

SECTION 19 OF THE ALIENATION OF LAND ACT 68 OF 1981

S COHEN

Research report presented for the approval of the Senate in fulfilment of part of the requirements for the degree of Master of Laws by Course-work, of which the other part consists of the completion of a program of courses

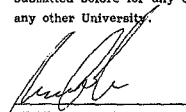
Supervisor : Professor J D Van der Vyver
B Comm Hons BA LLB (PU vir CHO) LLD (Pret)

Faculty of Law
University of the Witwatersrand
Johannesburg

26 November 1985

DECLARATION

I declare that this research report for the approval of the Senate in fulfilment of part of the requirements for the degree of Master of Laws by Course-work, of which the other part consists of the completion of a program of courses, is my own, unaided work. It is being submitted for the degree of Master of Laws in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree of examination in any other University.



SELWYN COHEN

26 November 1985

I
I N D E X

<u>PAGE/S</u>	<u>CHAPTER</u>	<u>CONTENTS</u>
I		<i>Index</i>
II - VI		Table of Cases
VII - VIII		Table of Statutes
1 - 4	I	Introduction
5 - 22	II	History of Legislation
23 - 28	III	Structure and Content of The Alienation of Land Act 68 of 1981
29 - 39		1. Development of Common Law and Legislation prior to section 19 in regard to seller's rights upon breach of contract;
39		2. Problems arising from section 13 of the 1971 Act and section 19 of the 1981 Act;
39 - 97		2.1 When does the thirty day notice period prescribed by section 19 commence to run?
97 - 110		2.2 Content of notice in terms of section 19(2)
111 - 119	IV	Conclusion
120 - 121		Bibliography

II

TABLE OF CASES

1. A.A. Mutual Insurance Association Ltd v Tlabakoe 1979 (1) SA 302 (A).
2. Botes and others v Toti Development Co. (Pty) Ltd 1978 (1) SA 205 (T).
3. Brink v Wild 1968 (1) SA 536 (A).
4. Britz v Du Wet, N.O., en h ander 1965 (3) SA 131 (O).
5. CD Development Co (East Rand) (Pty) Ltd v Novick 1979 (2) SA 546 (C).
6. Caldwell v Savopoulos 1976 (3) SA 741 (D).
7. Carila v McCusker 1904 TS 917.
8. Chesterfield Investments (Pty) Limited v Venter 1972 (2) SA 19 (W).
9. Commercial Union Assurance Company Limited v Clarke 1972 (3) SA 508 (A).
10. Corondimas and Another v Ladat 1946 AD 548.
11. Curtis v Johannesburg Municipality 1906 TS 308.
12. Da Mata v Otto, N.O. 1971 (1) SA 763 (T).
13. Dease v Minister of Justice 1962 (2) SA 302 (T).
14. Dynaland (Pty) Limited v U.E. Nielsen (Case 21432/81 (W) unreported).
15. Fitzgerald v Western Agencies 1968 (1) SA 288 (T).
16. Gordon v Tarnow 1947 (3) SA 525 (A).

III

17. Greenfield Manufacturers (TEMBA) (Pty) Ltd v Royten Electrical Engineering (Pty) Ltd 1976 (2) SA 565 (A).
18. Hamid & another v Cassim 1978 (2) SA 102 (T).
19. Hanekom's Trustee v Kotze (1829) 1 Menzies 411.
20. Harris v Trustee of Buissinne (1840) 2 Menz 105.
21. Herison v S.A. Mutual Life Assurance Society 1942 AD 259.
22. Holme v Bardsley 1984 (1) SA 429 (W).
23. Johannesburg Municipality v Cohen's Trustees 1909 TS 811.
24. John Gerard Anthony Leyds NO v Noord-Wustelike Kooperatiewe Landbou Maatskappy Beperk and others 1985 (2) SA 769 (A).
25. Kent, N.O. v South African Railways and another 1946 AD 398.
26. Lovas v Estate Rosenberg 1940 TPD 342.
27. Maharaj v Tongaat Development Corporation (Pty) Ltd 1976 (1) SA 314 (D).
28. Maharaj v Tongaat Development Corporation (Pty) Ltd 1976 (4) SA 994 (A).
29. Mangion v Bernhardt 1977 (3) SA 901 (W).
30. Maron v Mulbarton Gardens (Pty) Ltd 1975 (4) SA 123 (W).
31. Matross v Minister of Police and another 1978 (4) SA 79 (E).

32. Meyer v Kirner 1974 (4) SA 90 (N).
33. Microoutsicos and another v Swart 1949 (3) SA 715 (A).
34. Miller v Hall 1984 (1) SA 355 (D).
35. Morris v Kletsop and Minister of Police (Case I 428/74 (E) unreported)
36. Muller v Mulbarton Gardens (Pty) Ltd 1972 (1) SA 328 (W).
37. New Union Goldfields Ltd v Commissioner for Inland Revenue 1950 (3) SA 392 (A).
38. Noordvaal Konsruksie Maatskappy (Edms) (Bpk) v Booysen 1979 (2) SA 193 (T).
39. Oakley v Bestconstructo (Pty) Ltd 1983 (4) SA 312 (T).
40. Oatorian Properties (Pty) Ltd v Maroun 1973 (3) SA 779 (A).
41. Orkin en 'n ander v Phone-A-Copy Worldwide (Pty) Ltd 1983 (3) SA 881 (T).
42. Porteous v Strydom N O 1984 (2) SA 489 (D).
43. Provident Land Trust v Union Government 1911 AD 615.
44. Retail Dairy Co., Ltd v Clarke 1912 2 KB 388.
43. R v Berk 1958 (1) SA 685 (C).
44. R v Silman 1959 (3) SA 868 (C).
45. R v Sisilane 1959 (2) SA 448 (A).

46. R v Thwaites 1932 CPD 375.
47. Rex v Reynolds 1933 CPD 581.
48. Robinson v Bradfield 1981 (1) SA 349 (N).
50. Sandland v Neale 1955 3 All ER 571.
51. SA Wimpy (Pty) Limited v Tzouras 1977 (4) SA 244 (W).
52. Sher S v Crook T.E. 1984 (2) PH A64 (W).
53. Smith v Farrelly's Trustee 1904 TS 949.
54. Smit and Venter v Fourie and another 1946 WLD 9.
55. Stanley v Thomas 1939 2 All ER 636.
56. Swart v Vosloo 1965 (1) SA 100 (AD).
57. Swartz & Son (Pty) Ltd v Wolmaranstad Town Council 1960 (2) SA 1 (T).
58. Tucker's Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 1 (A).
59. Tucker's Land and Development Corporation (Pty) Ltd v Strydom 1984 (1) SA 1 (A).
60. United Bioscope Cafes Ltd v Moseley Buildings Ltd 1924 AD 60.
61. Van Aardt v Hartley's Trustees (1845) 2 Menz 143.
62. Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou 1978 (2) SA 835 (A).
63. Van Wyk v Rottcher's Saw Mills (Pty) Limited 1948 (1) SA 983 (A).

VI

- 64. Verryne v Van Zyl and another 1962 (2) SA 152 (T).
- 65. Walker v Minier et Cie (Pty) Ltd 1979 (2) SA 474 (W).
- 66. Wellworths Bazaars v Chandlers' Ltd and another 1947 (2) SA 37(A).
- 67. Wendywood Development (Pty) Limited v Rieger & Another 1971 (3) SA 28 (A).
- 68. Wilken v Kohler 1913 AD 135.

VI

64. Verryne v Van Zyl and another 1962 (2) SA 152 (T).
65. Walker v Minier et Cie (Pty) Ltd 1979 (2) SA 474 (W).
66. Wellworths Bazaars v Chandlers' Ltd and another 1947 (2) SA 37(A).
67. Wendywood Development (Pty) Limited v Rieger & Another 1971 (3) SA 28 (A).
68. Wliken v K. .er 1913 AD 135.

VII

TABLE OF STATUTES

PRE UNION

CAPE

An Act to amend the Ordinance No. 18, 1844 for regulating the payment of Transfer Duty in this Colony - Act 15 of 1855.

Transfer Duty Consolidation and Amendment Act 5 of 1884.

Transfer Duty Proclamation 8 of 1902.

NATAL

Statute of Frauds - Law 12 of 1884.

Act 7 of 1903 - To amend the law relating to the sale and purchase of land.

ORANGE FREE STATE

Chapter LXVII (Transfer Duty) of the Law Book

Transfer Duty Ordinance 12 of 1906.

TRANSVAAL

Transfer Duty Law 20 of 1895.

VIII

POST UNION

<u>NC.</u>	<u>YEAR</u>	<u>TITLE</u>
32	1916	Insolvency Act
29	1929	Insolvency Act 1916, Amendment Act
24	1936	Insolvency Act
29	1936	Co-operative Societies Act
36	1942	Hire Purchase Act
40	1949	Transfer Duty Act
50	1956	General Law Amendment Act
68	1957	General Law Amendment Act
33	1957	Interpretation Act
7	1958	Police Act
79	1969	Formalities in respect of Contracts of Sale of Land Act
72	1971	Sale of Land on Instalments Act
72	1971	Sale of Land on Instalments Act
49	1975	Sale of Land on Instalments Act
	1976	Development Schemes Bill
25	1976	Sale of Land on Instalments Act
36	1976	Pre-Union Statute Law Revision Act
74	1978	Sale of Land on Instalments Act
75	1980	Credit Agreements Act
68	1981	Alienation of Land Act
51	1983	Alienation of Land Amendment Act

CHAPTER I
INTRODUCTION

Section 13 of the Sale of Land on Instalments Act 72 of 1971 bore, and its successor, section 19 of the Alienation of Land Act 68 of 1981 bears, a simple heading: "Limitation of right of seller to take action."

The law reports of February 1984 contained three cases of enormous significance for parties to contracts for the sale of land on instalments. Robinson v Bradfield¹ and Miller v Hall² passed relatively unnoticed but I became extremely concerned when I read the judgment of Flemming J in Holme v Bardsley.³

It was quite unnerving to discover, within eighty pages of each other in the law reports, three cases with such serious implications for sellers of land in terms of such contracts; especially in regard to the calculation of the thirty day notice period required by section 19. Had the draughtsman of the Act been guilty of a great understatement when choosing his heading for the section; had he really intended to deprive a seller of his right to take action against a delinquent purchaser?

As a practising attorney I was aware of the protection innocent purchasers of land on instalments required against

1. 1984 (1) SA 349 (D).
2. 1984 (1) SA 355 (D).
3. 1984 (1) SA 429 (W).

CHAPTER I
INTRODUCTION

Section 13 of the Sale of Land on Instalments Act 72 of 1971 bore, and its successor, section 19 of the Alienation of Land Act 68 of 1981 bears, a simple heading: "Limitation of right of seller to take action."

The law reports of February 1984 contained three cases of enormous significance for parties to contracts for the sale of land on instalments. Robinson v Bradfield¹ and Miller v Hall² passed relatively unnoticed but I became extremely concerned when I read the judgment of Fleming J in Holme v Bardsley.³

It was quite unnerving to discover, within eighty pages of each other in the law reports, three cases with such serious implications for sellers of land in terms of such contracts; especially in regard to the calculation of the thirty day notice period required by section 19. Had the draughtsman of the Act been guilty of a great understatement when choosing his heading for the section; had he really intended to deprive a seller of his right to take action against a delinquent purchaser?

As a practising attorney I was aware of the protection innocent purchasers of land on instalments required against

1. 1984 (1) SA 349 (D).
2. 1984 (1) SA 355 (D).
3. 1984 (1) SA 429 (W).

their own "improvidence and folly"¹ in succumbing to the temptation of profits offered by enthusiastic commission-hungry land salesmen. The 1960's in South Africa had seen near hysteria amongst budding property tycoons, many hoping that by purchasing virgin land on instalments they would, with minimum cash outlay, be able to reap large profits with quick resales, often to other innocent purchasers who would part with hard earned cash to acquire the property with the same object in mind. There are many instances of land being resold several times on instalments before transfer was eventually taken with huge profits being made by all. There are likewise as many instances of tragic losses arising from many causes including inability or unwillingness of sellers to honour their obligations.

On the other hand, looking at the situation from the point of view of clients who were genuine property developers, and had been such in good times and in bad, I realised that serious inroads had been made by legislation into the rights of individuals to freedom of contract.

I re-read the above cases and others and came to the conclusion that the draughtsman was innocent; the courts, in their overeagerness to give the maximum possible protection to purchasers at a time when they were in breach of their contractual obligations, had extended the

1. Per M.L. J in Smit and Venter v Fourie and another 1946 WLD 9 when referring to the Hire Purchase Act 36 of 1942.

meaning of the statutes much further than could ever have been intended.

I decided to write a short note to set out my view that the interpretation placed on the sections by the courts was incorrect insofar as it related to the calculation of the period of notice required by the sections. I intended to publish the note in a commercial publication or law journal so that unwary sellers of land and their lawyers would be aware of the pitfalls of the law.

Although I began with the predetermined view that the judgments were incorrect, there were times when I questioned whether this was in fact so; and so my investigations went deeper and the short note grew longer. When I was finished (this introduction was written last) my view was unaltered - I still believe that the present state of the law in regard to the calculation of the thirty day notice period required by the sections *is incorrect*. I hope that my research will be of assistance not only to sellers but also to lawyers and advocates who may try to set the courts on the right direction in their interpretation of section 19. I have also dealt with other aspects of section 19 in regard to which the judgments, whilst not always harmonious, do not appear to be totally unresonable.

I am grateful to members of the Johannesburg Bar who have given up valuable time to discuss various aspects of the sections with me and to those who have made available to

me unpublished arguments in several cases relating to sections.

I am also grateful to counsel for a copy of the unreported judgment of O' Donovan J in Dynaland (Pty Limited) v U.E. Nielsen,¹ which seems to date to be the only judgment running contrary to the prevailing interpretation of section 19, appreciating fully the significance of changes in the legislation. Why it remains unreported is a mystery.

The preparation of this text has taken many hours of the time and patience of I Sacks and her I.B.M. word processor. She has given much of her free time to help me, has been extremely patient with me, and her advice and co-operation is sincerely appreciated.

It is hoped that this dissertation will serve a practical purpose. Perhaps, if the Appellate Division has not yet by the publication hereof pronounced finally on section 19² my research will assist some counsel in attempting to convince that court that O' Donovan J³ and Gordon J⁴ were correct.

1. Case 21432/81 (W) unreported.
2. Aspects of Section 13 have been argued in Orkin en h ander v Phone-A-Copy Worldwide (Pty) Ltd 1993 (3) SA 881 (T). Judgment has been reserved.
3. Dynaland v U.E. Nielsen supra.
4. Who in Noordvaal Konstruksie Maatskappy (Edms) Bpk v Booysen 1979 (2) SA 193 (T) appreciated the differences between section 13 as it was before and after its 1975 amendment and concluded that previous court decisions were accordingly no longer applicable.

CHAPTER II

HISTORY OF LEGISLATION

Before the abolition of slavery in the Cape Province, inasmuch as registration in the slave register was required to transfer property in slaves, sale and delivery of possession of a slave, by a person in whose name the slave was on the register, to the purchaser without registration effected in the latter's name, was wholly ineffectual in a question with creditors of the seller.¹

That principle was not restricted to slaves.

On 13 January 1837 Harris bought a house from Buissinne for:£1 050,00. He paid £400,00 on account and entered into possession of the premises. Before transfer could be registered in the deeds office, Buissinne became insolvent and Harris went to court with the trustee in regard to the ownership of the property. It was held that, as ownership could pass to Harris only by virtue of registration of transfer in the deeds office, he had never become the owner of the property and that it accordingly vested in the trustee for the benefit of creditors of the insolvent estate.

1. Hanekom's Trustee v Kotze (1829) 1 Menzies 411.

Harris had acquired nothing more than a *jus ad rem* and a personal claim against Buissinne to convey to him the *jus in re* by transfer *coram lege loci*. Harris thus lost both the property and the money he had paid on account and was left with the cold comfort of a claim against the insolvent estate.¹

It has been suggested² that the rule laid down in Harris's case³ presupposes that at the time the insolvent agreed to sell or otherwise alienate the property he had dominium therein by virtue of registered title and that the rule can have no application in a case in which at the time of disposal the insolvent had no actual dominium but merely a personal right to obtain dominium. Accordingly it is argued that if before obtaining delivery the insolvent sells the property (or cedes his right to obtain transfer), he thereby completely divests himself of all his rights with regard to the property, and that if he has before sequestration sold property of which he has not himself received transfer (or has ceded his right to obtain transfer), his trustee is bound on receipt of transfer to pass transfer of the property to the purchaser (or the cessionary) against payment of the purchase price if not previously paid. In this connection reliance is placed on Smith v Farrelly's Trustee.⁴ This approach too was

1. Harris v Trustee of Buissinne (1840) 2 Menz 105.
2. Mars The Law of Insolvency in South Africa (7th ed) at 179.
3. *Supra*.
4. 1904 TS 949 at 964.

adopted in Van Aardt v Hartley's Trustees¹ and Britz v De Wet, N.O., en 'n ander.²

The principle enunciated in Harris' case³ resulted in severe hardship and it should have been clear even at that stage that purchasers of land required protection. After all the purchase of land usually in the form of a domestic residence, is probably the most important commercial transaction the majority of people ever enter into in their entire lives.

Substantial protection has now been given to purchasers by the Alienation of Land Act 68 of 1981, but, for the purposes of considering it, it is useful to trace the history of legislation relating to the sale of land in South Africa. It will be seen that the wheels of justice have turned very slowly and not always fairly to all parties.

At common law a contract for the sale of land, like any other sale, does not for its validity require compliance with any formality.

The General Law Amendment Act 68 of 1957 was the first statute to introduce formalities in respect of sales of land applying equally in all four provinces. Its title was "To amend the Law relating to formalities of certain contracts".

1. (1845) 2 Menz 143.
2. 1965 (2) SA 131 (O).
3. Supra.

Prior to the General Law Amendment Act 68 of 1957 statutes requiring formalities for the sale of land had been introduced and existed independently in the four provinces.

In the Cape Province the common law applied until the promulgation of the General Law Amendment Act 68 of 1957 but there were certain statutes which made reference to matters affecting sales of land.

Section 8 of Act 15 of 1855 (C) which professed to be "An act to amend the Ordinance No. 18, 1844 for regulating the payment of Transfer Duty in this Colony", required a purchaser of land to disclose the name of the principal for whom he acted, if this was the case. Other sections related to transfer duty being payable by a purchasing agent who did not produce his principal's authority.

Several other amendment acts were thereafter promulgated and the Transfer Duty Consolidation and Amendment Act 5 of 1884 (C) repealed all the foregoing. This Act also dealt with the purchase of land by agents and required the name of the principal to be disclosed at the time of purchase. Unauthorised agents were liable for payment of transfer duty. Section 30 rendered a sale of land null and void where the purchaser did not profess to act for himself but failed to disclose -

"at the time of making and completion thereof the name of the principal for whom the purchase is made".

Section 24 provided that in a sale of land by public auction there would be no sale until the name of the purchaser had been taken down in writing, unless the name of the person for whom the bidder was purchasing had been announced publicly to the bystanders. The Act makes very interesting reading, especially in section 19 relating to exemptions from duty.

Although the common law applied in Natal as well, there were certain applicable statutes.

Law 12 of 1884 (known as the "Statute of Frauds") provided that an oral sale of land was not actionable unless evidenced by some writing or unless there had been part performance. This law was partially repealed by the General Law Amendment Act 50 of 1956 and finally by the General Law Amendment Act 68 of 1957.

The Act to Amend the Law relating to the Sale and Purchase, Act 7 of 1903, dealt with the sale of land through agents not being by public auction, and imposed transfer duty on unauthorised agents. Parts of this Act were repealed by the Transfer Duty Act 40 of 1949 and the remainder by the Pre-Union Statute Law Revision Act 36 of 1976.

In the Transvaal the common law applied until the Transfer Duty Law 20 of 1895. This provided in section 17:

"No property shall be considered to be lawfully sold until a proper memorandum or

declaration has been duly signed by both parties."

This Law was repealed by the Transfer Duty Proclamation 8 of 1902 (T) which contained provisions similar to those in the Cape Act 5 of 1884. Watermeyer CJ in Van Wyk v Rottcher's Saw Mills (Pty) Limited¹ commented on section 30 of this Proclamation:

" ... it seems clear from the provisions of the proclamation that one of the purposes of the section was to prevent frauds upon the revenue."²

In the Orange Free State the common law also applied until Chapter LXVII (Transfer Duty) of the Law Book was enacted. This enactment contained provisions similar to those in The Transfer Duty Consolidation and Amendment Act 5 of 1884 (C) and Transfer Duty Proclamation 8 of 1902 (T). This Chapter was repealed by the Transfer Duty Ordinance 12 of 1906 (O) which provided that no sale of fixed property was of any force or effect unless in writing and signed by the parties or their agents duly authorised in writing. The requirement of *disclosure of the name of a principal and the liability of an agent for transfer duty upon failure to make this disclosure was also dealt with.*

Innes JA in Wilken v Kohler,³ referring to the Transfer Duty Ordinance 12 of 1906 (O), said:

1. 1948 (1) SA 983 (A) at 988.
2. See also Brink v Wild 1968 (1) SA 536 (A) at 541.
3. 1913 AD 135 at 142.

"Recognising that contracts for a sale of fixed property were, as a rule, transactions of considerable value and importance, and that the conditions attached were often intricate, the Legislature, in order to prevent litigation and to remove a temptation to perjury and fraud, insisted upon their being reduced to writing. ... I am satisfied that the provision was adopted not for the advantage of any particular class of persons, but on grounds of public policy."

It was clear that some form of purchaser protection was required. The provisions of section 30 of the *Transfer Duty Consolidation and Amendment Act 5 of 1884* (C) and corresponding sections in legislation in other provinces were aimed at discouraging a fraud on the Receiver of Revenue.¹ The principle enunciated in *Harris'* case² still applied, and any protection which a purchaser of land on instalments derived from the existing legislation was only coincidental.

In an attempt to mitigate the hardship on purchasers of land on instalments, the *Insolvency Act 1916, Amendment Act 29 of 1926* introduced section 72 into the *Insolvency Act 32 of 1916*. This section was left unrepealed by the *Insolvency Act 24 of 1936*. It provided that a purchaser of land, the purchase price of which was payable in instalments at specified periods, and who had paid to the seller in such instalments not less than 50% of the agreed purchase price, was entitled to demand transfer of the land on condition that simultaneously therewith he registered in favour of the seller a first mortgage bond over the land to

1. *Diemont AJA in Wendywood Development (Pty) Limited v Rieger & Another* 1971 (3) SA 28 (A) at 38.

2. *Supra*.

secure the balance of the purchase price and interest in terms of the agreement of purchase. If the seller was unable or failed or refused to give transfer, the purchaser was entitled to treat the contract as cancelled and to recover the purchase price together with such damages as he could prove he had sustained as a result of such failure.

Section 72, however, offered little comfort for purchasers. Firstly, being for many years the only unrepealed section of the Insolvency Act 32 of 1916, many were unaware of its existence.¹ Secondly, the protection it provided was available only after a substantial portion of the purchase price (half) had already been paid and whilst the seller was not yet insolvent. Yet it is exactly in those circumstances, i.e. when the seller does become insolvent prior to transfer of the land to the purchaser, that the protection is required. There was little else, however, a purchaser could do, except perhaps to try and protect himself contractually by for instance stipulating in the contract of purchase and sale that transfer of the land was to be passed to him at any time he chose to require this against registration of a mortgage bond in favour of the seller for the balance of the purchase price then outstanding, whatever it was; but until transfer was actually registered, the purchaser would remain at risk.

1. See for instance the startling admission of Hienstra J in Verryne v Van Zyl and Another 1962 (2) SA 152 (T). As Innes JA (as he then was) said in Wilken v Kohler supra: "Experience shows that in South African legislation, whatever may be the case elsewhere, important provisions are sometimes found, like flies in amber, in unexpected settings."

The Transfer Duty Act 40 of 1949 came into operation on 1 January 1950. The prior statutory position in respect of sales of land other than those by public auction, as it then existed in each province, was unaffected thereby. The Act was noteworthy as it was the first statute relating to the sale of land which dealt solely with the fiscal aspects thereof, leaving formalities and other matters relating thereto to other statutes.

The General Law Amendment Act 68 of 1957 came into operation on 1 January 1958.

Section 1(1) of the Act provided:

"No contract of sale or cession in respect of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this section unless it is reduced to writing and signed by the parties thereto or by their¹ agents acting on their written authority."

This was the first time that a provision directed at formalities relating to the sale of land was introduced other than for fiscal purposes, as had been the case with prior provincial and colonial legislation.

In Wendywood Development (Pty) Limited v Rieger & another² Diemont JA referring to the General Law Amendment Act 68 of 1957 expressed views similar to those

1. This was very similar to the provisions of section 49 of the Transfer Duty Ordinance 12 of 1906 (O) and section 30 of Transfer Duty Proclamation 8 of 1902 (T).
2. Supra.

of Innes JA (as he then was) in Wilken v Kohler¹ in relation to the Transfer Duty Ordinance 12 of 1906 (O) when he said:

"Section 1 of the 1957 Act is however designed to ensure that in such important transactions as the sale of landed property the possibility of dispute or disagreement should be reduced to a minimum. In order to achieve this the legislature requires that the contract be in writing and that agents who sign the contracts for their principals be authorised in writing to sign."

There followed the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969. It contained substantially the same provisions as the General Law Amendment Act 68 of 1957 in regard to sales of land.

The late 1960's brought about a boom in the sales of land in terms of instalment sale agreements. People who had never dealt in land suddenly entered the arena hoping to resell property at a huge profit shortly after purchase and with only a small capital outlay, thus reaping large profits.² Apart from the potential problems (of which they were, as a result of their innocence, usually unaware) posed for them by the contracts in terms of which they acquired the land, most of these people were unaware of the fact that their transactions would render them liable for taxation - some even proudly proclaimed their successes and profits in newspaper advertisements on behalf of developers - probably at substantial cost to themselves and to the benefit of the fiscus.

1. Supra.
2. Many did, but during the late 1970's the market collapsed and many suffered losses they could scarcely afford.

At the same time the use of standard forms of contracts relating to sales of land on instalments became more popular and sophisticated, and these contracts, like most standard form contracts, provided very little protection for purchasers.

In fact, one usually would find pages and pages of clauses all containing protection for the seller and imposing only onerous obligations on purchasers. Sadly, fear (often of eviction), especially in regard to flats occupied by such persons (often elderly) in respect whereof sectional title registers were to be opened, and sometimes greed, resulted in purchasers signing such contracts despite warnings from their legal advisers not to do so. Often they had no option. If they did not buy they were evicted.

Section 1 of the General Law Amendment Act 68 of 1957 was repealed by the *Formalities in Respect of Contracts of Sale of Land Act 71 of 1969* ("the Formalities Act"), which came into operation on 1 January 1970. The purpose of this Act was to ensure that the essential terms of a contract for the sale of land, that is, the parties, the price and the subject matter, had to be in writing and defined with sufficient precision to enable them to be identified without extraneous evidence or any patent ambiguity in the description.

The last two mentioned Acts i.e the General Law Amendment Act 68 of 1957 and the Formalities Act were aimed at reducing the areas of dispute relating to sales of land.

They contained no purchaser protection. Yet, despite their avowed aim, they produced their own spate of litigation. In an article on this Act JC de Wet said:¹

"Writing' by itself is no guarantee of clarity nor does it have the aura of solemnity it may have had five centuries ago. Even in its present shape, the provision (section 1 of this Act) will continue to be a fruitful source of fruitless litigation."

Section 30 of Proclamation 8 of 1902 (T) and section 49 of the Transfer Duty Ordinance 1906 (O) have been described as "those notorious case makers"² and, following the prophecy of JC de Wet, section 1 of the Formalities Act has continued to be a fruitful source of fruitless litigation.

Then, as stated by Van Rensburg and Treisman:³

"Quite unexpectedly the Sale of Land on Instalments Act appeared on the statute book in 1971 as Act No 72 of that year";

but

"the Act was ill-conceived, theoretically unsound and poorly drafted."

It has been said of this Act:

"Unde etiam vulgare Graeciae dictum 'semper aliquid novi Africam adferre'" ("whence it is commonly said amongst the Greeks 'from Africa always comes something new'").⁴

1. 1969 Annual Survey 104. Words in brackets are mine.
2. Millner MA "Lively Prospects for Land Sales" (1959) 76 SALJ 16.
3. The Practitioner's Guide to the Alienation of Land Act (2nd ed) at 1.
4. Van Rensburg and Treisman op cit at 1.
5. Pliny Natural History quoted in Normans Purchase and Sale in South Africa (4th ed by CI Belcher) at 125.

The long title to this Act reads as follows:

"To regulate contracts of purchase and sale of certain kinds of land under which the purchase price is payable in instalments over a period of one year or longer, and to provide for matters incidental thereto."

The words of Millin J in Smit and Venter v Fourie and another,¹ used with reference to the Hire Purchase Act 36 of 1942, are apposite also to describe the purpose of this Act. He talked of -

".... the mischief of poor persons being enticed into shops and being sold goods of more or less value at prices which they can ill afford to pay, and on terms which are harsh and unconscionable, and it was intended to give protection to such persons against their own improvidence and folly."

According to the law as it stood in 1971 and prior to the passing of the Sale of Land in Instalments Act Act 72 of 1971 (which will be referred to hereafter as "the 1971 Act"), a purchaser who had bought land under a contract in terms of which the purchase price was payable in instalments, ran the risk of losing both the land and any instalments he may have paid in the event of the estate of the registered owner being sequestrated as insolvent or the land being sold in execution.² This often applied particularly to purchasers of residential stands in newly established or projected townships. Looking at the 1971

1. Supra.

2. Harris v Trustee of Buissinne supra.

Act as a whole, it is evident from its terms that Parliament intended altering the existing law insofar as it related to contracts for the sale of land used or intended to be used mainly for residential purposes under which the purchase price was payable in more than two instalments over a period of one year or longer, and where the purchaser was a natural person. It is not clear why there was any need to prescribe the number of instalments or the period over which they were payable or why the protection applied only to natural persons. Certainly, the longer the purchaser was exposed, the greater his risk; but the need for the protection remained the same for all purchasers, whether natural persons or companies, and irrespective of the number of instalments to be paid and the period over which they were to be paid.

The most far-reaching and fundamental changes made by the 1971 Act to the position as it existed prior thereto, were those contained in section 14. This section was designed to safeguard the rights of the purchaser in the event of the insolvency of the owner of the land or the attachment thereof at the instance of a judgment creditor of the owner. To this end section 14 in express terms conferred rights upon a purchaser which he did not have under the existing law and provided him with the means of enforcing such rights. The most important of these rights, and the one that matters most, is that in terms of section 14(2), read with section 14(3) and section 14(4), the purchaser was entitled, in the event of insolvency of the

registered owner or the attachment of the land, to obtain transfer of the land upon compliance with the requirements of section 14(3) where there was no mortgage bond over the land, or section 14(4) where the land was encumbered by a mortgage bond. Section 14 created a legal preference in favour of the purchaser in respect of the land and provided for a particular way of realising it on insolvency or execution. Very important too was the right created by section 20, by which the seller was compelled to have the contract recorded by the Registrar of Deeds in the prescribed manner. The effect of the recording was that a purchaser, in the event of a subsequent sale in execution or because of insolvency, had a preferent claim in respect of the proceeds of the sale. This claim ranked in preference immediately after any claim of a mortgagee under a bond registered over the land on or before the date of recording of the contract, and equalled the amount which the purchaser might recover under section 28(1) in the event of a termination of that contract, or, if he was a remote purchaser, i.e. one who had purchased from a person (the intermediary) who had previously purchased the land but not yet received transfer, any amount paid by him on behalf of the owner under section 11(1). This section gave the remote purchaser the right to pay his instalments to the owner on behalf of the intermediary.

The 1971 Act was amended by the Sale of Land on Instalments Amendment Act 72 of 1972 which consisted only of one section. In terms thereof the seller could now

recover from, and/or obtain judgment against, the purchaser for costs of drawing the contract and transfer costs. Amazingly, section 6 of the 1971 Act had by implication forbidden this. In 1975 the Sale of Land Amendment Act 49 of 1975 further defined certain expressions, regulated the required and permissible contents of contracts, made further provision for the rights of purchasers under contracts, prescribed further requirements for the cession and assignment by the seller of rights and obligations under a contract, defined the circumstances in which the seller could take action against the purchaser, further regulated certain matters relating to the death or insolvency of the owner of land under a contract and a sale in execution of such land, and also provided for other matters in connection therewith. In 1976 yet another Sale of Land on Instalments Amendment Act, Act 25 of 1976, introduced further amendments relating to the rights of a purchaser under an intermediate transaction, and the circumstances in which the seller could take action against the purchaser. The final Sale of Land on Instalments Amendment Act 74 of 1978 amended the provisions of the 1971 Act relating to the right of any person to whom land had been sold in terms of a contract to obtain transfer of the land when it was attached or in the case of the issue of a final order of liquidation or sequestration in respect of the registered owner of such land or his estate.

The effect of these amendments was that some of the more

serious defects of the 1971 Act were eliminated, but as stated by Van Rensburg and Treisman:¹

"At the same time, some brand new defects slipped in. Shortcomings of the Act did not extend to its former theoretical foundation only. It was really put to the test when the property industry ran into difficulties during the mid seventies, when it was found severely deficient in achieving that which evidently it had set out to do, viz. to protect individual purchasers of fixed property against exploitation by large property developing concerns."

One of the greater shortcomings of the 1971 Act was that it did not state what the consequences of non-compliance with the prescribed formalities would be. The result was that the "rule" in Carlis v McCusker² continued to operate in the Transvaal although it had been severely criticised.³ The "rule" arose from an obiter dictum by Innes J in the Carlis case. In terms of the "rule" a purchaser who had paid portion of a purchase price in terms of a contract which was void due to non-compliance with prescribed formalities was not entitled to claim back what he had paid unless he was able to prove that the seller was unwilling or unable to perform his part of the void contract.⁴ Once the seller had given transfer in terms of such a contract and the purchaser had paid the full purchase price, neither party could claim back performance on the ground of

1. Op cit at 2-3.

2. 1904 TS 917.

3. For an excellent criticism see the judgment of Baker J in CD Development Co (East Rand) (Pty) Ltd v Novick 1979 (2) SA 546 (C).

4. See Wilken v Kohler supra and Botes And Others v Toti Development Co. (Pty) Ltd 1978 (1) SA 205 (T).

invalidity of the contract. That aspect was not prejudicial to either party, both having performed and received what they had contracted for. However, as there was no valid contract, a further consequence of the "rule" was that the purchaser was deprived of his ordinary accidential remedies and remedies for breach of contract, and accordingly a purchaser who purchased in terms of such a contract would have no claims for damages arising from defects in the property or from partial eviction from the property.¹ This was a serious omission in a statute which had been introduced for the protection of purchasers.

The Development Schemes Bill was published in December 1976 and was aimed at trying to rectify the situation. Fortunately it went no further. According to Van Rensburg and Treisman:²

"It is very difficult to judge what the effect of this bill would have been, had it ever become law, since it contained very few rules of substantive law. Its basic approach was to grant extensive powers to the Minister concerned to legislate by regulation, and to his officials to control by arbitrary decision."

The Alienation of Land Act Act 68 of 1981 repealed all the prior legislation referred to above including "so much as is unrepealed" of the Insolvency Act, 1916, Amendment Act 29 of 1926. Was the legislature, like Hiemstra J,³ also not sure of what still remained thereof?

1. Wilken v Kohler supra.
2. Op cit at 2.
3. In Verryne v van Zyl and Another supra.

CHAPTER III

STRUCTURE AND CONTENT OF
THE ALIENATION OF LAND ACT 68 OF 1981

The Alienation of Land Act 68 of 1981 (which will be referred to hereafter as "the 1981 Act") was assented to on 28th August 1981 and the English text signed by the State President. Its date of commencement was 19th October 1982, except for section 26. The latter section was amended by section 12 of the Alienation of Land Amendment Act 51 of 1983 and, in terms of Proclamation R148 of 1983, came into operation on 6th December 1983.¹

The purpose of the 1981 Act is stated to be -

"To regulate the alienation of land in certain circumstances and to provide for matters connected therewith."

The 1981 Act is divided into section 1 which contains definitions and thereafter three chapters.

The definition of "alienation" in section 1 includes transactions of exchange and donation of land or an interest

1. Government Gazette 8919 of 7th October 1983.

in land, whether the transaction is subject to a suspensive or resolute condition or not.¹

Chapter I deals with formalities in respect of deeds of alienation. Section 2(1) provides:

"No alienation of land after the commencement of the section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

The wording of this section is very similar to the equivalent sections of old Transvaal and Orange Free State enactments, being section 30 of Transfer Duty Proclamation 8 of 1902 (T) and section 49 of Ordinance 12 of 1906 (O).

The requirement of writing for contracts of sale of land was retained. It had been originally introduced into prior legislation on grounds of public policy and the courts are left with no equitable jurisdiction which overrides public policy and statutory requirements in this regard.² The parties to the sale may also not waive the requirements of the legislation.³

1. The reference to the conditions was intended to overcome judgments to the effect that a disposal subject to a suspensive condition was not a sale until the condition was fulfilled and at most created some other contractual relationship. See eg Corondimas and another v Badat 1946 AD 548. Corondimas's case has been criticised but not overruled - see Tuckers Land and Development Corporation (Pty) Ltd v Strydom 1984 (1) SA 1 (A).
2. Per van Heerden J in Meyer v Kirner 1974 (4) SA 90 (N) at 97.
3. See Meyer v Kirner supra and Da Mata v Otto, N.O. 1971 (1) SA 763 (T) at 772.

Chapter II of the 1981 Act is headed "Sale of Land on Instalments". It is aimed at protecting the purchaser of land on instalments by virtue of a contract as defined in the Act. The regulatory measures contained in this chapter can be divided into two categories namely:

1. those aimed at providing the purchaser with full information regarding the nature and content of the contract; and
2. substantive provisions, some of which attempt to control malpractices on the part of sellers, and others which attempt to afford protection to purchasers against the consequences of insolvency of the seller or attachment of the property at the instance of a judgment creditor of the owner thereof.

To guard purchasers against their own "improvidence and folly"¹ section 29 of the 1981 Act provides that the waiver by any person who has purchased land in terms of a deed of alienation of any right conferred upon him by the 1981 Act shall be null and void. It may be argued that waiver would in any event not have been possible.²

Of note in Chapter II are the invalidity of certain contract terms;³ provisions required to be contained in a contract;⁴

1. Per Millin J in Smit and Venter v Fourie and another supra.
2. See Meyer v Kirner and Da Mata v Otto, N.O. supra.
3. section 1
4. section 6.

provisions relating to sale of land encumbered by a mortgage bond;¹ provisions relating to transactions where the seller is not the owner;² the calculation of interest and limitation of the amounts recoverable from the purchaser;³ provisions for recording of contracts;⁴ stipulations relating to purchaser protection when the land is attached or an owner becomes insolvent;⁵ the relief which the court may grant in respect of contracts;⁶ and the limitation of the rights of sellers to take action.⁷

Chapter III contains general provisions, the most important being section 26 which imposes a restriction on the receipt of consideration by virtue of deeds of alienation prior to the erf or unit (included in the definition of land)⁸ becoming registrable or the contract having been recorded if such is required; and section 28, which deals with the consequences of deeds of alienation which are void or are terminated.

As with previous statutes,⁹ non-compliance with the provisions of the 1981 Act renders the transaction a nullity, but section 28 thereof has been drafted to prevent the implementation of the "rule" laid down in Carlis v McCusker¹⁰ and followed inter alia in Botes and others v Toti Development Co (Pty) Limited¹¹ to the severe prejudice

1. Sections 7 and 9.
2. Sections 10, 11 and 18.
3. Section 12.
4. Section 20.
5. Sections 21 and 22.
6. Section 24.

7. Section 19.
8. Section 1.
9. eg. Section 17 of Act 68 of 1971.
10. Supra.
11. Supra.

of the purchaser in those cases. The "rule " in Carlis v McCusker¹ had suggested that, despite invalidity of any agreement, completed performance would not be disturbed; yet it did not bestow validity on the transaction even in those circumstances with the consequences mentioned above. Section 28(1) provides that, in the event of partial performance in terms of a contract which does not comply with the 1981 Act, the party who wishes to rescind will be entitled to do so. It details the extent of the rights of recovery which either party will have in such a case, which rights they would not have had but for the provisions of the section. Accordingly, a party who has received part performance under a contract which does not comply with the provisions of the 1981 Act will not be able to defeat the other party's right to recover performance by tendering to perform his part of the bargain. Section 28(2) provides that full performance by both parties will bestow validity on the transaction ab initio.

Whilst it cannot be doubted that there certainly existed and still exists a need for purchaser protection in regard to sales of land on instalments, and the 1981 Act certainly provides a great measure of this, it can fairly be said that the 1981 Act has created yet another "fruitful source of fruitless litigation",² which the legislature, surely aware of the difficulties experienced with, and brought about by

1. Supra.

2. De Wet JC 1989 Annual Survey 104 referring to Section 1 of Act 68 of 1957.

previous legislation, could and should have been avoided; on the contrary the 1981 Act has with the assistance of (mis)interpretation by some courts¹ created serious procedural difficulties for sellers and other problems affecting both sellers and purchasers. It has become yet another of "those notorious case makers".²

1. See *Holme v Bardsley* 1984 (1) SA 429 (W) and other cases as discussed hereunder.
2. Millner MA *loc cit* referring to Section 30 of Proclamation 8 of 1902 (T) and Section 49 of Transfer Duty Ordinance 1906 (O).

CHAPTER IV

SECTION 19 OF ALIENATION OF
LAND ACT 68 OF 1981

The 1981 Act has not in clear terms resolved all the problems attending the alienation of land. It has also raised new ones. If current litigation is anything to go by, the main problems in this regard seem to be focused upon sections 2 and 19. The litigation in regard to section 2 is mainly a continuation of that relating to the early provincial legislation referred to above. It is not the purpose of this dissertation to deal with that.

I propose to analyse the problems relating to and arising from section 19 in the light of existing judgments including those relating to section 13. In order to do this, it will be convenient to analyse the development of the common law and legislation as it existed prior to the introduction of section 19 and its predecessor, section 13 of the 1971 Act.

1.

DEVELOPMENT OF COMMON LAW AND LEGISLATION PRIOR
TO SECTION 19 IN REGARD TO SELLER'S RIGHTS UPON
BREACH OF CONTRACT

At common law breach of contract by a party does not necessarily give the other party the right to cancel the

contract. Cancellation is an extraordinary remedy which is permitted only for *serious breaches* of contract where the other party has committed a breach showing that he has no intention of being bound by the contract. The normal remedy available to a party as a result of breach of contract is enforcement of performance of the terms of the contract.¹ A breach of contract in the form of repudiation is material by itself and would normally justify cancellation, unless the breach refers, for instance, to an irrelevant portion of a severable obligation.²

Accordingly a party can cancel only "where the breach 'goes to the root of the contract' or affects a 'vital part' of the obligations or where there is no 'substantial performance' ... the breach must be so serious that it cannot be expected of the other party that he should continue with the contract."³

If the breach consists of a failure to perform timeously (*mora debitoris*), the creditor can withdraw and cancel only where time is of the essence of the contract. The mere fact that a date is prescribed for performance by a party

1. De Wet and Yeats Kontraktoreg en Handelsreg (1978) at 194 and Van Jaarsveld Suid Afrikaanse Handelsreg (1978) at 114.
2. De Wet and Yeats op cit at 152; Van Jaarsveld op cit at 106; Van Rooyen v Minister van Openbare Werke en Gemeenskapbou 1978 (2) SA 835 (A); Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A).
3. Hiemstra J in Swartz & Son (Pty) Ltd v Wolmaransstad Town Council 1980 (2) SA 1 (T) at 4.

does not necessarily make time of the essence. Something more is required in respect of most contracts. In some contracts however, for instance between dealers where the value and price of performance fluctuates from time to time and where from the nature of the contract and the relevant circumstances it appears that the parties placed a high premium on timeous performance, time will be of the essence.¹

A creditor may by notice of rescission create a right to cancel and withdraw by making a new demand on the purchaser to perform within a stated reasonable period.²

Creditors often experienced problems in proving the gravity of a breach of contract and cancellation often became difficult. In addition, in many cases difficulty was experienced in serving notices on defaulting parties to contracts. Accordingly it became the custom to insert provisions in contracts entitling the creditor to cancel at any time if the debtor committed a breach. This is known in systems of Roman origin as a "pactum commissorium" or "lex commissoria".³ It has been held that in the absence

1. Kerr AJ The Principles of the Law of Contract (1986) at 352; Greenfield Manufacturers (TEMBA) (Pty) Ltd v Royten Electrical Engineering (Pty) Ltd 1976 (2) SA 585 (A) at 571; Mulligan GA "Mora" (1952) 69 SALJ 276.
2. Microtelcoos and another v Swart 1949 (3) SA 715(A), Wouter De Vos "Mora Debitoris and Rescission" (1970) 87 SALJ 304; Basil Wunsch "Mora Debitoris and Time of the Essence" (1965) 82 SALJ 463.
3. Van der Kessel Praelectionis (Gonin translation 1967 3.1.4.32) and Voet 18.3.1.

of wording to the contrary, the "lex commissoria" is a resolute condition.¹ If a contract contains such a term, a creditor is entitled, but not obliged, to terminate and withdraw, even if the breach is not material or relevant.² Sometimes there is no requirement for any notice at all to be given to the purchaser to rectify the breach prior to the seller becoming entitled to cancel the contract; more often there is, but to prevent the purchaser avoiding receipt of the notice, it is usually stipulated that all that is required is proof of the dispatch thereof. The effect of such a stipulation was referred to by Nestadt J in SA Wimpy (Pty) Limited v Tzouras.³ The learned Judge said:⁴

"The contractual provisions dealt with in those cases were of course different from those here; however the judgments illustrate the principle that where there has been compliance with the requirements of a clause providing for the sending of a notice to the address chosen as the domicilium it matters not that the notice is never received".⁵

With the development of standard contracts the lex commissoria became a usual and expected provision. In fact, in the case of any contract (whether for the sale of

1. See de Villiers CJ in Provident Land Trust v Union Government 1911 AD 615.
2. Ostorian Properties (Pty) Ltd v Maroun 1973 (3) SA 779 (A) at 785.
3. 1977 (4) SA 244 (W).
4. Supra at 248.
5. The cases referred to by the Judge being Lovas v Estate Rosenberg 1940 TPD 342 and Muller v Mulbarton Gardens (Pty) Ltd 1972 (1) SA 328 (W).

land or otherwise) in terms whereof performance must be made over a period, it became difficult to locate an example where this provision did not appear. Such rare cases where it was absent would usually be those in which the contract was drawn by the parties themselves or by another person unaware of the difficulties placed by the common law on a creditor in enforcing his rights upon default by his debtor.¹

From the point of view of the debtor such a clause may have serious consequences. If there is no qualification to the clause, the creditor would be entitled, immediately upon breach, to cancel, withdraw and perhaps claim forfeiture of what had already been performed, either as an alternative or in addition to damages, even if the breach consisted only of a failure to pay one instalment or if it was an immaterial or irrelevant provision. The obligations imposed on a debtor in terms of modern contracts, which are often printed in very small type and in colours which make reading very difficult (and in most cases are not read by them in any event), provide ample opportunity for the breach by the debtor of terms and obligations which may be completely immaterial or irrelevant and do not justify cancellation by a creditor as a result thereof, certainly not without the debtor having an opportunity to rectify the breach.

1. In the light of the court decisions discussed hereafter, those difficulties may well have been preferable to those raised by section 19.

Clearly, therefore, some curbs were required on the contractually imposed draconian rights afforded to sellers to cancel and claim forfeiture or damages or acceleration, or a combination thereof, as a result of any failure by a purchaser to comply with his obligations in terms of a contract, however immaterial or irrelevant such failure may be.

An example of the prejudice which could befall a purchaser for the breach of a relatively unimportant obligation appears from the case of Mangion v Bernhardt.¹ The facts in that case were that the seller wished to cancel the contract, which was for the sale of an agricultural holding, in terms of which the purchase price was payable in instalments, the purchaser having failed to pay on due date rates amounting to a mere R180,15. No demand had been made on the seller for such payment by the local authority to whom the rates were payable. The accounts therefore were sent by the local authority to the seller, not the purchaser. The court found that in terms of the contract the seller would have been entitled to cancel, unless the provisions of the 1971 Act applied. No notice to remedy the breach was required by the contract. The contract had been entered into prior to the coming into force of the 1971 Act which, whatever its deficiencies were, introduced in section 13 the right to the purchaser to be given notice of a breach prior to the seller being able to terminate the contract. Fortunately for Bernhardt the Court accepted that the

1. 1977 (3) SA 901 (W).

provisions of section 13 were procedural and, following the judgment in Curtis v Johannesburg Municipality,¹ applied the law as it was at the date of the trial. It held that Bernhardt was entitled to notice, thus giving him protection which he did not have or did not contemplate that he would have when the contract was entered into. The cancellation was therefore bad and Bernhardt retained his property.

Accordingly, several statutes have for some time required that despite such a provision in a contract (i.e. that no notice is required to be given to a purchaser prior to a seller being entitled to cancel) a demand nevertheless has to be made (sent?) prior to the creditor being entitled to terminate and withdraw from the contract. The demand is usually required not only for the purposes of cancellation but also where claims for damages or for the enforcement of forfeiture or of a penalty or acceleration of payments are contemplated.²

Section 13 of the 1971 Act originally read as follows:

"13(1) No seller shall, by reason of any failure on the part of the purchaser to fulfil an obligation under the contract, be entitled to terminate the contract or to institute an action for damages unless he has by letter handed over to the purchaser and for which an acknowledgment of receipt has been

1. 1906 TS 308.
2. See for example section 12(b) of the Hire Purchase Act 36 of 1942, section 11 of its successor, the Credit Agreements Act 75 of 1980 and section 13 of the Sale of Land on Instalments Act 72 of 1971.

obtained, or sent by registered post to him at his last known residential or business address, informed the purchaser of the failure in question and made demand to the purchaser to carry out the obligation in question within a period stated in such demand, not being less than thirty days, and the purchaser has failed to comply with such demand.

- (2) Sub-section (1) shall not be construed in such manner as to prevent the seller from taking steps to protect the land and improvements thereon or, after notice as required by the said sub-section, from claiming specific performance."

Section 4(1)(a) of the 1971 Act originally required that a contract contain -

"the names of the purchaser and the seller and their addresses in the Republic which shall serve as *domicilium citandi et executandi* for all purposes of the contract."

From the wording of the section as above, it appears that the "purposes of the contract" referred to in section 4(1)(a) did not include the notice referred to in section 13(1). The address to which the notice was to be directed was determined in accordance with section 13(1).

In terms of Section 10 of the Sale of Land on Instalments Amendment Act 49 of 1975, section 13(1) was substituted by the following sub-section:

- "(1) No seller shall, by reason of any failure on the part of the purchaser to fulfil an obligation under a contract, be entitled to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price, to terminate the

contract or to institute an action for damages, unless he has by letter handed over to the purchaser and for which an acknowledgment of receipt has been obtained, or sent by registered post to him at his (last known residential or business address) address required to be stated in the contract in terms of section 4(1)(a), or at his changed address on which notice ~~is~~ required to be given in terms of section 16, as the circumstances may require, informed the purchaser of the failure in question and made demand to the purchaser to carry out the obligation in question within a period stated in such demand, not being less than thirty days, and the purchaser has failed to comply with such demand."⁴

The preamble to the Act expressed the purpose of the amendments to section 13 to be:

"to further define the circumstances in which the seller may take action against the purchaser."

Section 4(1)(a) was also amended by the Sale of Land on Instalments Amendment Act 49 of 1975 by the omission of reference to the addresses serving as *domicilii citandi et executandi* for all purposes of the contract. That Act also substituted a new section 16, as the previous section 16 had merely stated that notice of change of address in terms of section 4(1)(a) was to be given in writing and delivered or sent by registered post by one party to another. The new section read as follows:

"16. The addresses stated in any contract in terms of section 4(1)(a) shall serve as *domicilium citandi et executandi* of the parties for all purposes of the contract and notice of a change of such address shall be

1. Underlinings represents insertions; words in brackets represent omissions from existing legislation.

given in writing and shall be delivered or sent by prepaid registered post by one party to the other, in which case such changed address shall serve as such domicilium citandi et executandi of the party who was given such notice."

By virtue of Proclamation R226,¹ the amendments came into force on the 1st January 1976.

The significance of the changes brought about by the last mentioned amendments was referred to and appreciated by Gordon J in Noordvaal Konstruksie Maatskapy (Edms) Bpk v Booyesen² in the following passage from his judgment:

"Prior to 1975, S.13(1) of the Act, dealing with the despatch of the notice to the buyer, required that it be sent by registered post to him at his last known residential or business address. The amendment to the section, brought about by S.10 of Act 49 of 1975, required that it be sent to the domicilium citandi et executandi stated in the agreement or as changed by due notification in accordance with the provisions of S.16 of the Act. The object of the amendment is to ensure greater certainty regarding receipt of the notice by the buyer. The authorities quoted in the argument on this section deal with the position under the old act which provides for notice to be given to the last known residential or business address, and are inapplicable to the facts of this case."

Unfortunately, these sentiments have not been shared by other courts. Unfortunately too, the learned judge was not required to consider when the period of notice commenced to run, and he did not do so.

1. Government Gazette 4847 dated 19 September 1985.
2. Supra at 197.
3. See too O'Donovan J in Dynaland (Pty) Limited v U.E. Nielsen Case 21432/81 (W) unreported.

Section 13 was again amended by the Sale of Land on Instalments Amendment Act 25 of 1976, which merely reduced the period of notice required to be given by a seller to a defaulting purchaser in certain circumstances.

2.

PROBLEMS ARISING FROM SECTION 13 OF THE 1971 ACT
AND SECTION 19 OF THE 1981 ACT

Two aspects of section 13 of the 1971 Act and section 19 of the 1981 Act have created problems for sellers. These are the content of the notice required thereby and the date on which the period of the notice commences to run. As many of the reported cases deal with section 13, in order to consider and understand the law as contained in section 19, it is necessary to deal also with the decisions relating to section 13.

3.

WHEN DOES THE THIRTY DAY NOTICE PERIOD
PRESCRIBED BY SECTION 19 COMMENCE TO RUN?

The judgments relating to the determination of this date are a nightmare for sellers. In terms of section 19 (and the earlier section 13), a seller can elect to hand the notice to the purchaser personally or send it to him by registered post. It is only the second method which causes difficulty.

Maron v Mulbarton Gardens (Pty) Ltd¹ seems to be the first reported case on section 13. It was held by Galgut J that "inform" (as it appeared therein) connoted that the buyer actually receives the notice and that the phrase -

"Not being less than 30 days' lends support to the view that the buyer was to₂ have thirty days in which to purge his default."

Thereafter, and on the same page, Galgut J said:

"Certainly, in the case where delivery was effected by hand, the buyer has 30 days. There can be no good reason for suggesting that he should have had less time if the post is used as the method of delivery."

Galgut J had been referred to the case of Fitzgerald v Western Agencies³ which dealt with notice required to be given by a seller in terms of section 12 of the Hire Purchaser Act 36 of 1942 prior to being able to enforce certain rights arising from a failure of a buyer to carry out any obligation under the agreement. The section provided that such rights could not be enforced by a seller -

"... unless he has by letter handed over to the buyer or sent by registered post to him at his last known residential or business address, made demand ..."

The similarity between that section and section 13 of the 1971 Act is obvious. Section 12(b), however, used the

1. 1975 (4) SA 123 (W).
2. At 125.
3. 1988 (1) SA 288 (T).

words "made demand" whilst section 13 used the word "informed", but it is submitted that nothing turns on this.

In Fitzgerald's case Steyn J (with whom Moll AJ concurred) held that when a purchaser had failed to notify the seller of a change of his address, the seller could comply with the requirement that he make a written demand to the purchaser, by sending the demand to the purchaser's last known address.¹ Accordingly, even though the purchaser never received the notice, the seller, having posted it as required, was entitled to exercise his rights. Although the Judge did not specifically say so, the result to which he came necessarily implies that he held that the demand had been made by the posting.

I submit however that it would not be correct, as was done by the Court, to apply its reasoning only if no change of address was notified. That fact could not, it is submitted, change the meaning of the section. The time of making of the demand cannot alter depending on whether or not notice of change of address is given to a seller.

Galgut J in any event was unimpressed by Steyn J's judgment. He was of the view that all that Steyn J had held was that posting to the last known address was an effective method of giving the notice. He overlooked the fact that Steyn J could never have held the seller to be

1. Supra at 291.

entitled to succeed unless he had also held that demand, as required by the Act, had been properly made. As the notice had never been received by the purchaser this could only have occurred upon posting.

Galgut's judgment was not approved by Shearer J in Mahara v Tongaat Development Corporation (Pty) Ltd,¹ in which section 13(1) of the 1971 Act in its original form was considered. Shearer J held² that the significance of the word "inform" in the section in its context was that it described the content of the notice - it must, he said, "inform the purchaser of the failure in question", and make "demand to the purchaser" to remedy it. He came to the conclusion that:³

"the period stipulated in the notice for the purchaser to remedy his default commences in the event that the notice is posted by registered post, from the date of posting";

and thereafter that:⁴

"... the section clearly contemplates the possibility that the notice may not ever be received by the purchaser."

Kumleben J in Caldwell v Savopoulos⁵ agreed with Shearer J and also held that posting by certified mail would not be compliance with the section.

1. 1976 (1) SA 314 (D).
2. At 319.
3. At 318.
4. At 319.
5. 1976 (3) SA 741 (D) at 744.

On appeal the judgment of Shearer J was reversed by the Appellate Division in Maharaj v Tongaat Development Corporation (Pty) Limited,¹ where Wessels JA, who delivered the judgment of the Court, based his rejection of the judgment in the court a quo on seven considerations.² These, it is submitted, are mainly concerned with the equities of the case. There is, regrettably, no detailed analysis of the legal principles involved, nor any detailed reference to, or consideration of, many relevant cases.

Much space is devoted in the judgment to the legislature's intention, and Wessels JA expressed the legislature's concern:³

"that the purchaser should personally be apprised of the alleged default and should, moreover, be accorded the full benefit of the period within which he is required to remedy it."

Accordingly he held that to enable the seller to exercise his rights arising upon a breach of contract by the purchaser, the purchaser must receive the notice (or have it made available to him at an address where he is likely to be placed in possession thereof) either by hand delivery or by registered post. He held this for the following reasons:

- (a) The legislature's intention in enacting section 13(1) was to afford reasonable protection⁴ to a purchaser

1. 1976 (4) SA 994 (A).
2. At 1001.
3. At 1001.
4. Underlining is mine.

who by reason of a failure on his part to fulfill an obligation under a contract faces a threat by the seller to terminate the contract or to institute an action for damages.

- (b) The legislature prescribed registered post as a method whereby the seller was required to send a letter, as this method is invariably employed for sending important letters through the post and that whilst such letters no doubt do go astray, there is at least a high degree of probability that most of them are delivered.
- (c) The date of posting and date of delivery of a registered letter can be readily established.
- (d) As the section required the letter to be sent to the purchaser at his last known residential or business address, as opposed to the address chosen as *domicilium citandi et executandi* in terms of the contract, this emphasised the fact that the legislature intended that the letter should reach the purchaser or, at least, be made available to him at the address where he is likely to be placed in possession thereof. If the question of delivery of the letter was in issue, evidence that it was delivered would constitute *prima facie* proof of delivery to the addressee, the purchaser.¹

1. This factor is, it is submitted, extremely important when considering the interpretation of the present section 19.

- (e) In case of non-delivery the letter would be returned to the sender.
- (f) The period of thirty days could not run from the date of posting, as this would lead to uncertainty in that the date of the letter is not necessarily the date of posting and because postmarks are sometimes not clearly decipherable. It was important for the purchaser to know when the thirty-day period commences to run. He would have certainty if it ran from receipt by him of the letter.
- (g) It is open to the seller to take steps to verify whether delivery has been effected. He will then be able to know when the period mentioned in the letter expires.

The correctness of this judgment is doubted. The reasoning of the learned Judge is unconvincing and clearly based on equitable and not legal principles; but, applying the criteria mentioned above, the learned Judge could quite as easily have reached the conclusion that the termination was valid. In any event the reasoning does not justify the conclusion to which the Court came. The reasoning is also, as I shall attempt to show, inconsistent. I deal *seriatim* with each of the seven reasons given by the learned Judge for his decision:

Ad (a)

It is correct that the object of section 13 of the 1971 Act was (and it is conceded that *this too is the object of section 19 of the 1981 Act*) to ensure that a defaulting purchaser of land in terms of a contract, as defined in the 1971 Act, was provided with the prescribed notice prior to entitling an aggrieved seller to exercise his remedies resulting from the default; but the steps expected to be taken by a seller in giving (sending) the notice can only be those which are reasonably practicable.¹ In fact, Wessels JA accepted that it was intended to give the purchaser "reasonable protection" only.² Was this not ensured by choice of hand delivery or registered post for transmission of the notice and of the last known residential or business address as the address to which the notice was to be directed?³ The concept of "reasonable protection" however is not consistent with the finding of the learned judge that the notice must reach the purchaser or have it made available to him. It is not clear when, if the latter test is applied, the period commences to run. When is the notice "made available" and by whom is this to be done? In any event this first "reason" of the learned Judge is merely a statement by him of his interpretation (correct, it is submitted) of the legislature's intention and not a reason for his conclusion as to the meaning of the section.

1. See the judgment of Kumbleben J in Robinson v Bradfield 1984 (1) SA 349 (D).
2. At 1001.
3. See reasons (b) and (d) of the learned Judge supra.

Ad (b)

It is the high degree of probability that registered letters are delivered which can equally support the conclusion that the period of thirty days should commence to run from the date of posting. After all, as the learned Judge said in his first reason, it is only "reasonable protection"¹ which it was intended to confer on the purchaser. Furthermore, had it been intended by the legislature that the period of notice was to run only from receipt of the notice by the purchaser (or, perhaps when it was made available to him), the method of transmitting the notice would be irrelevant and it would not have been necessary for the Act to provide the permissible methods for doing this. The seller would, in such event, irrespective of the mode of conveyance used for the notice, have to prove that he had "informed" the purchaser of his failure and the demand to make it good. On the basis of the majority judgment in Swart v Vosloo² (also delivered by Wessels JA) and that of Galgut J in Maron v Mulbarton Gardens (Pty) Ltd³ (the latter being approved by Wessels JA), it is submitted that it would be correct to argue that the purchaser will not be informed unless and until the notice reaches his mind, irrespective of when the letter containing it is received by him or made available to him, and this would be the case whether the letter reaches him by hand or through the

1. *ibid.*
2. 1965 (1) SA 100 (A).
3. *Supra.*

post. This would be the necessary interpretation of the cases read together. That it would be impossible in most cases for the seller to determine when the notice reaches the purchaser's mind was appreciated by Kumleben J in Robinson v Bradfield¹ although he refers only to delivery of the notice to the purchaser and not to its reaching his mind; but if the seller would have difficulty in determining the former, how much more difficult would the latter be? Wessels JA said in Swart's² case:

"A person making a written declaration would ordinarily be a completely sterile activity unless it were addressed to some person or persons. A person who makes a written declaration would normally have in mind some other person who is to read it ..."

It is true that Swart's case involved consideration of the word "declare", but it is submitted that the reasoning therein could apply equally to section 13 (and section 19). It is submitted that the choice by the legislature of registered post as a means of transmitting the notice and the high degree of probability (acknowledged by Wessels JA) that most of such letters are delivered, actually supports the contention that the thirty days commences on posting.

Ad (c)

It is correct that the date of posting and delivery of a

1. Supra.
2. Supra at 113.

registered letter can readily be established, but in view of the judgment in Swart v Vosloo¹ that receipt of a letter does not necessarily mean receipt of the notice by the addressee, this reasoning is irrelevant. It is true, of course, as was stated by Wessels JA that proof of delivery of the letter may raise a presumption that it was received (read) by the purchaser. This however is a purely evidential provision and, as was held in the latter case, was not well founded. On the reasoning of Wessels JA in both cases,² to entitle a seller to enforce his rights he would have to prove that the purchaser received and read the notice. In the Court a quo in Maharaj v Tongaat Development Corporation (Pty) Ltd³ Shearer J held, contrary to the finding of the Appellate Division (but it is submitted, correctly), that the date of receipt of the letter is not so readily or speedily ascertained whilst the date of dispatch of it is easily ascertainable by both the seller and the purchaser; by the seller because he was responsible for sending it and is reminded of it by the post office slip in his possession, and by the purchaser who may observe it on the postmark of the letter. If the postmark is illegible (this does not often happen) the purchaser can ascertain the date of posting from the post office. Shearer J further said in regard to section 13:⁴

1. Supra.
2. Maharaj v Tongaat Development Corporation (Pty) Ltd 1978 (1) SA 314 (D) supra and Swart v Vosloo supra.
3. Supra.
4. Supra at 318.

"In any event the section clearly contemplates the possibility that the notice may not ever be received by the purchaser. Once the seller has sent it by registered post, he has done all that the legislature has required him to do. The address is not to be his actual address but his 'last known residential or business address' whatever that may be. It is gravely unlikely that it was intended that, when providing for the effectiveness of a properly addressed and informative letter, which goes astray in the post or for some other reason does not find the purchaser, the legislature should at the same time be concerned with the date of receipt of one which did not go astray."

Ad (d)

Following the judgments of Wessels JA in Swart v Vosloo¹ and in Maharaj's case,² delivery of the letter of demand to the purchaser would in itself not be sufficient. Presumably the words "last known" in section 13 referred to the knowledge on the part of the seller. What if the purchaser had moved and the seller was unaware of this? What duty was imposed on him to ascertain such an address? Contrary to the views of the learned Judge, it would have been much better for the purchaser if the notice was required to be addressed to his domicilium citandi et executandi over which he had control. In such event the purchaser would not have to rely on knowledge by the seller of his last known address. But then, if the notice commences to run only upon receipt thereof by the purchaser, what really is the relevance of the address to which it is sent. It must be remembered that in the light

1. Supra.

2. Supra.

of the judgment of Wessels JA in Swart v Vosloo¹ the notice must reach the mind of the purchaser to be effective, and "receipt" should be interpreted in this light. The seller would in any event have to prove receipt. If one holds (as Wessels JA did) that the notice commences to run only on its receipt by the purchaser, then that is when it commences. If the purchaser never receives it, it never commences to run. This would be an intolerable situation for a seller and could never have been intended by the legislature. Counsel for the purchaser in Maharaj's case had suggested in argument in the Appellate Division that the choice of the purchaser's last known residential or business address as the address to which the letter was to be directed instead of to the chosen domicilium, supported the argument that the legislature intended the notice to run only from receipt thereof by the purchaser. This argument was accepted by the court.² It is important to bear this in mind when construing the meaning of the section after its amendment in 1975 and of section 19 in the 1981 Act which required that the letter be addressed to the domicilium chosen by the purchaser.

Ad (e)

The fact that in the case of non-delivery the letter would be returned to the sender is irrelevant and is not a reason

1. Supra.

2. Supra at 1001.

for arriving at the conclusion that receipt of the notice is the criterion; it would be a consequence thereof.

Ad (f)

The certificate of posting of the registered article issued by the postal authorities reflects the date of posting. If the date stamped thereon is illegible, the authorities will be able to ascertain the information from their records relating to the certificate of posting which bears an identifying number. It would be a simple matter for the purchaser to ascertain this. It has however been suggested in Miller v Hall¹ that this could result in prejudice to the purchaser, for by the time he ascertained the date of posting some of the thirty days would already have passed. This argument is not tenable. The period of thirty days is extremely generous. It seems to have been forgotten by all that the situation being considered is one where the purchaser has committed a breach, usually the result of failure to make a payment. The purchaser surely knows the terms of the agreement, what he must do in terms thereof and what he has failed to do. He will usually be aware of the extent of his breach. If not, he can enquire from the seller as to its exact nature. In any event the cases² require substantial details of the breach to be contained in the notice.

1. 1984 (1) SA 355 (D).

2. See the cases mentioned hereunder.

Ad (g)

It will not always help the seller to know when the registered letter was delivered. In any event, why should he have to go to the trouble of ascertaining when it is delivered. Certainly he can ascertain this, but this will not enable him to determine when the addressee was "informed" or "personally apprised" or when the notice reached his mind. It is common knowledge that third parties often accept delivery of registered articles for others, and some delay may occur in them being passed to the addressee. He may never receive them. In any event, even if it is received by the purchaser, the letter may lie around without him reading it immediately or at all. On the basis of the judgment of Wessels JA in Swart v Vosloo¹ the purchaser would have to read the letter to set in motion the calculation of the period. The difficulty arising from this reasoning is that the seller will have no idea when the purchaser was "informed" or "personally apprised" or when the notification reached his mind, and will have no certainty as to when he can commence action. This is solely within the knowledge of the purchaser. That this problem existed was acknowledged by Kumbleben J in Robinson v Bradfield.² Although the learned judge followed the Appellate Division judgment in Maharaj's case (incorrectly and suprisingly, bearing in mind the amendments to the 1971 Act and his judgment in Caldwell v Savapoulos³), he held that the

1. Supra.

2. Supra.

3. Supra.

seller could not in the written notice specify the actual commencement of the notice period as this would -

"be an impracticable task in as much as he does not know on what date the registered letter will be delivered".

It is submitted that it is not correct to suggest, *as has* been done by the courts,² that the two alternative methods for transmitting the letter both contemplate receipt of the letter by the purchaser personally. The method of personal delivery does, but, for reasons stated above, posting, even by registered post, does not. Furthermore, if proof of receipt of the notice by the purchaser is required, why was it necessary to prescribe the address to which the letter is to be posted whilst the handing over personally could apparently be effected anywhere? If proof of receipt is available, why should the seller not be entitled to enforce his rights simply because such receipt may have taken place pursuant to delivery by ordinary post or certified post³ or at an address other than the domicilium chosen by the purchaser.⁴ The prescribing of the mode of conveyance and the address to which the notice is to be directed, it is submitted, supports the view that the period commences to run from date of posting.

1. The learned judge seems to have overlooked the fact that section 13 does not require the seller to specify when the period is to commence. This comment by the learned judge is however important when one enquires how the seller is to determine when the notice period expires so that he can institute action.
2. See eg Wessels J A in Maharaj's case *supra*.
3. Caldwell v Savopoulos *supra*.
4. Noordvaal Konstruksie Maatskappy (Edms) Bpk v Booyen 1979 (2) SA 193 (T).

It must not be forgotten that in the absence of statutory intervention our law recognises the common law freedom of parties to a contract to stipulate that upon a breach thereof by any one of them the contract is to terminate forthwith,¹ or that the defaulting party is entitled to notice to remedy the breach, in which event they may agree also on the period of the notice and when it is to commence.²

The effect of section 13(1) was to modify the common law, and it must accordingly be restrictively interpreted.³

The section expressly referred to a "sending", that is the method of dispatch. If it had so desired the legislature could have used the word "delivery" or "receipt".

Accordingly, it is submitted that the decision of the Appellate Division in Maharaj's case was incorrect, and that if it were correct, it no longer applies in view of the amended legislation.

On 18th May 1979⁴ a draft bill headed "Sale of Land Act 1979", whose object was "To regulate and amend the law relating to disposals of Land; and to provide for incidental matters", was published.

1. Gordon v Tarnow 1947 (3) SA 525 (A).
2. See eg United Bioscope Cafes Ltd v Moseley Buildings Ltd 1924 AD 60 and Muller v Mulbarton Gardens (Pty) Ltd 1972 (1) SA 328 (W).
3. Johannesburg Municipality v Cohen's Trustees 1909 TS 811.
4. Government Gazette 6450 (Vol 187).

Eventually in 1981 the 1971 Act emerged under a new title "The Alienation of Land Act No. 68 of 1981" the preamble whereof read as follows:

"To regulate the alienation of land in certain circumstances and to provide for matters connected therewith."

What was previously contained in section 13 of the 1971 Act now appeared substantially in section 19 which, after its amendment in 1983,¹ reads as follows:

"19. Limitation of right of seller to take action :-

- (1) No seller is, by reason of any breach of contract on the part of the purchaser, entitled :-

(a) to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract;

(b) to terminate the contract; or

(c) to institute an action for damages,

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

- (2) A notice referred to in 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 be signed by him.

1. The preamble to the amending Act (Act 51 of 1983), states its purpose inter alia to be "to effect certain textual improvements to section 19."
2. Subsection (1) amended by s 8(a) of Act 51 of 1983 by the substitution of "notified" for "informed".

- (a) a description of the purchaser's alleged breach of contract;¹
 - (b) 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; and²
 - (c) an indication of the steps the seller intends to take if the alleged breach³ 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.
- (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."

The 1983 amendments were probably a somewhat belated consequence of the decision in Hamid and another v

1. Para (a) substituted by s 8(b) of Act 51 of 1983 by the substitution of the words "purchaser's alleged breach of contract" for the words "obligation the purchaser has failed to fulfill".
2. Para (b) amended by s 8(b) of Act 51 of 1983 by the substitution of the words "rectify the alleged breach" for the words "fulfill the obligation".
3. Para (c) amended by s 8(b) of Act 51 of 1983 by the substitution of the words "alleged breach of contract" and "rectified" for "obligation in question" and "fulfilled" respectively.

Cassin¹ where it was held by Coetzee J (with Le Grange J concurring) that a distinction was to be made between positive and negative obligations and that no notice was required to be given before cancellation in the case of a breach of a negative obligation is the obligation to refrain from doing something (non facere).

It is clear from the wording of the section that it is essential that a demand from a seller to a buyer must be in the right form and must be given in the correct manner,² and that a failure to comply with the formalities prescribed by the section for demands can have serious consequences for the seller.³

The wording of section 18 brought forth the following comments:

"In the light of the clear wording of the present section 19(2)(b) the aforementioned judgments will no longer be followed"

1. 1978 (2) SA 162 (T) at 165.
2. See inter alia Holme v Gardsley 1984 (1) SA 429 (W) re the calculation of the thirty day notice period; Robinson v Bradfield 1984 (1) SA 349 (D) re demands sent at intervals of more than thirty days; Porteous v Strydom NO 1984 (1) SA 489 (D) re incorrect calculation of overpaid amount; Miller v Hall 1984 (1) SA 355 (D) re specification of steps a seller intended to take and incorrect statutory reference; Caldwell v Savopoulos 1976 (3) SA 741 (D) re invalidity of notice sent by certified post. These cases are dealt with in detail later.
3. See cases referred to in immediately preceding footnote.
4. Maron v Mulbarton Gardens (Pty) Ltd 1956 (1) SA 160 (A) and Mahara v Tongaat Development Corporation (Pty) Ltd 1976 (4) SA 994 (A).
5. Van Rensburg & Treisman op cit at 206.

and that -

"a notice which is sent in the prescribed manner to the purchaser's address as it appears in the contract, or if his address has changed since then, to his latest address of which he has given notice in terms of section 23, will be effective in every respect even if it does not reach him ..."¹

Alas, those predictions, expressed in November 1983, have not been fulfilled.

The first reported judgment on section 19 is that of Grosskopf J in Oakley v Bestconstructo (Pty) Ltd.² He held inter alia that:-

- (a) although section 19(2) was intended to give a purchaser greater protection than its predecessor;
- (b) care should be taken not to impose on the seller a greater burden than the legislature had intended; and
- (c) the provisions of section 19 were very onerous and had to be restrictively interpreted.³

In Oakley's case the period of the notice did not arise for consideration.

1. Van Rensburg & Treisman op cit at 202.

2. 1983 (4) SA 312 (T).

3. See too Hamid & another v Cassim 1978 (2) SA 102(T) and Johannesburg Municipality v Cohen's Trustees supra.

Although the wording of section 19 differs in several material respects from that of section 13, and although there are other material differences between the two acts relating to notices, Mahara¹ soldiered on, and in several cases² the judgment of that court in regard to the calculation of the thirty day notice period was followed.

In his book³ Flemming HCJ had said:

"Omtrent berekening van die aanvangspunt van die aanmaningsperiode toon beide artikel 11 van die Kredietoorrekomstewet en artikel 19 van die Grondvervreemdingswet met voldoende duidelikheid dat die periode nie van aanvangs van die aanmaning loop nie (behalwe vir sover dit met oorhanding saamval) maar vanaf oorhandiging of versending. Die idee was vermoedelik dat selfs met stadige aflewering 'n periode van 30 dae genoeg kans vir herstel van kontrakbreuk gee al is die partye ver van mekaar af. Beslissings wat 'n ander gevolgtrekking handhaaf omtrent vorige wetgewing is derhalwe onderskeibaar."

This is irreconcilable with his views expressed earlier in the same work⁴ that the notice period commences to run only from receipt thereof by the addressee.

In Holme's case⁵ Flemming J had the opportunity to elect which of the views expressed by him in his book were

1. (The Appellate Division judgment) supra.
2. See inter alia Holme v Bardsley, Robinson v Bradfield (supra) and Sher S v Crooke T.E. 1984 (2) PH A84 (W).
3. Krediettransaksies (1982) at 319.
4. At 318.
5. Supra.

correct. Unfortunately he held that the notice commenced to run only upon receipt thereof by the purchaser. This was despite his acknowledging that the legislature would probably have realised that:

"there are circumstances where a seller doing his utmost nevertheless cannot actually reach the buyer personally to hand over a demand or cause a registered letter to actually reach a purchaser",

and that such an interpretation of section 19 would be unfair to the seller. He did not suggest what the seller was to do in such circumstances, although in his book¹ he said:

"Vir die verbruiker wat nie meer by sy keuse-adres is nie of wat weier om geregistreerde stukke van die poskantoor te ontvang sal die praktyk waarskynlik die aanknopingspunt in die Maharaj saak benut om die aanmaning as voldoende te handhaaf alhoewel die bewoording van die huidige wette nie steun vir so 'n uitleg gee nadat die wetgewersbedoeling dat ontvangs van die aanmaning nodig is, blyk nie."

Although Flemming J held² that

"the absence of an equity safety valve, if that is the case, tends to strengthen the argument that the legislature, in fairness to the seller would have intended that the posting of the demand is adequate",

he continued:³

"The weight of that consideration is lessened by the fact that the legislature had a basic stake between unfairness towards the seller where there is 'impossibility' - generally the exception rather

1. Krediettransaksies (1982) at 319.
2. Holme's case supra at 431.
3. ibid.

than the rule - and the unfairness, perhaps also mostly in exceptional cases, of a purchaser finding his contract cancelled because the letter was not delivered."

Although he conceded that a purchaser, realising from the postal slip from whom a letter emanated, might not bother to collect it, he held that:¹

"The existence of Section 19, in context, and its general tenor and object, indicate protection to the buyer even at the price of some prejudice to the seller",

and (astonishingly) that the differences between that section and its predecessor were not material and that the period of notice commenced to run only when the written notification was received.

It is conceded that the intention of the legislature was to afford a measure of protection to the purchaser and to limit the rights of the seller. The latter is stated to be the intention of the section; but it was not necessary to hold that as a corollary to the reasonable protection² intended for the purchaser, the legislature had in mind prejudice to the seller.

With respect to Flemming J, and even assuming that Wessels JA³ correctly decided the law as it was then, it is submitted that he erred in the following respects:

1. *ibid.*
2. Per Wessels JA in Maharaja's case *supra*.
3. In Maharaja's case *supra*.

- (a) in overlooking the fact that the intention of the legislature was to afford the purchaser only reasonable protection¹ and not to guarantee that the notice actually comes to the attention of the purchaser;
- (b) in equating the "sending" of the demand to the "receipt" of the letter. If any confirmation is required that those words have a different meaning, one need look only at section 7 of the Interpretation Act 33 of 1957 and also to dictionary definitions;²

It will be remembered that in his book Flemming J had said³ that if the legislature intended "sent" to mean "forwarded" or "posted" it could have used another word instead. But is that not exactly what it does mean? In that case, why should it have used another word. Surely that argument would have been valid if the legislature had intended to connote anything other than the natural meaning of the word. If the legislature had intended it to mean "received" it would have used another word, presumably "received" itself. It could simply have said "within 30 days of receipt of notice". The two words "sent" and "received" connote stages at extreme ends of the journey of the notice: "sent" at

1. Per Wessels J A in Maharaj's case supra.
2. See eg Shorter Oxford Dictionary "send" means "chiefly to dispatch"; "to cause to go"; Concise Oxford Dictionary "order or cause to go"; "bring about conveyance of".
3. Op cit at 432.

its commencement and the other "received" at its destination. How can the same word possibly mean both?

- (c) in holding that the purchaser could not be adequately protected without necessarily prejudicing the seller;
- (d) in not placing enough emphasis on the fact that in terms of section 19 the letter is now to be addressed to the address referred to in section 23 - which is to be the *domicilium citandi et executandi* chosen for all purposes under contract by the purchaser and which may be changed from time to time by the purchaser - whilst in terms of section 13 it was to be addressed to his last known business or residential address. In fact he appears to have considered this insignificant. It will be remembered that in the Appellate Division in Maharaj's case,¹ the fact that the notice was required to be directed to the last known business and residential address and not to a chosen *domicilium citandi et executandi* was used as the fourth reason in support of the finding that the notice period started to run when the notice was received. On this basis it may well have been that if section 13 as considered in Maharaj's case had required notices to be directed to a *domicilium citandi et executandi*, Wessels JA would have come to a different conclusion.

1. Supra.

Certainly his fourth reason for his judgment would no longer have applied. It is clear that (as in fact happened in Holme's¹ case) the registered letter may never be received by the purchaser. The onus is now, in terms of section 19, read with section 23, of the 1981 Act, on the purchaser to select from time to time an address to which his mail is to be directed. It is submitted that whether he does or does not receive it is irrelevant according to the 1981 Act as it stands. The seller has no control over the address. It may be a place where the purchaser will never receive a letter; he may in fact select it expressly for that purpose, i.e. to ensure that he will never receive it. It may be a vacant stand. In such a case, what is a seller expected to do? Is he to be completely without remedy? The seller is obliged to send the notice to that address to constitute an effective demand if he chooses the post as the means of conveyance, even if he knows the purchaser is not there or has by letter addressed by ordinary post indicated another address to which he wishes letters to be directed.² Section 19, read with section 23, requires this. Once the letter is sent, the calculation of the thirty day period should be pure arithmetic. It was contemplated by the legislature that letters addressed to the domicile

1. 1984 (1) SA 429 (W).
2. Noordvaal Konstruksie Maatskappy (Edms) Bpk v Booysen 1979 (2) SA 193 (T).

citandi et executandi may not reach the purchaser,¹
but registered post was prescribed as the method for
postal conveyance in view of its reliability;²

- (e) in not holding that the words "calculated from the date on which the notice was ... sent to him by registered post ... " were intended to indicate that the calculation of the notice period commenced on sending (posting by registered post). In fact he seems to have attached no significance at all to these words, which did not appear in section 13. The Appellate Division in Maharaj's³ case was forced to decide when the period of notice was to commence only for the reason that the 1971 Act as it then stood did not specify this. Had the words "calculated from ..." appeared in the section then considered, it is submitted that the problems would never have arisen. *Flemming J*, when considering the differences between sections 13 and 19, overlooked judgments such as that in R v Sisilane,⁴ where Schreiner JA said:

"It is a general rule in the construction of statutes that a deliberate change of expression is prima facie taken to import a change of intention."

1. See *Shearer J in Maharaj v Tongaat Development Corporation (Pty) Ltd 1978 (1) SA 314 (D)* and, although not referring to the section, *Nesbitt J in SA Wimpy (Pty) Limited v Tzouras 1977 (4) SA 244 (W)*.
2. *Wessels JA in Maharaj v Tongaat Development Corporation (Pty) Ltd 1976 (4) SA 994 (A)*.
3. *Supra*.
4. 1959 (2) SA 448 (A) at 452.

- (f) in adapting the meaning of "sent" to fit in with the meaning he ascribed to section 19(1). There can be no doubt that he was of the view that in terms of the ordinary meaning of section 19(2) the notice would commence to run on posting. He said:¹

"Unless the reference to a letter 'sent' in S.19(2) is in conformity with what I understand S.19(1) to convey, it would now also be correct to calculate the 30 days of the demand from the date of forwarding the letter instead of the date of receipt thereof."

This was after he had ascribed a meaning to "sent" to interpret section 19(1).² Then, having done so, he again interprets "sent", but now interprets it to be in conformity with what he understood section 19(1) to convey. It will be seen, therefore, that because of his preoccupation to afford maximum possible protection to the purchaser, Flemming J was forced to disregard what he too interpreted to be the clear and obvious meaning of section 19(2). He simply says that if it was intended by "sent" to connote "forwarded" or "posted", other words would have been used. As stated above, this is not tenable.

I agree with the views expressed by Vorster³ that the word "sent" in section 19(2) is not so ambiguous

1. At 432.
2. Vorster JP "Die Bepoerking van die Verkoper se Regte in die Geval van Kontrakbreuk deur die Koper by die Verkoop van Groot op Afbetaling" (1985) 48 THRHR at 88.
3. Vorster JP op cit.

that the question as to whether the notice must reach the purchaser can be answered solely by reference to "notified" in section 19(1). The fact that it does not reach the purchaser cannot alter the fact that it was "sent". The primary meaning of "sent" does not contemplate "receipt".

It has been suggested¹ that the only ambiguity is between the use in the English text of section 19 of the word "notified" and of the phrase "kennis gegee het" (translated as meaning "given notice") in the Afrikaans text, whereas one would have expected the use of the phrase "in kennis gestel het". The Afrikaans terminology, Vorster suggests, does not contemplate that the notice must reach the purchaser, whilst the English text "notified" does. He suggests, however, that, notwithstanding the signature of the English text, before it can be given priority one must ascertain whether there is an irreconcilable conflict between the two texts.

It may be probable, he says,² that the unsigned text better reflects the intention of the legislature.³

1. Vorster JP op cit.
2. Vorster JP op cit.
3. Steyn Die Uitleg van Wette (5th edition uitg deur SIE van Tonder) (1981) at 142 and New Union Goldfields Ltd v Commissioner for Inland Revenue 1950 (3) SA 392 (A) at 406.

Applying those principles, says Vorster, one concludes that "gestuur" or "sent" in section 19(2) are not ambiguous. The ordinary meaning of the word does not contemplate that what is sent must reach the addressee. That the ordinary meaning of the word "sent" is intended is shown by the reference in section 19(2)(b) to the fact that the period commences to run "on the date on which the notice ... was sent to him by registered post".

Although "notified" in section 19(1) may contemplate receipt of the notice, in view of the word "sent" in section 19(2), its use may indicate that that aspect of the meaning of notified which implies that the notice must reach the purchaser should be regarded as surplusage;¹

(g) *in holding that a purchaser to whom a demand was posted should not have less time to remedy his breach than one to whom it was delivered by hand. The answer to this is that the legislature surely was aware that registered letters are usually delivered within two or three days after being sent, and considered that even this would leave sufficient time for the purchaser to cure his defect. Generally, very few letters are hand delivered, and it must have been contemplated*

1. Van der Heever JA in New Union Goldfields Ltd v Commissioner For Inland Revenue *supra*.

that registered post would be the more commonly used method of transmission of the demand. Furthermore, thirty days is an extremely generous period for rectification of a breach.

It must not be forgotten that in most cases the purchaser would be aware of the breach - after all it results from a failure by him to comply with his contractual obligations.

Van Rensburg and Treisman¹ also are of the view that a notice sent in the prescribed manner to the address chosen or altered in terms of section 23 will be effective even if it does not reach the purchaser. This, they say, follows from the provisions of section 23 which make it peremptory for a party to give written notice of a change of address. The case of Fitzgerald v Western Agencies² is cited as authority for this proposition.

Section 23 reads as follows:

"23. The address stated in any contract in terms of section 6(1)(a) shall serve as *domicilium citandi et executandi* of the parties for all purposes of the contract, and notice of a change of such an address shall be given in writing and shall be delivered or sent by registered post by one party to the other, in which case such changed address shall serve as such *domicilium citandi et executandi* of the party who has given such notice."

1. Op cit at 202.
2. Supra.

Whilst the conclusion of the learned authors is correct, I submit that their reasoning is not. Section 23 does not oblige a purchaser to notify a change of address; it only prescribes the manner in which it must be done in order to be effective. As was decided by Gordon J in Noordvaal Konstruksie Maatskappy (Edms) Bpk v Booysen¹ strict compliance with the requirements of section 13(1) of the 1971 Act is essential to a seller's cause of action for relief contemplated therein, and accordingly a notice of change of address given in a manner other than by registered post can be disregarded by a seller as it does not amount to a formal notification of change of address. In this case the letter by the purchaser to the seller had been sent by ordinary post and had read as follows:

"Dit sal waardeer word indien u my met 'n volledige staat kan voorsien. Geliewe alle korrespondensie na bogenoemde address te rig."

Gordon J held that a notification of change of address had to be sent by registered post, and said:²

"The Act seeks to eliminate, as far as possible, disputes about posting and receipt of the notice."

And in regard to the amendment requiring the notice to be directed to the domicilium citandi et executandi he continued:³

1. Supra.
2. Supra at 196.
3. Supra at 197.

"The object of the amendment is to ensure greater certainty regarding receipt of notice by the buyer."

He then held that the authorities quoted, which dealt with the section before its amendment, were accordingly inapplicable.

It is submitted that Gordon J was correct in holding¹ that the cases decided under the 1971 Act, as it originally read, were inapplicable after the amendments brought about by the Sale of Land on Instalments Amendment Act 49 of 1975 to sections 4(1)(a) and 18 of the 1971 Act. It is significant that although he was not pertinently called upon to address his mind to the question of whether or not the buyer was required to actually receive the notice, the above quoted passage in which he spoke about eliminating disputes about posting and receipt indicates that he did not think that it was essential for the seller to prove that the notice was brought to the attention of the buyer. It is submitted that he did not regard the period as commencing only on receipt; otherwise what would be the relevance of ensuring certainty of receipt?

The point really is that the seller must send the notice to the address for the time being selected by the purchaser as his domicilium citandi et executandi.

1. At 197.

As previously mentioned, in the Maharaj case ¹ Wessels JA stated, as the fourth reason for his judgment, that the fact that the letter was to be sent to the "last known residential or business address" (of the purchaser), which would not necessarily be the same address as that chosen as the domicile, was an indication that the legislature intended that the letter should reach the purchaser. Implicit in this is that, if the letter was to be sent to a chosen domicile, it would be contemplated that it might not reach the purchaser, and presumably, therefore, if the section had read as it now does, namely that the letter is required to be directed to the domicile, Wessels JA would have arrived at a different conclusion. It will be remembered that one of the amendments to the 1971 Act, introduced in 1975, was to require notice to be sent to the domicile chosen by the purchaser instead of to the last known business or residential address. Section 19 of the 1981 Act is the same in this respect.

The 1975 amendment to the 1971 Act was effected prior to both Maharaj judgments,² but the section as considered therein was the section in its original form. When the 1981 Act was passed, the legislature must have been aware of the judgments and must be taken to have intended a meaning other than that which the Courts had arrived at based on section 13(1) as it existed in the 1971 Act. It must have intended to meet the very problem which was

1. Supra at 1001.

2. Supra.

caused by the earlier judgment. As Hefer JA stated in John Gerard Anthony Leyds NO v Noord-Westelike Kooperatiewe Landbou Maatskappy Beperk and Others¹ when referring to an interpretation of the Co-Operative Societies Act 29 of 1939 -

"... word die wetgewer geag op hoogte te wees met die stand van die toepaslike regspraak..."

This is, it is submitted, supported when one bears in mind the fourth reason of Wessels JA in the Maharaj judgment² - he held that the choice of the last known residential or business address as opposed to the domicilium as the address to which notices were to be directed emphasised that:

"the notice should reach the purchaser, or, at least, be made available to him at the address where he is likely to be placed in possession thereof".

Section 19 of the 1981 Act prescribes to what address the notice must be sent, i.e. to the purchaser's domicilium citandi et executandi, being the address stated in the contract in terms of section 6(1)(a) of the 1981 Act. The purchaser in terms of section 23 is given the right to change that address. It is now clearly within the control of the purchaser to control the address to which a notice is to be directed. It is common knowledge that domicilii for various reasons very often do not reflect the current address of a party and that that party may have omitted,

1. 1985 (2) SA 769 (A) at 781. See also R v Sishane supra.
2. Supra.

intentionally or otherwise, to inform his creditor of a change in his domicilium. A domicilium may even be a vacant piece of land. It may be an address where the purchaser will never receive a letter or may never intend to receive a letter. Surely it can never have been the legislature's intention that the purchaser, by moving from the *domicilium* chosen by him, or by choosing a domicilium such as a vacant piece of ground or one where he would not for any other reason receive the letter, could deprive a seller of his remedies. To hold that would be to give the purchaser far more than the reasonable protection envisaged by Wessels JA in Maharaj's case.¹ The effect of choice of a domicilium was considered by Nestadt J in S.A. Wimpy (Pty) Ltd v Tzouras.² He said:

"... the judgments illustrate the principle that where there has been compliance with the requirements of a clause providing for sending of a notice sent to the address chosen as the domicilium it matters not that the notice is never received."

On the basis of the judgment in Maharaj's³ case and that in Holme's⁴ case, a seller could find that if his purchaser had disappeared he could never give the prescribed notice and could never terminate the contract or exercise other remedies requiring notice. Surely the legislature, however far it intended to go, could never have intended to go this far.

1. *supra* at 1001.
2. *supra*.
3. *Supra*.
4. *Supra*.

I accept, as was stated by Flemming J,¹ that section 19(2) deals with formalities, such as the contents of the letter and method of conveyance, but why was it necessary to prescribe at all the methods of conveyance of notice or to state when the notice period commenced to run if it was intended that the period would run only from receipt of the notice by the purchaser? All that would have been necessary was to say that the alleged breach had to be rectified "within 30 days of receipt of notice".

If the onus is on the seller to prove when the notice was received by the purchaser, does it really matter how the notice was given?

Flemming J² held that section 19(2) was ambiguous. He pointed out that section 19(2) refers to "a notice referred to in ss(1)", yet the English text of the Act does not refer to a notice. He surmises (without justification, it is submitted) that the Act was originally drafted in Afrikaans where both subsections refer to notice, and that the English version merely reflects the mirror image of the Afrikaans. The ambiguity, he says, arises as follows: In one sense a letter (which he views as the notification) is "sent" only if it reaches the addressee; otherwise it remains a letter which the writer attempted to send. In this regard he says:³

1. Holme v Bardale 1984 (1) SA 429 (W).
2. Supra.
3. Supra at 432.

"Ordinarily one cannot say that the seller has 'informed' the purchaser or 'made a demand' if the true facts are that he attempted to inform the purchaser but the attempt failed for some reason. Section 19(2) is concerned with the content of the letter and the method of conveyance thereof and is accordingly subsidiary to the major premise contained in section 19(1). Accordingly the attention may henceforth be directed towards 19(1)".

In view of the ambiguity in section 19(2), says Fleming J, the natural meaning of the words in section 19(1) must take preference.

He concluded:¹

"What remains is predominantly an area of similarity, in particular in regard to the pattern of the legislation, and of s 19 itself; the object of a provision such as s 19 and the policy underlying the creation of such a limitation on the rights of the seller; and a similarity in the crucial question of whether a lesser measure of protection for the purchaser was intended in regard to a letter sent by post than in regard to a letter handed over to the purchaser (which concededly he does not now have to acknowledge). Having regard to such considerations and the reasons stated in the Manaraj case I am of the view that a similar conclusion must be reached in regard to s19."

I submit that the interpretation of Shearer J in the court a quo in Maharaj's² case is to be preferred. He held that the word "inform" as used in section 19(1), in its context, described the content of the notice; i.e. it must "inform the purchaser of the failure in question" and "make demand" to the purchaser to remedy it.

1. Supra at 432.

2. Supra.

The section as considered by Flemming J in Holme's case still used the word "inform". Although by then the Act had already been amended by substituting "notify" for "inform" Flemming J made no reference to it - not that he had to for the purposes of that judgment.

Boshoff J In Muller v Mulbarton Gardens (Pty) Ltd¹ had dealt with the effect of the choice of a domicilium citandi et executandi by a party to a contract. He interpreted the contract which he was considering as entitling the seller to post the notice to the chosen address. He said:²

"If this construction of clause 12 is correct, then the postal address was the address to which a notice under clause 10 had to be sent and it was sufficient for the respondent to have posted a registered letter to that address warning the applicant that the contract would be cancelled in term of clause 10 if the outstanding instalments were not paid within seven days, and it was immaterial whether the applicant received it on the same day as the letter of cancellation, ... or not at all"³

It is submitted that the fact that the selection of a domicilium is imposed by statute cannot affect the effect thereof.

In Mehara's case Wessels JA had found that the judgment of Boshoff J⁴ was unhelpful as it concerned a section which used the words "within seven days of the posting". That

1. 1972 (1) SA 328 (W).
2. At 333. See too Nestadt J in S.A. Wimpy (Pty) Limited v Tzouras supra.
3. The underlining is mine.
4. In Muller v Mulbarton Gardens (Pty) Ltd supra.

has, it is submitted, the same meaning as "within seven days of it being sent by post" and would have been of assistance.

The judgment of Kumleben J in Robinson v Bradfield¹ is surprising. Despite having, in Caldwell v Savopoulos² approved the judgment of Shearer J in Maharaj's case and despite being aware of the differences between section 13(1) of the 1971 Act as originally promulgated, and as it read after amendment in 1975, he failed to follow the cautionary rules expressed in Sidlane's³ and Leyd's⁴ cases and to seize the opportunity of restating his earlier views. He did not even refer to his earlier judgment. All he had to say was:

"The amendment to the subsection substituted another address, but the decision in the Maharaj case still applies. The notice period runs from the date of delivery at such address."

He did not comment on the significance of the fact that whereas Wessels JA in Maharaj's case had emphasised the fact that the letter in question was required to be sent to the last known business or residential address of the purchaser, it was now required to be sent to a domicile chosen by the purchaser. It must be noted that Kumleben J used the word "delivery" and did not direct his attention to the "receipt" of the notice by the purchaser. As we have seen, "receipt" and "delivery" need not be simultaneous⁵. This shows how loosely the words are used

1. Supra.
2. Supra.
3. Supra.

4. Supra.
5. Swart v Vosloo supra.

and interpreted. Notwithstanding his findings mentioned above (i.e. that the decision of the Appellate Division in Maharaj's case still applied), Kumbleben J found that the seller was not obliged to specify the actual commencement or expiry date of the notice. He conceded,¹ quite correctly it is submitted, that this would be:

"... an impracticable task in as much as the seller does not know on what date the registered letter will be delivered), nor does the subsection enjoin him to state in the letter - as it could easily have done - that the 30 days is to run from the date of receipt or delivery of the registered letter".

In fact the learned Judge should have gone further: For the words "receipt or delivery" in the above passage, he should (applying the dicta in Swart v Vosloo²) have substituted "read by the purchaser" or "reached the mind of the purchaser" or words to that effect. That is really what Wessels JA said in Maharaj's case. It is submitted that not only would that be "impracticable", it would impose an impossible onus on the seller. Kumbleben J did not have to direct his mind to the date upon which the notice commenced to run. Unfortunately he chose not to do so.

This highlights one of the major problems arising from the judgments, including those of Wessels JA³ and Flemming J.⁴ If the judgments are correct, not only would it be impracticable for a seller to specify in the letter of

1. Supra at 352-3.
2. Supra.
3. In Maharaj (A) supra.
4. Holme v Bardsley supra.

demand the date from which the notice is to run or when it is to expire (as Kumleben J conceded in the above quoted passage), but it would be similarly impracticable (if not impossible) for him to be able to determine when the thirty day period has expired so as to enable him to decide when legal proceedings can safely be commenced. A factor which is usually within the knowledge of the addressee of the letter only, will determine when the notice period expires and proceedings can commence. This dilemma for the seller would be a logical consequence of the reasoning in the judgments referred to and can never have been intended by the legislature.

Grosskopf J in Oakley v Bestconstructo (Pty) Ltd¹ was aware of the *serious consequences of section 19* and had the following to say:

"Daar moet ... gewaak word ... dat daar nie 'n swaarder las op die skouers van die verkoper gelaa word as wat die wetgewer beoog het. Die bepaling van art 19 is immers beswarend van aard en moet dus streng uitgelê word."

Unfortunately, he was not required to consider when the notice in question commenced to run as he found, for other reasons, that it did not comply with the section.

None of the judgments previously referred to appear to have borne in mind the caveat expressed by of Grosskopf J. On the contrary each has in fact imposed a heavier burden on the shoulders of the seller.

1. Supra.

The matter came before O'Donovan J in the Witwatersrand Local Division in the unreported case of Dynaland (Pty) Limited v U.E. Nielson¹ which dealt with section 13 of the 1971 Act after its amendment in 1975. Apart from the judgment of Gordon J in the Noordvaal case² (which, although it recognised that significant changes had been made to the 1971 Act, did not specifically decide when the notice period commenced to run), it is the only glimmer of hope to date for sellers.

It will be remembered that Wessels JA in Maharaj's case² held that the reason for the letter being required to be sent to the last known residential or business address was an indication that the legislature intended that it should reach the purchaser, or at least be made available to him at an address where he was likely to be placed in possession thereof. This too was one of his reasons for holding that the thirty day period commenced on receipt of the letter by the purchaser or, (inconsistently, it is submitted with the above) when it is made available to him at that address. O'Donovan J held that the subsequent abandonment (in terms of the 1975 amendment) by the legislature of the purchaser's last known residential or business address as the address to which the notice must be sent in favour of his *domicilium citandi et executandi* was an indication of a complete change of policy on the part of the legislature and

1. (Case 21432/81 (W) unreported).
2. *Supra*.
3. At 1001.

that upon a proper construction of section 13(1) in its amended form the risk of non-delivery of a registered notice was henceforth to fall on the purchaser. If this was correct, held the Judge, the only available date from which the period of notice can be calculated is the date of posting thereof.¹ This reasoning becomes even more logical and acceptable when one considers the present wording of section 19, which specifically says when the notice period commences.

The judgments which hold that the period of the notice commences to run only when the letter is received by the purchaser require that the word "sent" be interpreted as meaning "received". Apart from the difficulties which would be caused by Swart v Vosloo² in adopting this interpretation, it involves unnecessary convoluted reasoning and is inconsistent with the plain meaning of the words.

In Commercial Union Assurance Company Limited v Clarke³ Holmes JA considered the meaning of the word "sent" in section 11(bis) of the Motor Vehicle Insurance Act 29 of 1942, which provided that medical reports were to be "sent by registered post or delivered by hand". The learned Judge held that, although the section was

1. It is submitted that the correctness of this view is supported by the principles enunciated in Sisilane's and Leyds cases and the judgment of Gordon J in the Noordvaal case supra.
2. Supra.
3. 1972 (3) SA 508 (A).

introduced for the benefit of the addressees (as was section 13 of the 1971 Act and section 19 of the 1981 Act), the insurance companies, in the context of the statute there was no reason for departing from the plain and ordinary meaning of "sent" and that such departure would be a disservice to clarity. He stated that he was fortified in his view by the antithetical juxtaposition of the verbs in "sent or delivered", the latter referring to manual delivery. He then said:¹

"... but if 'sent' is also to be given the meaning of or approximating to 'delivered' why use 'sent' at all. In the result I hold that 'sent' refers to the date when the documents are despatched in the post";

and:²

"On the other hand it is important for a claimant to be able to know when he may serve his summons, in other words, the exact date as from which the period of 60 days begins to run. We have already held that it runs from the date when the letter containing the relevant information is (i) dispatched (as distinct from delivered) by post; or (ii) delivered manually, as the case may be.

In the latter event the company is enjoined to acknowledge receipt in writing thereof and the date of such receipt. Why? Clearly for the purpose of providing the claimant with proof of the date from which the statutory period begins to run, for the onus is on him to prove the expiration of a period of 60 days as from the date on which the claim was sent or delivered as the case may be before service of the summons. The provision just mentioned is therefore primarily one for the benefit of the claimant. If he elects to send the claim by post, he is enjoined to register it. Why? Again primarily to furnish him with

1. Supra at 515.
2. Supra at 517.

proof of that date, by means of his registration slip, as from which the period of sixty days begins to run."

I submit that this reasoning is equally applicable to section 19 and is to be preferred to that of Wessels JA in Maharaj's¹ case and Flemming J in Holme's² case. It is based on the plain meaning of the words used in the section and not on artificial reasoning which attempts to over-emphasise what has been interpreted as being the intention of the legislature.

The Appellate Division again considered the meaning of "sent" in section 11(bis) of the Motor Vehicle Insurance Act 29 of 1942 in the case of A.A. Mutual Insurance Association Ltd v Tiabakoe.³ The majority judgment was delivered by Rabie AJA, with whom Van Blerk and Ogilvie Thompson JJA concurred. The court held that the sixty days commenced, if notice was sent by registered post, upon the posting. Rabie AJA said:⁴

"... selfs wanneer aanvaar word dat die Wetgewer bedoel het om 'n voordeel vir versekeraars te skep, dit nie gesê kan word dat die bedoeling was dat die tydperk van 60 dae inderdaad of in alle omstandighede 60 dae sou wees nie. Soos reeds gesê is, as 'n eis per geregistreerde pos gestuur word sal 'n versekeraar normaalweg minder - dalk 'n hele paar dae minder - 60 dae gegun word om die eis te ondersoek. Trouens, dit is nie ondenkbaar dat 'n geval hom kan voordoen waar 'n eiser sy eis

1. Supra.
2. Supra.
3. 1970 (1) SA 302 (A).
4. Supra at 314.

behoorlik per aangetekende pos stuur soos die
Wet van hom vereis en dat dit die versekeraar nie
bereik nie."

Vermooten AJ delivered the judgment in Sher S v Crook
T.E.¹ He was considering section 19 of the 1981 Act, and
although he correctly interpreted the problem as follows:

"The crisp question to be decided is when the 30
day period commences to run";

he assumed, incorrectly it is submitted, that

"the legislature requires the notice ... to reach
the hands of the defaulting buyer ... "

and thereafter, like Flemming J,² incorrectly equated "sent"
to "receive". He said:

"It is clear that 'send' can and does in many
cases mean 'receive'."

He held that, as the phrase "or sent to him" in the section
stands in juxtaposition to "handed to the purchaser", it
tended to connote the achievement of the same result as
handing over and that the legislature intended that the
expression "sent to him" in section 19(2) must be taken to
mean "received by him". This is in direct conflict with the
judgment of Holmes JA.³ This case was not mentioned in
the judgment and one does not know whether Vermooten J
was referred to it - presumably not. He endorsed the

1. 1984 (2) PH A64 (W).
2. Holme v Bardsley 1984 (1) SA 429 (W).
3. Commercial Union Assurance Company Limited v Clarke
supra.

judgment of Flemming J in Holme's¹ case and also referred to the cases of R v Thwaites² and R v Berk³ which are discussed below, as well as to section 7 of the Interpretation Act 53 of 1957.

The Judge failed to appreciate that Maharaj's⁴ case considered section 13 when it did not provide how the time period was to be calculated and when the letter was to be directed to the last known residential or business address of the purchaser.

The fact that section 19 now specifically provides when the calculation of the period of notice is to commence, in my view renders it unnecessary to invoke, as Vermooten J did, the provisions of section 7 of the Interpretation Act 53 of 1957 in interpreting Section 19.

Vermooten J did not attempt to specify any of those "many cases" he referred to above. This is not surprising - they would be very difficult to find. I know that when I send a letter someone should receive it. If he does not for any reason receive it, this does not alter the fact that I sent it. My sending was not unsuccessful, the receipt was. One cannot support the judgments of Flemming J or Vermooten J, unless one adopts a course of contrived reasoning to arrive at such a conclusion. The word "sent"

1. Supra.

2. Infra.

3. Infra.

4. 1976 (4) SA 994 (A).

in the section has a clear meaning. Why must one depart from this? If the legislature intended it to mean "receipt", it could quite easily have said so. The express wording of section 19 requires no interpretation and overcomes the problems which arose from the original section 13. That was, it is submitted, the contention of the legislature in drafting the present section.

Vermooten J erred, as did Wessels JA, (although, perhaps, he can be forgiven to some extent because of the wording of section 13 as it then was), Flemming J and others in founding their interpretation of sections 13 and 19 *mainly* on the intention of the legislature as they saw it - namely that the sections, like the Acts in which they found themselves, were intended to protect purchasers and that they accordingly had to be construed and extended by the courts to give the purchaser protection far beyond what was contemplated by the legislature. They first decided that the notice had to be received by (or at least made available to), the purchaser, and then interpreted "sent" accordingly. Why was it necessary, as Flemming J did in Holme's¹ case, to choose between unfairness to the purchaser (he conceded that such would arise only in exceptional cases if the word "sent" was interpreted to mean "sent") and unfairness to the seller? No choice was

1. Supra.

necessary. Why should the word not have been given its ordinary meaning? Before the sections appeared, the only protection the purchaser had, for what it was worth, was section 72 of the Insolvency Act 32 of 1916. Sections 13 and 19 both brought about substantial added protection for purchasers - they were far better off than they were before, and there was no need for the courts to extend the meaning of the section to the severe prejudice of the seller; only reasonable protection was intended to be given to purchasers.¹

In Sher's² case Vermooten J sought support for his view that "sent" means "received" in the judgments in R v Thwaites³ and R v Berk.⁴ In the latter case the *Ordinance* referred to a notice "served on or sent ... " within ten days of commission of the alleged offence. The Court held that a considerable degree of ambiguity had been created and that as the matter related to a criminal prosecution it had to be interpreted in a manner most favourable to the accused; accordingly, the word "sent" was interpreted to mean "effected" not "despatched". This decision is, it is submitted, incorrect. The court, approving Thwaite's case, interpreted the section to accord with its understanding of the intention of the legislature. This is not justified. The meaning of the section is clear.

1. Per Wessels JA in Mahara's case supra.

2. *Supra*.

3. 1932 CPD 375.

4. 1958 (1) SA 685 (C).

If giving "sent" its ordinary meaning produces an unfair result, the legislature, not the courts, must correct the matter.

In R v Filman¹ Banks AJ held that Thwaites' case did not decide that notices sent by registered post must be proved to have been received personally.

Vermooten J overlooked the judgments of Holmes J A in Commercial Union Assurance Company of South Africa Limited v Clarke,² Smalberger J in Matross v Minister of Police and Another,³ Morris v Kletsop and Minister of Police⁴ and Rex v Reynolds,⁵ the latter case considering the same Ordinance as was considered in Thwaites'⁶ and Berk's⁷ cases. The latter was also a full bench decision and related to the identical section considered in Thwaite's case.

This section provided that no person could be convicted of a *contravention thereof* unless the court was satisfied that notice of the intention to lay the complaint had been sent to him or handed to him personally within such time after commission of the offence, *not exceeding seven days*, as the

1. 1959 (3) SA 868 (C).
2. *Supra*.
3. 1978 (4) SA 79 (E).
4. Case 1428/74 (E) *unreported*.
5. 1933 CPD 581.
6. *Supra*.
7. *Supra*.

court thought reasonable. Referring to Thwaites' case¹
Gardiner JP, who delivered the judgment of the Court, in
Reynolds' case² said:

"It is true that there are remarks in the judgment which might be read as suggesting that the court meant that the notice must be received within seven days but ... I must regard it as obiter dictum. What the court did decide was that the notice was to be dispatched in sufficient time to be received within seven days. By any remarks beyond that, I am not bound. I do not think that the Ordinance requires that the Crown must prove that the accused has received the notice."

I submit that Gardiner JP erred in his interpretation of Thwaites' judgment, as both judges in that case clearly interpreted "sent" as meaning "received". However Gardiner JP correctly interpreted "sent" in accordance with its ordinary meaning.

Other remarks by Gardiner JP are also interesting. In Reynold's case the letter advising of the intention to lodge the complaint was returned undelivered because of "the insufficient address given by the accused". He held:³

"Now if an accused gives an insufficient address, I do not think he can complain when the procedure provided by the Act has not been

1. Supra.
2. Supra.
3. Supra. See too Nestadt J in S.A. Wimpy (Pty) Limited v Tzouras supra.

effectively carried out. Take for instance where he gives a false address; could it be said ... that he could claim an acquittal because the notice was not received by him. That would be absurd."

The same reasoning applies equally to sections 13 and 19. Here too the purchaser himself selects the address to which the notice is to be sent, and the legislature has provided the means of sending it - by hand or by registered post with its "high degree of probability" of being delivered.¹ The alternative methods of conveyance were chosen for the benefit of the seller. Surely a seller could not be without remedy if the purchaser did not receive a letter because of a false address chosen as his domicilium (or for any other reason). Would it be necessary, if the cases are correct, in such circumstances to apply the doctrine of fictional fulfilment? HCJ Fleming suggested:²

"Daar is gevolglik grond vir die interpretasie dat die aanmaningsvereiste nie geld waar dit volgens verkeersmaatsstawe onmoontlik is om na te kom nie."

In other words, according to the author (now Fleming J) no notice is necessary in terms of Section 19 in such circumstances.

de Jager,³ whilst agreeing with the view of Wessels JA suggests that where the purchaser is to blame for the non receipt by not notifying change of address, the time

1. Per Wessels JA in Maharaj v Tongaat Development Corporation (Pty) Limited (supra).
2. Krediettransaksies (1982) at 318. See too passage quoted at page 66 above.
3. Theo de Jager Alienation of Land (1982).

period should begin to run when the postal service delivers the registered slip or attempts to deliver it.

It is submitted that there is no room for this view or that of HCJ Flemming in the above quoted passage. Both are suggesting that their interpretation of the section would be otherwise than the prevailing one if delivery could not be effected for the reasons mentioned. This surely cannot be correct. The section can have only one meaning and that must apply in all circumstances.

Matroos' case¹ in which the judgment was delivered by Smalberger J, concerned section 32(1) of the Police Act 7 of 1958 which provides:

"Any civil action against the state or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof."

Smalberger J held:²

"The delivery of the registered slip to the second defendant's usual address for the receipt of post was akin to placing him in possession of the letter to which it referred, for it placed him in a position where he could obtain the letter, and would in the normal course be expected to obtain it within a relatively short time of the receipt of the registered slip";

1. Supra.
2. Supra at 82.

And:¹

"There seems to be no logical reason for holding that a different position should pertain where a registered slip, not the letter itself, is delivered. Registered post is generally regarded as one of the safest means of ensuring that a letter reaches its destination. It would be an absurdity if a person in the position of the second defendant could receive a registered slip for a letter containing a notice in terms of s.32(1), deliberately ignore it for an indefinite period and thereafter claim that the provisions of s.32(1) have not been complied with".

The court in Matross³ case had referred to the judgment in Morris v Kietsoop and Minister of Police² (which also involved a reference to section 32(1) of the Police Act, Act 7 of 1958. In that case Addieson J said :

"Mr Van Rensburg fairly drew my attention to the case of Dease v Minister of Justice 1962 (2) SA 302 T at 306 from which it appears, by implication, to have been held that receipt of a notice such as the present one, at the office of the person concerned, would constitute a proper giving of notice to that person, even if he did not physically receive it himself on that date. To hold otherwise would, in my judgment, open the door to a situation whereby the intended recipient could deliberately defeat the legitimate claim of the plaintiff, by refusing to pick up or handle a letter which had reached its appointed destination in time, until after the prescribed period had elapsed. In my view it is sufficient for compliance with the section if, within the stipulated time, the notice reaches the place where the recipient has directed or agreed that this post should be placed. If the letter reaches the defendant's post box well within the period required by the section, it would surely be no answer for him to say that he was on leave and therefore could not take physical delivery of it."

The judges in both the Matross³ and Morris⁴ cases were thus aware of the danger in interpreting the section in

1. *ibid.*

2. *Supra.*

3. *Supra.*

4. *Supra.*

question as requiring actual receipt of the notice by the addressee. Was Wessels JA when referring¹ to the notice "at least being made available ... ", not also aware of this danger?

Certain English cases may, in the present context, be of assistance.

In Stanley v Thomas² the Kings Bench Division considered a section of the English Road Traffic Act, 1930. The wording of this section was similar to that in the Cape Ordinance considered in the Thwaites, Reynolds and Berke³ cases and provided that a notice of intended prosecution had to be "served on or sent by registered post". Lord Hewart LCJ said:⁴

"It is to be observed that the words are 'sent to him', not 'sent to him and received by him'."

He approved, in relation to the statute he was considering, the following passage in the judgment of AT Lawrence, J in Retail Dairy Co., Ltd v Clarke:⁵

"... in the absence of any words in the subsection indicating that the word 'sent' is used with any other than its ordinary meaning of 'dispatched' it must be construed as bearing that meaning."

1. In Maharaj v Tongaat Development Corporation (Pty) Ltd *supra*.
2. 1939 2 ALL ER 636.
3. *Supra*.
4. *Supra*.
5. 1912 2 KB 388.

The English Road Traffic Act was again considered in Sandland v Neale¹ where Lord Goddard CJ said:

"The section requires a notice to be 'sent by registered post to him'. It does *not* say *where*. It does not say to the last known address. Surely no-one could contend that if it was sent to his ordinary address, the fact that he *was away* on holiday would make the service bad; it is the sending, not the receipt, as I have already emphasised, that is material."

The reasoning in all the latter three cases is simple, sound and, with the greatest respect, correct, and is consistent with that of Holmes JA in Clarkes' case.² All the above-mentioned judgments in South Africa, except that of O'Donovan J³ have applied contriv¹ reasoning to interpret "sent" as meaning "sent to him and received by him" or simply "received" or perhaps "made available to him",⁴ and have given it a meaning other than its ordinary meaning.

As the law stands at present, what is to happen to a seller who sends a notice which is never received by a purchaser, whatever the reason for it? It seems that he would have no remedy at all. In Holme's⁵ case Flemming J found that the letter was addressed to the domicilium chosen by the purchaser and that it may have been impossible to deliver a letter there by registered post. Notwithstanding this he

1. 1955 3 ALL ER 571.
2. *Supra*.
3. In Dynaland (Pty) Limited v U.E. Nielsen (case 21432/81 (W) unreported).
4. Wessels JA in Mahara v Tongaat Development Corporation (Pty) Ltd (supra).
5. *Supra*.

found that notice had not been given. It will be remembered too that Flemming J acknowledged that a seller, doing his utmost, might find it impossible to procure that a demand reaches the purchaser - what is to happen then he did not say. Did he intend that the seller would, in those circumstances, be without remedy? He said:¹

"A true impossibility of communication with the respondent (the purchaser) was in this case not factually established ..."

Did he intend by this to indicate that, if such impossibility could be established, the section would be given another meaning or that the notice would not be required?² It is however not the purpose of this dissertation to consider the question of impossibility of performance but it is submitted that it would be most unfortunate if sellers had to resort to such legal principles for assistance.

2.2.

CONTENT OF NOTICE IN TERMS OF SECTION 19(2)

Section 19 of the 1981 Act, as amended by section 8 of the Sale of Land Amendment Act 51 of 1983, requires that a notice in terms of section 19(1) shall contain:-

1. Supra at 431.
2. See extract from his book Krediettransaksies (1982) at page 92 supra which suggests that he was of this view.

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

Originally section 13 of the 1971 Act had simply required that the seller had by letter:

"informed the purchaser of the failure in question and made demand on the purchaser to carry out the obligation in question within the period stated in the demand ... "

The departure from the wording used in the 1971 Act was probably, to some extent, prompted by the judgment of Coetzee J in Hamid and another v Cassim,¹ where he held that the section as it appeared in the 1981 Act applied only to positive obligations. The notice in question in Oakley v Bestconstructo (Pty) Limited² sent on behalf of the seller to the purchaser is an example of a failure to comply with several of the requirements of the section. It would in fact be difficult to find a better example to illustrate the requirements of the section and its interpretation by the courts. It reads as follows:

1. 1978 (2) SA 102 (T).
2. 1983 (4) SA 312 (T).

"We have been instructed by our client, Bestconstructo (Pty) Limited, to advise you as we hereby do, that unless we receive your payment of the balance of the purchase price still due to our client within thirty days from the date hereof, our client will in its sole and absolute discretion act against you in terms of para 9 of the deed of sale entered into with you on 14 January 1961 in respect of the abovementioned property".

It was held by Grosskopf J that the notice did not comply with section 19 in that:

1. the reference to the "balance of the purchase price" was intended by the seller to include all other amounts (including rates and taxes) owing under the contract,¹ and the purchaser might have had difficulty in calculating the outstanding balance because he may not have known the amount of rates and taxes or the rate of interest applicable at the appropriate time;²
2. it did not itself specify the amount to be paid³ and if the purchaser were required to make enquiries as to the amount he had to pay and if he still had to wait for a reply, it may well be that the thirty day period available to him would be drastically reduced,⁴ (The Judge did not refer to the method of calculation of the thirty day period);

1. At 317-18.
2. At 318-319.
3. At 318.
4. At 319.

3. the respondent's notice did not contain an adequate description of the obligation with which the applicants had allegedly failed to comply;¹
4. the notice contained no indication of the steps the seller intended to take if the demand was not complied with; it referred merely to a clause of the contract which referred to a wide variety of possible steps the seller could take. (These steps are not enumerated in the judgment but it is difficult to contemplate how extensive the "wye verkeidenheid van moontlikke stappe"² could really be (presumably they included cancellation, claims for damages or acceleration of payment).)

It is interesting to note that the Judge expressed doubts³ as to whether the steps the seller intended to take and which appeared in the provisions of the contract could be incorporated into a notice merely by reference to it.

The Judge said:⁴

"Die wetgewer het klaarblyklik bedoel dat die koper 'n geleentheid moet kry om sy kontrakbreuk te herstel. Indien nakoming van die betrokke verpligting dus vereis dat die koper 'n bepaalde bedrag geld aan die verkoper moet betaal, en indien die koper nie redelikerwys kan weet wat die omvang van daardie bedrag is nie, volg dit myns insiens dat 'n eis om nakoming van

1. At 318.
2. At 320.
3. At 320.
4. At 319.

die betrokke verpligting ook moet vermeld wat die bedrag is wat die koper moet betaal. Indien die verpligting wat 'n koper versuim het om na te kom, b v 'n vaste maandelikse pasieement vir 'n sekere maand is, mag dit voldoende wees om in die kennisgewing te eis dat die pasieement vir die betrokke maand betaal word, sonder vermelding van die bedrag van die pasieement, en wel omdat die bedrag daarvan aan die koper bekend is. Waar die bedrag egter nie vasstaan nie, soos die verskuldige balans in die onherhawige geval, sal die eis om betaling myns insiens slegs sin uitmaak indien die bedrag wat betaal moet word in die kennisgewing vermeld word."

That it is not necessary for the seller to state in the notice when it commences to run had earlier been held by Kumleben J (with whom Van Heerden J concurred) in Robinson v Bradfield.¹ He said:²

"He (the purchaser) was thus under a duty - to my mind not an unreasonable one - to find out from what date according to law the notice (which professed to be given in terms of the Sale of Land on Instalments Act 1971) ran."³

Kumleben J, referring to the seller, continued:⁴

"He is not called upon to specify the actual commencement or expiry date (which incidentally would be an impracticable task inasmuch as the seller does not know on what date the registered letter will be delivered) nor does the section enjoin him to state in the letter - as it could easily have done - that the thirty days is to run from the date of receipt or delivery of the registered letter."

The judgment in Miller v Hall⁵ followed shortly after that in Robinson v Bradfield.⁶ In the former case the letter of demand referred to the alleged breach but incorrectly

1. 1984 (1) SA 349 (D).
2. At 352.
3. Words in brackets are mine.
4. Supra at 352-53.
5. Supra.
6. Supra.

stated that the notice was being given in terms of the 1971 Act and clause 9 of the agreement of sale. It then continued:¹

"As to the consequences attached to your non-compliance with the terms of this notice, your attention is drawn to the relevant clause in the agreement of sale, particularly the fact that should the seller elect to take legal action against you, all costs incurred thereby will be borne by you."

The first defence raised by the purchaser was that the notice did not comply with the provisions of section 19(2)(b) as it did not specify when the thirty day period therein referred to commenced to run. In the light of the judgment in Robinson v Bradfield² this point was abandoned by the purchaser's counsel, and Page J, who delivered the judgment of the Court, clearly accepted the latter mentioned judgment as being correct. The court thereafter rejected the next defence that the notice was defective in that it purported to be given in terms of the 1971 Act instead of the 1981 Act which was applicable. It was not a requirement of the section, held the Judge, that there be any reference in the notice to the statute in terms of which it was given. The incorrect reference was accordingly mere surplusage.

Clause 9 of the contract entitled the seller to :

1. Supra at 357.
2. Supra.

- (a) cancel the contract and claim a penalty; or
- (b) cancel and claim damages; or
- (c) claim acceleration if the default was not remedied within thirty days.

The purchaser contended that the notice did not comply with section 19(2)(c) as the seller had failed to specify exactly what steps the seller intended to take if the default was not remedied. Counsel for the seller argued that the seller was required to do no more than indicate an intention to take any one of the steps set forth in sections 19(1)(a), (b) or (c) without being obliged to say which he in fact intended to take.

Page J held that, no matter whose argument was correct the notice did not in any event comply with section 19(2)(c) because -

"even if the second paragraph of the letter can be construed as incorporating therein a reference to the remedies set forth in clause 9(a), (b) and (c) of the contract, it contains no indication of an intention on the part of the seller to enforce any of those remedies, either singularly or in the alternative. It certainly contains no express statement of such an intention; nor is such an intention, in my view, a justifiable implication from its terms. Those terms would be equally consistent, for instance, with an intention merely to enforce specific performance in respect of the arrear instalments without resorting to any of the more drastic remedies provided for in clause 9."

1. Supra at 360. See also Oakley v Bestconstructo (Pty) Limited supra.

The learned Judge then held obiter¹ that the seller's argument was not correct. The object of section 19(2)(c) was, he held, to ensure that the purchaser knew precisely the consequences of a failure to remedy his breach so as to put him in a position to decide whether it was in his best interests to remedy or not; and that this object could be achieved only if the purchaser knew exactly what remedy the seller intended to enforce if he persisted with his breach.

It was further held that the letter did not comply with the provisions of section 19(2)(c) in that it contained -

"no indication of an intention on the part of the seller to enforce any of those remedies (being those stated in the contract) either singularly or in the alternative."²

Page J in Miller v Hall³ said as follows:

"... the seller must state in the notice which of the steps enumerated in ss.1 he intends to take."

In so doing, Page J approved similar views expressed by J M Otto.⁴

Argument had been addressed to the court to the effect that the use of the words "steps" instead of "step" in the section meant that it was permissible to indicate an intention

1. Supra at 361.
2. Supra at 360; (words in brackets are mine).
3. Supra at 364.
4. "Aanmanings by Afbetalingskoopkontrahte van Grond" June 1982 de Rebus 253 at 255.

to take all the steps enumerated in section 18(1), albeit in the alternative. That this can be done is the view of Van Rensburg and Treisman, when they say:¹

"It is submitted that in a notice given in terms of section 19, the seller may state alternative steps which he intends taking if his demand is not met, and that his options remain open until he finally decides which of the various remedies to pursue."

Page J, however, was of a different view, saying:

"each of the courses enumerated in ss.(1) could comprise more than one step",

and accordingly that such an interpretation would:

"run counter to the intention of the provision, properly construed."

The judgment of Page J which, although delivered prior to the publication of the book of the learned authors, appeared in the law reports only thereafter and is not referred to in the book. Obviously the learned authors were unaware of the judgment.

It is submitted that the view of the learned authors is preferable to that of Page J. The object of the legislature has been said to afford reasonable protection to purchasers.³ Surely sufficient protection is afforded to the purchaser if he is advised of the alternative remedies the seller may follow.

1. Op cit at 204.

2. Supra at 365.

3. Wessels JA in Mahara's case (supra).

There are very few cases on warning notices dealing with the question whether the amount of the non-payment must actually be mentioned.

Chesterfield Investments (Pty) Limited v Venter¹ dealt with a clause in a contract entitling the seller to cancel in the event of the purchaser failing to remedy a breach within a stated period. The warning notice sent in this case referred to the outstanding balance but did not state the amount thereof. The notice was held to be sufficient, the Court holding that there had been no suggestion that the purchaser could not ascertain the amount from the seller or from a statement of account which had been sent to him some four months earlier.

Porteous v Strydom NO² was a judgment of Galgut AJ. In this case the demand required payment of:

"the sum of R16 109,99 being the balance due and owing by you as at this date in respect of increased building society interest which you are liable to pay to our client under the provisions of the last sentence This additional interest was due and payable in terms of the said agreement. We attach hereto a schedule showing how the interest claimed is arrived at."

The amount claimed in the above demand was incorrectly calculated and too high because of an incorrect calculation

1. 1972 (SA) 19 (W).
2. 1984 (2) SA 489 (D).

of interest. It had been calculated as compound interest instead of simple interest. However a schedule of the date and amounts of payments was attached to the notice.

Following the dicta of Coetzee J in Hamid and another v Cassim,¹ the Judge held that care should be taken in interpreting and enforcing the provisions that a heavier onus was not put on the seller than had been intended by the legislature. In regard to the incorrect calculation of the amount in the notice, he said:²

"From the large amount itself that was claimed in the notice it must have been clear to Jacobs (the purchaser) that the figure was far too high. It was clear from the schedule that it was compound interest that had been calculated and demanded."

The judge held that:

1. it is not required by section 19(2) that the amount overdue is to be stated in the notice, although in given circumstances, such as in Oakley's case (where it is not a simple matter for the purchaser to calculate it), it may be necessary to state it in order to fulfil the requirement of section 19(2)(a). It is submitted that this is a correct interpretation of the judgment of Grosskopf J in Oakley's case;
2. although, in the case in question, the seller had named an amount which was wrong because it was
 1. Supra.
 2. Supra at 497. Words in brackets are mine.

based on a calculation of interest which, instead of being simple, had been compounded, there was sufficient detail in the notice, read with the schedule attached, to comply with section 19(2)(a); that is, it gave a sufficient description of the obligation which the purchaser had failed to fulfil;

3. in Oakley's case the notice was held to be invalid not merely because it failed to state the amount but because it was in other respects confusing and unclear. It is submitted that this is also a correct interpretation of that judgment.

Is the seller bound by the intention he expresses in the notice or may he thereafter *change his mind*?

In Walker v Minier et Cie (Pty) Ltd¹ the parties had entered into a deed of sale which afforded the seller substantially the same remedies as were in issue in Miller v Hall², namely the right to cancel and claim forfeiture, or to cancel and recover damages, or to enforce specific performance. The purchaser was in breach of her obligations to pay the full purchase price. The seller gave her notice to do so within thirty days in terms of the 1971 Act. Although it was not obligatory to do so in terms of that Act, the seller's attorneys stated in the letter that

1. 1979 (2) SA 474 (W).
2. *Supra*.

they had been instructed, in the event of failure to pay the outstanding balance,

"to proceed against you for payment of the same in terms of the aforesaid deed of sale."

It was argued that the seller had elected, albeit in advance, to abide by the contract and to sue the purchaser for specific performance and that it was bound by such election. Nestadt J agreed with that argument but said that if attempts to enforce performance were unsuccessful the seller could change his mind and rescind and claim damages but that a further thirty day notice indicating his new intention was necessary.

The respondent in Miller v Hall¹ had argued that, once having called on the purchaser to perform, the seller could never claim cancellation, or, presumably, if having given an indication of an intention to cancel, could never have a change of mind and claim specific performance. This argument was rejected, the court holding that unless the expression of intention amounted to an election, if the seller wished to change her mind and adopt another remedy she merely had to give another notice. The Court said:²

"... Intention may be expressed in such a way as to manifest and convey not merely the seller's state of mind but also simultaneously the overt

1. Supra.
2. Supra at 363.

act of actually making the election ... It is, however, equally possible to express no more than an intention to make a specified overt act of election in the future; which is, in my view, all that the sub-section requires."

CHAPTER IV

CONCLUSION

From the above analysis of the cases I think it can fairly be said that the present legal position in regard to section 19 is as follows:

1. The provisions thereof are preemptory and must be strictly adhered to before a seller is entitled to enforce his rights. The provisions of the section will be strictly interpreted.¹
 2. If the notice referred to therein is conveyed by registered post, the thirty day period commences only upon receipt of the notice by the purchaser (or perhaps when it is made available to him).² It is submitted that this is incorrect and that the correct position is as stated in the Dynaland³ case and (suggested perhaps?) in the Noordvaal⁴ case. The matter has been argued recently before the Appellate
1. See eg Maharaj v Tongaat Development Corporation (Pty) Limited 1976 (4) SA 994 (A); Maron v Mulbarton Gardens (Pty) Ltd 1975 (4) SA 123 (W) and Caldwell v Savopoulos 1976 (3) SA 741 (D).
 2. See eg Maharaj v Tongaat Development Corporation (Pty) Limited 1976 (4) SA 994 (A); Miller v Hall 1984 (1) SA 355 (D); Sher S v Crookes T.E. 1984 (2) PH A64 (W); the only dissent being O'Donovan J in Dynaland (Pty) Limited v U.E. Nielson (case 21432/81 (W) unreported) and perhaps Gordon J in Noordvaal Konstruksie Maatskappy (Edms) Bpk v Booyse 1979 (2) SA 193 (T).
 3. Supra.
 4. Supra.

Division in the case of Orkin en 'n ander v Phone-A-Copy Worldwide (Pty) Ltd.¹ Judgment has been reserved. This case refers to the original Section 13 of the 1971 Act.

3. The amount required to be paid by the purchaser to rectify the breach must be stated unless the purchaser is able from information accompanying the notice or other information (readily) available to him to easily ascertain the details.² This will apply equally if the breach is other than a failure to pay.
 4. The seller can indicate an intention to take only one step if the breach is not rectified. He cannot state alternative steps he will take.³ It has been suggested that this is not correct.⁴ This view is preferable.
 5. It is not necessary for the seller to state in the notice when the thirty day period commences or ends. To do so would be impracticable.⁵
 6. It is not necessary to state in the notice in terms of which statute it is being given.⁶
1. Presently reported as 1983 (3) SA 881 (T).
 2. See Porteous v Strydom NO 1984 (2) SA 489 (D) and Oakley v Bestconstructo (Pty) Limited 1983 (4) SA 312 (T).
 3. See Miller v Hall supra.
 4. See Van Rensburg and Treisman - op cit at 204.
 5. See Robinson v Bradfield supra.
 6. See Miller v Hall supra.

7. The indication by a seller of the steps he intends to take does not necessarily amount to his making an election, but, if he changes his intention, a further thirty day notice indicating the change is required before he can enforce his rights. However, once he makes an election, he will not be permitted to change his mind.¹

8. If post is used as the means for conveying the notice :-

8.1 registered post must be used. Certified post will not suffice even if the notice is received by the addressee.²

8.2 the letter must be sent to the chosen domicilium or may be altered by notice sent per registered post. Alteration in any other manner is ineffective.³

9. It is doubtful whether the steps intended to be taken can be incorporated in the notice by reference to another document.⁴

1. See Miller v Hall; Walker v Minier et Cie (Pty) Ltd supra.

2. See Caldwell v Savopoulos supra.

3. Noordvaal Konstruksie Maatskappy (Edms) Bpk v Booyen supra.

4. See Oakley v Bestconstructo (Pty) Limited and Miller v Hall (obiter) supra.

It is submitted that the judgment of the Appellate Division in Maharaj's case was wrong, but that even if it was correct, the present wording of section 18 renders it no longer applicable¹ and that the cases which followed the judgment after the amendment of section 13 and the enactment of section 19 failed to appreciate the significance of the amendments.

It is a pity that in their interpretation of section 13 of the 1971 Act and section 19 of the 1981 Act the Courts have not shown the caution so often stated by them to be necessary in the interpretation of a provision, such as the one under consideration, to prevent imposing on a seller a greater burden than was intended by the legislature.²

Many years ago, in Kent, N.O. v South African Railways and Another³ Watermeyer CJ quoted with approval the following statement in Crales⁴:

"In Re Cuno, Bowen LJ said

'In the construction of statutes you must not construe the words so as to take away rights which already existed before the Statute was passed, unless you have plain words which indicate that such was the intention of the legislature'."

1. Per O'Donovan J in Dynaland (Pty) Limited v U.E. Nielsen and Gordon J in Noordvaal Konstruksie Maatskappy (Edms) Bpk v Booysen supra.
2. See for example Grosskopf J in Oakley v Bestconstructo (Pty) Limited; Coetzee J in Hamid and another v Cassim 1978 (2) SA 102 (T).
3. 1946 AD 398 at 405.
4. Statute Law (4th ed) at 111.

Although this was a reference to rights which existed under a previous statute, the same principle applies to rights which exist at common law. That this is so was stated by Davis JA in Wellworths Bazaars v Chandlers' Ltd and another,¹ which related to the rights of a lessor.

The Judge said:²

"Nor must it be overlooked that, as has been said by this Court in Herison v S.A. Mutual Life Assurance Society (1942 (AD) 259 at 263) the provisions of measures of this type 'constitute a drastic interference with the common law rights of lessors'. Such rights are not to be held to have been taken away save by express words or by necessary implication ... Here neither are there express words nor any necessary implication. Consequently there is no ground for reading into Reg 4 any further inroad on the rights of the lessor than those actually contained therein ..."

Similar sentiments were expressed by the full bench of the Transvaal Provincial Division in Hamid and another v Cassim³ by Coetzee J (with whom Le Grange J concurred). The following was the view of the court in regard to section 13 of the 1971 Act:

"One must not overlook that provisions of this type constitute a drastic interference with the contractual rights of sellers which should not be held to have been taken away save by express words or necessary implication. Here there are neither express words nor any necessary implication."

It is submitted that neither the express words nor necessary implications referred to by Davis JA and

1. 1947 (2) SA 37 (A).
2. At 43.
3. *Supra* at 105.

Coetzee J are present in regard to section 19. There was no reason whatsoever to depart from the plain and ordinary meaning of the words used in that section in order to give effect to it.

What is the position of the seller who cannot deliver the notice by hand to the purchaser who resides at an address other than that chosen as his domicilium, or has chosen a domicilium at which he will never receive the notice if it is despatched by registered post? According to the law as it now stands, his rights of action will not be limited, as the heading to section 19 states; they will have been frustrated entirely.¹

As the law now stands, delivery of a notice by hand to a purchaser is acceptable irrespective of where such delivery is effected. If, however, the post is used as a means of conveying the notice, it must be directed to the chosen domicilium notwithstanding that the purchaser may never receive it; and in such event the seller would be without a remedy. If the purchaser receives a notice through the post at any other address it is ineffective irrespective of whether it was conveyed by registered post or not. The notice is likewise ineffective if the purchaser receives it, even at the chosen domicilium, unless it has been conveyed

1. Unless one adopts, in such circumstances, a different interpretation of the Section as was suggested by HCJ Flemming op cit and Theo de Jager op cit.

by registered post. It can surely be seen that this state of affairs is completely illogical.

Flemming J in Holme's¹ case was well aware of the difficulty his judgment would create for sellers. He mentioned various reasons why delivery of the demand to the purchaser may be impossible. He was also aware that there might be circumstances where it is practically or absolutely impossible for the seller to cause the registered letter to actually reach the purchaser.² He said:³

"The difficulty of practical or even absolute impossibility arose in regard to legislative provisions similar to s19 and preceding s19. The Legislature would surely have been aware of the seller's problems. The Legislature would have been aware thereof and the Court cannot by construction legislate. It would probably have realised that there is little to no room (there appearing to be no room to claim that *lex non cogit ad impossibilia*) for invoking common law principles to override what Parliament spells out. Nevertheless no comfort was explicitly derived for the seller who has attempted all that could be reasonably expected of him. The absence of an equitable safety valve, if that is the case, tends to strengthen the argument that the legislature, in fairness towards the seller, would have intended that the posting of a demand is adequate. The weight of that consideration is lessened by the fact that the legislature had a basic choice between unfairness towards the seller ... and unfairness ... of a purchaser finding his contract cancelled because the letter was not delivered."

It is submitted that there is a safety valve in that in terms of the section as presently drafted, receipt of the notice is

1. Supra at 430-31.
2. At 431.
3. At 431.

not necessary if it is sent by registered post. That is the whole purpose of the legislature prescribing this method of posting. Even Wessels JA in Maharaj's¹ case appreciated that the choice of this method was significant. It is submitted that the present unsatisfactory situation arose because the courts commenced with the hypothesis that the purchaser must receive the notice, whatever mode of transmission was used, and in order to justify this argument were obliged to interpret "sent" as meaning "received".

The purpose of the legislature in requiring notices to be directed to the domicilium citandi et executandi instead of the last known business or residential address and requiring that they be sent by registered post is two-fold. Firstly it ensures that the address to which they are sent is within the control of the purchaser (who should, bearing in mind the importance of the notices, make sure that it is an address at which he will receive them) and secondly it uses a method of conveyance which is usually reliable. Having regard to the foregoing, which provides reasonable protection for the purchaser, the legislature was prepared to grant the seller some relief by providing that the thirty day period commences on the date the notice is sent by registered post to that address. The words "calculated from" were, it is submitted, specifically introduced into the

1. Supra.

statute to meet the difficulty raised by the judgment of Wessels JA in Mahara's¹ case, of which the legislature must have been aware.²

It could never have been intended that a seller could ever find himself in a position where he could not enforce his rights simply because he could not deliver a notice to the purchaser.

Contracts often contain a provision to the effect that all notices given in terms thereof are deemed to have been received within a stated period after posting. Could this be the answer? I submit that it would not. Such a clause would amount to a waiver of the purchaser's rights to receive the notice, and in view of the peremptory provisions of section 19 and the provisions of section 29 prohibiting a waiver by the purchaser of any rights conferred upon him by the 1981 Act, it is doubtful that such a provision would be valid.

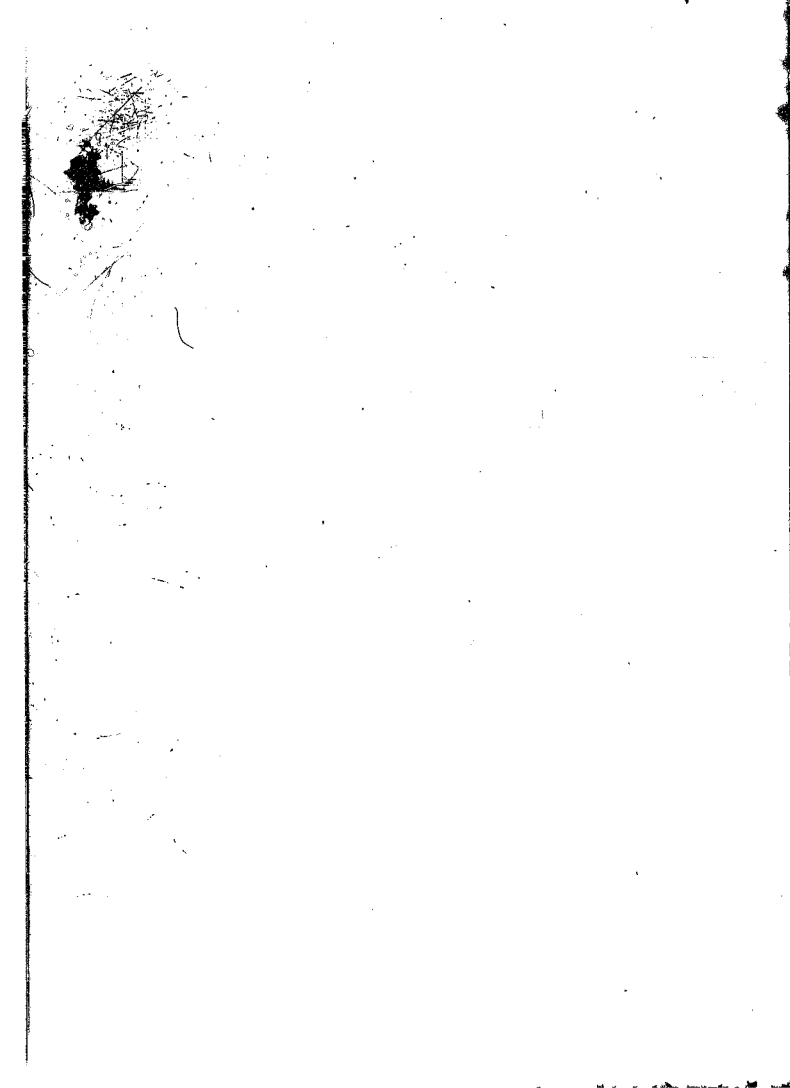
Hopefully the arguments set forth herein will enable someone to persuade a court that the decision of the Appellate Division in Mahara's case no longer applies. Certainly, sellers of land on instalments would welcome this.

1. Supra.
2. Leyds NO v Noord-westelike Koöperatiewe Landboumaatskappy Bpk en Andere supra.

BIBLIOGRAPHY

1. Crales Statute Law (4th ed).
2. De Vos W "Mora Debitoris and Rescission" (1970)
87 SALJ 304.
3. De Wet JC and Yents JP (4th ed by De Wet JC
and Van Wyk AH) (1978) Kontraktereg en
Handelsreg.
4. De Wet JC 1969 Annual Survey of South African
Law 104.
5. Flemming HCJ Krediettransaksies (1982).
6. Kerr AJ The Principles of the Law of Contract
(1980).
7. Mars The Law of Insolvency in South Africa (7th
ed).
8. Millner MA Lively Prospects for Land Sales (1959)
76 SALJ 16.
9. Mulligan GA "Mora" (1952) 69 SALJ 276.
10. Otto JM "Aanmanings by Afbetalings kontrakte
van Grond" June 1982 de Rebus 253.
11. Pliny - Natural History quoted in Normans
Purchase and Sale in South Africa (4th ed by
Cl Belcher).

12. Steyn LC Die Uitleg van Wette (5th ed uitg deur SIE Van Tonder).
13. Theo De Jager Alienation of Land (1982).
14. Van der Kessel Praelectionis (Gonin translation) (1967).
15. Van Jaarsveld Suid Afrikaanse Handelsreg (1978).
16. Van Rensburg ADJ and Treisman S The Practitioner's Guide to the Alienation of Land Act (2nd ed).
17. Voet Commentarius ad Pandectas (1698).
18. Vorster J.P. Die Beperking van die Verkoper se Regte in die Geval van Kontrakbreuk deur die Koper by die Verkoop van Grond op Afbetaling (1985) 48 THRHR 88.
18. Wunsh B "Mora Debitoris and Time of the Essence" (1965) 82 SALJ 463



Author Cohen Selwyn

Name of thesis Section 19 Of The Alienation Of Land Act 68 Of 1981. 1985

PUBLISHER:

University of the Witwatersrand, Johannesburg

©2013

LEGAL NOTICES:

Copyright Notice: All materials on the University of the Witwatersrand, Johannesburg Library website are protected by South African copyright law and may not be distributed, transmitted, displayed, or otherwise published in any format, without the prior written permission of the copyright owner.

Disclaimer and Terms of Use: Provided that you maintain all copyright and other notices contained therein, you may download material (one machine readable copy and one print copy per page) for your personal and/or educational non-commercial use only.

The University of the Witwatersrand, Johannesburg, is not responsible for any errors or omissions and excludes any and all liability for any errors in or omissions from the information on the Library website.