beneficiaries of the scheme in the light of the two cases above. I further discuss how the State breached its obligations. Lastly, I will discuss how the states failure to fulfil its obligations has impacted the beneficiaries.

Link between the Company and the State

The Company is a private company that was initially owned in equal shares by the City of Cape Town and the NHFC. The Company is currently a housing institution funded and wholly owned by the NHFC.²⁰⁶ The Company fulfils a public function which is housing provision. The Company's objective is to achieve bigger and better-quality housing for qualifying beneficiaries. It currently holds residential housing stock mainly in and around Cape Town, especially where the poor and disadvantage groupings live.²⁰⁷ It was initially owned in equal shares by the City and the NHFC to fulfil the City's obligations to meet the housing demand.²⁰⁸ The housing scheme focuses on low-cost housing for people in the gap market.²⁰⁹ These people are obviously vulnerable; the need to protect their right to housing requires that the Company and the State act with due regard to their circumstances.

Although the Company is a private company, it performs a government function that is providing housing opportunities to beneficiaries. Furthermore, it utilises state subsidies to pay for the costs of construction of the housing.²¹⁰ The Company mission is to create integrated and sustainable Human Settlements through developing, acquiring, holding

²⁰⁶ *Op sit* note 2.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ <http://www.ctchc.co.za/?controller=pages&view=load&id=company#mandate>

and or selling immovable property in the form of affordable housing, amenities and public facilities, and commercial concerns aim at low-cost housing consumers.²¹¹

Withdrawal of Department of Human Settlements as amicus curiae

The Department was admitted as the first amicus curiae. However, it withdrew six days before the hearing.²¹² The CC took a serious view of the Department's withdrawal without reasons, as the Department is the only entity that can provide information to the Court on the conditions of the financial arrangements regarding the institutional subsidy and the constitutional implications of the Company's management of that subsidy.²¹³

In its application for admission as amicus curiae, the Department acknowledged that it is responsible for ensuring that the housing scheme is designed to assist low to middle-income earners, not lead to their evictions and ultimate homelessness.²¹⁴ The Department raised the concern of the cancellation of the ISAs leading to homelessness, contrary to the scheme's purpose. It contended correctly that the subsidies are not subject to the ISAs. The ISAs are to cover investments by the developer. It also raised the issues with the mismanagement of the scheme by the company stating it appeared that it failed to undertake affordability assessments.²¹⁵

The CC showed disappointment with the Department's late withdrawal. Noting the Department's responsibility for ensuring that the government housing subsidies are accessible to low to middle-income groups in furtherance of their right to access adequate housing in terms of section 26 of the Constitution. It held that the Department is the only entity that can assist the Court regarding the impact of the Company's cancellation of the instalment sale agreements upon the subsidy amount granted to the Company to

²¹¹ Id.

²¹² *Amardien* above at Para 69.

²¹³ *Amardien* above at Para 71.

²¹⁴ Founding affidavit of Departments amicus curiae application para 15.

²¹⁵ Id.

implement the housing scheme.²¹⁶ The CC concluded that the Department's withdrawal amounts to an abrogation of its duty to assist the Court in this matter.²¹⁷

The objective of the subsidy is to finance the construction of housing. The subsidy is targeted at housing institutions to arrange tenure arrangements for qualifying beneficiaries. This the State does to fulfil its obligations in terms of section 26(3) of the constitutions.²¹⁸ They contended that the Company's right to cancel the agreements where beneficiaries failed to make payments must be exercised in a manner that advances their constitutional rights to housing. That where the exercise of the right would lead to homelessness, the right must be curtailed.²¹⁹ The Department also raised that the impact of the cancellation of the ISA and eventual homelessness that would ensue is inimical to the purpose of the scheme.²²⁰

Unfortunately, the attitude of the Department throughout the whole dispute was passive. However, the Department belatedly joined the matter; it reverted to its unhelpful stance by withdrawing from the matter without explanation. Throughout the implementation of the scheme, the Department has the duty to facilitate, oversee, monitor, and supervise the execution of the Company's mandate.²²¹ It failed to fulfil its duties in breach of all its obligations in terms of the Constitution and the Housing Act. Only belatedly acknowledging that there was mismanagement of the implementation of the scheme. Further, stating that the company's course of action was inimical to the purpose of the scheme which is to provide security of tenure to its beneficiaries.

Breach and Enforcement

The Company needs to recover its investment that the beneficiaries contracted to pay off in instalments. The Company uses the funds from the state subsidies for housing

²¹⁶ The CC had regard to section 165(4) of the Constitution which requires that organs of state, through legislative and other measures, to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts.

²¹⁷ *Amardien* above at para 71.

²¹⁸ Note 154 above at paras 17 – 18.

²¹⁹ *Id* at para 19.2.

²²⁰ *Id* at para 19.3.

²²¹ Section 3, 4, 9, 10 of the Housing Act.

construction. The Department contended that the credit portion is the Company recouping its investment.²²² The importance of recouping the beneficiaries' debts is substantial as it means the Company generates revenue to carry on and fulfil its mandate and more people obtain housing opportunities.²²³ Furthermore, the Company must ensure that the scheme is administered in a fiscally sensible manner, is sustainable, and upholds the practice of good governance, which does not lead to the waste of public funding.²²⁴

Where a beneficiary breaches the agreements, in terms of clause 17 of the agreements, the seller must notify him of the breach and require him to rectify the breach within a period that is more than 30 days. If more than 2 of such notices have been served on him in the same calendar year, this period can be more than 7 days.²²⁵ Should the beneficiary not rectify the breach, that seller may exercise different remedies, including cancellation, repossession, recovery of outstanding amounts and keeping penalties.²²⁶

The Company may choose to enforce the agreement through cancellation and other common law or contractual remedies where the breach justifies cancellation.²²⁷ In addition to this, the Company must notify the department of the alleged breach and its intended cancellation and recovery of outstanding balances in terms of the agreements. The Housing Act requires that the department and Provincial MEC be given the first option when subsidised housing is repossessed and sold.²²⁸

The ALA and NCA require certain steps in addition to the provisions of the agreements and the common law.²²⁹ The ALA requires first that the credit agreements be registered with the Deeds Registrar offices.²³⁰ Both the NCA and the ALA require that the Company inform the purchaser of the default, and they must inform a purchaser in terms of section

²²² Note 207 below.

²²³ Reghard Brits *Sale in execution of mortgaged homes may not result in arbitrary deprivation of property* 2013 SAJHR at p 545.

²²⁴ Housing Act.

²²⁵ Clause 17.3 of ISAs.

²²⁶ Clause 17.4 of the ISAs.

²²⁷ Hutchicon, Pretorius et al *The law of Contract in South Africa* Oxford University Press 2009 p322-3 cancellation is an extraordinary remedy that is available in exceptional circumstances.

²²⁸ Section 10B of the Housing Act.

²²⁹ Supra note 35 at p 113, discussion on seller's duty to record Aronstam supra at p73.

²³⁰ Section 20 of the ALA

19 ALA if they are going to rely on the remedies in terms thereof if entitled to do so as the CC concluded that the two pieces of legislation serve different purposes.²³¹ The Company is required to comply with both their provisions: it must deliver notices in terms of both section 19 of the ALA to notify the purchaser of their breach and the consequences of not correcting their breach. Suppose the purchaser does not pay arrears outstanding within the period provided, and the Company wants to cancel the agreement and exercise its right to accelerate the outstanding amounts to enforce the agreement. In that case, it must issue a notice in terms of section 129 of the NCA detailing the options available to the purchaser in terms of the NCA to avoid cancellation as the Company intends to employ the remedy of cancelling the agreement.²³²

In the case of a secured credit agreement, if a credit provider wishes to enforce its rights in terms of a mortgage agreement, the credit provider may approach the court for an order to enforce the remaining obligations if the net proceeds from the sale did not discharge the consumer of all her financial obligations.²³³ The Company may apply to the court to have the properties declared executable by the court.²³⁴

The CC first looked at the circumstances under which subsidy housing can be declared executable in *Jaftha v Schoeman; Van Rooyen v Stoltz*²³⁵ the CC decided that a writ of execution that would deprive a person of 'adequate housing' would compromise such person's section 26(1) rights and would therefore need to be justified as contemplated by section 36(1).²³⁶ Judicial oversight is required when a creditor wants to enforce an

²³¹ *Amardien* note 133 above.

²³² Above note 184 at p 536 "If the consumer is in arrear and a credit provider wishes to enforce the agreement, the consumer must first be notified of her default and informed that she should seek advice. Only after the lapse of a certain period, will the credit provider be allowed to take legal steps. If the credit provider takes legal steps and ends up in court, one of three things can happen. Firstly, the contract may be cancelled due to the consumer's breach and the goods will be sold and the outstanding debt be paid with the proceeds. Secondly, the court can find that reckless credit was granted and either suspend the agreement or part of the agreement or set aside the consumer's obligations. And lastly, the court may find that the consumer is over-indebted and may make an order to reschedule the debt."

²³³ Section 130(1) of the NCA, id p 537. Rule 46A prohibit the issuing of a writ of execution against immovable property until the sheriff has issued a *nulla bona* return in respect of the movable property, see Herbstein and Van Winsen 'The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa' 5th Ed Juta 2009.

²³⁴ *Supra* note 193 at 332.

²³⁵ 2005 2 SA 140 (CC).

²³⁶ *Op sit* note 184 p 537.

agreement in respect of a residential property where the creditors right to housing will be affected.²³⁷

The court considering whether it is justifiable to execute must assess the legitimacy of a sale in execution. It must perform a balancing act between the interests of creditors. Looking at whether the creditor's advantage in execution outweighs the harm caused to the debtor.²³⁸ In circumstances where the impact of the execution on indigent debtors is detrimental, it will be unjustifiable to execute.²³⁹ Execution of the property would also be unjustifiable where the advantage that attaches to a creditor will be far outweighed by the immense prejudice and hardship caused to the debtor.²⁴⁰

Impact of the sales on the beneficiaries

The forced sale of primary residences clearly implicates section 26 of the Constitution. A sale in execution of property also results in a deprivation of property for purposes of section 25(1) of the Constitution and as such must satisfy the non-arbitrariness test.²⁴¹ The CC in *Jaftha* held that a measure that permits the deprivation of access to adequate housing limits the rights in section 26(1). Such deprivation of the right to adequate housing cannot easily be justified in terms of section 36 of the Constitution.²⁴²

Sale in the execution of property to enforce debt is an established and necessary part of South African law.²⁴³ Although the forced sale of primary residences clearly implicates the housing rights under section 26 of the Constitution²⁴⁴, people losing their homes

²³⁷ *Id* p541.

²³⁸ *Id* p 554.

²³⁹ *Id* - other factors of great importance will be the circumstances in which the debt arose. The arrear amount: how substantial the outstanding amount is the debtor's ability to pay that amount and keeping the agreement alive; if the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.

²⁴⁰ *Id* p 541 -542.

²⁴¹ *Op sit* note 220 at 536.

²⁴² *Jaftha* para 40, above note 184 p 540.

²⁴³ *Op sit* note 220 p 545 see *Gundwana v Steko Development* 2011 (3) SA 608 (CC).

²⁴⁴ *Id*.

because of debt enforcement is not only that primary residences are at risk, but more that homelessness will exacerbate or bring about their poverty.²⁴⁵ In the case of the beneficiaries whose homes were sold to a third party without any due process being followed by the Company, it is clearly an infringement of the rights in terms of both sections 25 and 26 of the Constitution.²⁴⁶ Failure to record the agreements deprived the beneficiaries of obtaining registered title to their property despite the Company having received substantial payments for the houses. The Company took poor people from a hopeful position where they were beginning to have a leg up and force them into a devastating welfare problem as it sold the only property, they have without considering any of the beneficiaries' circumstances, contrary to the purpose of the scheme and the constitution.

Brits excellently states the impact on poor people who are especially vulnerable when they become unable to fulfil their obligations. The effects can be particularly devastating for the poor or those facing poverty as their dignity often hangs in the balance when creditors seek to have their homes sold in execution. Debt enforcement litigation will place many of these home-owning debtors in a position from which few will recover. Therefore, it is important to consider that the fight against poverty is not only aimed at alleviating existing poverty but includes the ideal to ensure that those on the brink of financial disaster do not step into the poverty trap.²⁴⁷

People who own immovable property should ideally not lose such assets, which may represent the only wealth they possess.²⁴⁸ This is in line with the Department's contentions that the scheme was aimed at realising the beneficiaries' rights to housing. The subsidies were not subject to the enforcement of the credit agreements. The beneficiaries cannot be rendered homeless because of failure to repay the Company without the court making the necessary determination. An investigation into the impact of the sale of the beneficiaries' houses needs to be undertaken; considering the nature of the agreement, size of the debt, period of arrears, the combative power between the

²⁴⁵ Id.

²⁴⁶ Section 25 protects property rights.

²⁴⁷ Id p 537.

²⁴⁸ Id.

parties, whether the beneficiaries would be rendered homeless, their likelihood to secure alternative properties, the availability of alternative ways to achieve the purpose of the sale. If there are alternatives that would still give effect to the creditor agreement, but that can avoid the loss of the home, then going ahead with the sale would be unjustifiable.²⁴⁹ The CC in the *Amardien* case did not make this analysis; however, it held that the beneficiaries housing rights are affected. It has on several cases considered the impact on the right to housing where litigants were facing the loss of their homes through forced sale and evictions.²⁵⁰

In the case of the Company, the impacts on the beneficiaries right to housing are obvious as they were facing eviction, and their properties were already sold to a third party by the time the matter was argued at the CC. They are poor people who would be driven into further poverty without any judicial oversight if they had not challenged the cancellation of their agreements. The CC did not deal with the Departments' obligations as the administrative body mandated by the Constitution to oversee the implementation of housing institutions like the Company. The CC also did not consider the impact of the Department's inaction in contravention of its duties under the Housing Act and the Constitution throughout the dispute between the Company and the beneficiaries in the judgment, which is disappointing. However, the CC did not need to make such an analysis or to make the determination considering the outcomes it reached interpreting sections 19 of the ALA and 129 of the NCA.

Conclusion

The major take-home point that comes out of the litigation against the Company by the beneficiaries is that they are consumers of goods and services in terms of consumer protection legislation. As such, they enjoy the same protections available to all consumers under the ALA and NCA. Where there are disputes that arise, the NCA and ALA provisions apply equally to them as any consumer contrary to the Company and State's

²⁴⁹ *Op sit* note 220 at p548 see also *Gundwana, Nkata, Kubyana*.

²⁵⁰ *Id* see also *Sebola, Gundwana, Kubyana, Nkata*.

incorrect position that it remained the property owner and could simply repossess the houses and sell them to third parties without more.

Such conduct amounted to an unjustified infringement of their housing rights and constituted an arbitrary deprivation of property. Judicial oversight is required in determining whatever enforcement mechanisms are appropriate in the circumstances of default by the beneficiaries. The beneficiaries' rights are protected by various procedural and substantive requirements which the Company took improperly or failed to take completely. The company unlawfully bypassed the procedural steps and the whole judicial process to enforce the agreements. The point is that it is unlawful to sell another person's property without judicial oversight. It is disappointing that poor people had to battle to make this point to a Company whose purpose is to provide housing to the poor with state funding and support.

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