

Should the Alienation of Land Act 68 of 1981 be amended to Address Homelessness? *Sarrahwitz v Maritz* 2015 8 BCLR 925 (CC)



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Abstract

This case note evaluates the judgment of the Constitutional Court in *Sarrahwitz v Maritz* 2015 8 BCLR 925 (CC). The authors evaluate the decision of the Constitutional Court to resort to the amendment of the *Alienation of Land Act* 68 of 1981 to protect a vulnerable purchaser of property against homelessness. It is argued that the origins and purpose of the Act should have been considered by the Constitutional Court. Such consideration shows that the Act protects against a specific vulnerability that an instalment-sale purchaser faces, and deals with the right to take transfer. This vulnerability is not necessarily homelessness and it is, therefore, questioned whether the Act can be applied to give effect to section 26 of the *Constitution of the Republic of South Africa*, 1996.

This contribution further argues that an alternative solution could have been developed, in line with constitutional values and the common law provision that provides the trustee of the insolvent estate with the discretion to cancel a sale agreement pertaining to property sold but not yet transferred. It is submitted that the minority judgment's reliance on the *Prevention of Illegal Eviction and Unlawful Occupation of Land Act* 19 of 1998 provided the best solution in this instance.

Keywords

Alienation of Land Act; right to obtain transfer of land; instalment sale agreement; sections 25(1), 39(2) and 26 of the *Constitution*; insolvency; common law; transfer of property from insolvent estate; development of common law; homelessness and vulnerability.

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1 Introduction

This contribution evaluates the judgment of the Constitutional Court (hereafter the CC) in *Sarrahwitz v Maritz*.¹ As a result of Ms Virginia Sarrahwitz's (hereafter Sarrahwitz) homelessness and vulnerability, the CC ruled that certain sections of the *Alienation of Land Act*² had to be amended to protect a vulnerable purchaser of property against the effects of the common law, where the seller becomes insolvent before the transfer of the property has taken place.³

The common law determines that the trustee of the insolvent estate of an owner who has sold but not yet transferred property has the discretion to give effect to the sale or to cancel it.⁴ Sections 21 and 22 of the *Land Act* protect the interests of the purchaser in such a situation by providing that if the purchaser bought the property in terms of a "contract"⁵ - where payment of the purchase price is made in instalments - such a purchaser is entitled to take transfer of the property.⁶ After the CC's judgment in *Sarrahwitz*, this protection has been extended to a purchaser who paid the purchase price in a once-off payment. The CC held that the differentiation by the *Land Act* between instalment-sale purchasers and purchasers such as the applicant infringed the right to equality before the law and the equal protection of the law. The differentiation also infringed the applicant's constitutional right of access to adequate housing (section 26).⁷

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¹ *Sarrahwitz v Maritz* 2015 8 BCLR 925 (CC) (hereafter *Sarrahwitz*).

² *Alienation of Land Act* 68 of 1981 (hereafter the *Land Act*).

³ *Sarrahwitz* par 69.

⁴ *Gordon v Standard Merchant Bank Ltd* 1980 2 All SA 213 (C) 215, 219-220 (hereafter *Gordon*). Also see *Harris v Trustee of Buissinne* (1828-1849) 2 Menz 106, 108, 109 (hereafter *Harris*).

⁵ Before amendment in terms of the CC's judgment in *Sarrahwitz*, "contract" was defined in s 1 of the *Land Act* as "a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year". It furthermore "includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take".

⁶ Section 22(1) of the *Land Act*. The purchaser, however, must arrange for the payment of certain costs as set out in s 22(1) and s 22(2).

⁷ *Sarrahwitz* pars 66-68.

Homelessness and inequality remain major unresolved problems in the South African society despite the protection afforded by the *Constitution*⁸ to the rights to equality (section 9) and access to adequate housing (section 26). *Sarrahwitz*⁹ confirms that the realisation of these rights underpins the right to human dignity (section 10). This decision shows that the CC, as the guardian of the Bill of Rights, can be expected to embrace every opportunity to combat and prevent both homelessness and inequality.

This contribution critically analyses the view of the majority judgment that uninformed, financially constrained purchasers, vulnerable because they face homelessness, should fall within the ambit of sections 21 and 22 of the *Land Act* irrespective of the method of payment of the purchase price.¹⁰ It is argued that the legislator made patent provision for the protection of instalment-sale purchasers, to the exclusion of other purchasers, for a specific reason. It is also argued that the *Land Act* in general and sections 21 and 22 in particular essentially deal with the transfer of property. These legislative provisions are, therefore, not suitable to give effect to section 26 of the *Constitution* either by providing housing or avoiding illegal eviction. The right to claim transfer - as a possible section 25 property right¹¹ - ought to be distinguished from the right to access to adequate housing and the right not to be evicted without a court order as provided for under section 26 of the *Constitution*. Moreover, as was argued in the minority judgment, suitable legislation to protect against homelessness already exists. By applying the *Prevention of Illegal Eviction and Unlawful Occupation Act*,¹² the trustee's discretion would have been aligned with the values that underlie the *Constitution*.¹³

This contribution also considers the role of section 39(2) of the *Constitution* and contemplates how the CC should have considered the development of the common law in this case.¹⁴

⁸ *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

⁹ *Sarrahwitz* par 42; *Jaftha v Schoeman; Van Rooyen v Stolz* 2005 2 SA 140 (CC) (hereafter *Jaftha*); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter *Grootboom*).

¹⁰ *Sarrahwitz* pars 34-39.

¹¹ See the discussion at 5 below.

¹² *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (hereafter PIE).

¹³ In compliance with s 39(2) of the *Constitution*, which provides that every court, tribunal or forum must promote the values and purpose of the Bill of Rights when it interprets legislation or develops the common law or customary law.

¹⁴ See fn 13 above.

2 Facts

Sarrahwitz was a poor woman who, when the matter was heard, was unemployed and headed a household comprising her daughter and granddaughter. She entered into a written deed of sale with Reynier Posthumus (hereafter Posthumus) on 17 September 2002 in terms of which she purchased a property in Booyens Park, Port Elizabeth (hereafter the property). She took occupation of the property on 1 October 2002 and paid R 40 000 as the full purchase price, which she borrowed from her employer. Posthumus undertook to arrange for transfer into her name. After countless attempts to follow up with the attorneys appointed by Posthumus, and more than a year after the deed of sale was entered into, Sarrahwitz had still not received any feedback.¹⁵

In 2005 Sarrahwitz instructed attorneys to determine the reason for the delay in the transfer. It transpired that while Posthumus had signed all the transfer documents his municipal accounts were in arrears. As a result, the municipal rates clearance certificate could not be issued, barring the transfer of the property. Sarrahwitz paid the outstanding amount in instalments, but instead of crediting the payments against the municipal account for the property Sarrahwitz had purchased, the payments were credited to the accounts of other properties owned by Posthumus.¹⁶

Posthumus's estate was sequestrated on 18 April 2006 and Maritz, the respondent in this case, was appointed as the trustee (hereafter the Trustee) of the insolvent estate. On various occasions Sarrahwitz attempted to have the Trustee authorise the transfer of the property. Having been unsuccessful, she launched an application in the Eastern Cape High Court (hereafter the HC) in 2012, seeking an order directing the Trustee to perform in terms of the deed of sale and to have the property transferred into her name in terms of sections 21 and 22 of the *Land Act*.¹⁷ The HC held that the *Land Act* was not applicable and that transfer had to take place in terms of the common law, providing the Trustee with the prerogative to cancel the sale agreement.¹⁸

Sarrahwitz then applied for leave to appeal to the full bench of the HC and the Supreme Court of Appeal (hereafter the SCA). It was only at this stage

¹⁵ Sarrahwitz par 5.

¹⁶ Sarrahwitz pars 6, 7.

¹⁷ Sarrahwitz v Maritz 2013 ZAECGHC 10 (7 February 2013).

¹⁸ Sarrahwitz v Maritz 2013 ZAECGHC 10 (7 February 2013) par 14. Also see Sarrahwitz par 9.

that she argued for the development of the common law based on certain constitutional grounds.¹⁹ She was denied leave to appeal because the Trustee, the HC and SCA had not had the opportunity to consider the arguments based on the development of the common law. Sarrahwitz subsequently made an application to the CC.²⁰

Mogoeng CJ's majority judgment found in favour of Sarrahwitz. The CC held that the exclusion by the *Land Act* of the transfer of a house from an insolvent estate to a vulnerable purchaser such as Sarrahwitz, who had paid for it within one year, was unconstitutional and accordingly invalid. The decision was made because this exclusion caused the homelessness of a vulnerable person such as Sarrahwitz.²¹ The CC held that sections 21 and 22 of the *Land Act* irrationally differentiated between a person in Sarrahwitz's position and an instalment-sale purchaser. In the court's view, the differentiation justified the severance and reading-in of words into the *Land Act* to address the constitutional invalidity.²²

The discussion of the CC's approach to the *Land Act* and the manner in which it has been amended is preceded by a brief outline of the history and purpose of the *Land Act*.

3 The Alienation of Land Act

3.1 Introduction

Sarrahwitz was prevented from taking transfer of the property for a period of four years until the seller's estate was sequestrated. One can agree with the underlying sentiment expressed in the judgment that the *Constitution* should somehow come to the aid of a person such as Sarrahwitz. However, it is argued that the amendment of the *Land Act* was not necessarily a suitable remedy. Mogoeng CJ confirmed that the matter pivoted on "vulnerability and homelessness" and used these notions to justify the amendment of the *Land Act* to assist Sarrahwitz.²³ Two questions arise in this regard: What kind of vulnerability are the protective measures of the *Land Act* aimed at and does the purpose of the *Land Act* include the prevention of homelessness? Both questions involve determining the reason why the impugned sections of the *Land Act* applied to instalment-

¹⁹ *Sarrahwitz* par 10 fn 5. The challenge was based on ss 9-10, 25-26 and 33 of the *Constitution*.

²⁰ *Sarrahwitz* par 11.

²¹ *Sarrahwitz* pars 67-68.

²² *Sarrahwitz* par 70.

²³ *Sarrahwitz* par 1.

sale purchasers only, and not to purchasers who paid the full purchase price in a one-off payment.

The judgment needs to be investigated for the effect it has on the operation of the *Land Act* and the jurisprudence it creates. Therefore, the history and purpose of the *Land Act*, specifically sections 21 and 22, as well as the context within which the *Land Act* and its predecessors were created, is described. The CC's reason for focussing on the *Land Act* as providing Sarrahwitz with a remedy is considered. In this regard, the difference between the forfeiture of a right to take transfer of a property and homelessness is discussed and the possible effects of the amendment ordered are examined.

3.2 History and purpose of the Land Act

The *Land Act* has its origins in the *General Law Amendment Act*,²⁴ which was the first statute to prescribe formalities for the sale of land in all four provinces.²⁵ At that time, purchasers of land on instalments acquired protection in terms of section 72 of the *Insolvency Act* of 1916.²⁶ To enforce this provision, an instalment-sale purchaser had to have paid a substantial part of the purchase price while the seller was still solvent. The instalment-sale purchaser, therefore, was not protected against the most substantial risk it faced: that the seller became insolvent before the purchaser became entitled to claim transfer of the land.²⁷

The *General Law Amendment Act* was repealed by the *Formalities in Respect of Contracts of Sale of Land Act*.²⁸ Both statutes were aimed at preventing disputes relating to the sale of land.²⁹ At that stage, however, the law did not contain real protection for purchasers, as it did not explicitly provide for the consequences of non-compliance with the formalities

²⁴ *General Law Amendment Act* 68 of 1957.

²⁵ Cohen *Section 19 of the Alienation of Land Act* 7-8; Van Rensburg and Treisman *Practitioners' Guide to Alienation of Land Act* 22. Legislation dating before the unification of South Africa in 1910 regulating the formalities for the alienation of land was concerned mostly with the payment of transfer duty. Since the enactment of the *Transfer Duty Act* 40 of 1949, however, fiscal matters and the formalities for the alienation of land have been regulated in separate legislation.

²⁶ *Insolvency Act* 39 of 1916. The *Insolvency Act* 24 of 1936 did not repeal this section initially. Cohen *Section 19 of the Alienation of Land Act* 11-12

²⁷ Cohen *Section 19 of the Alienation of Land Act* 12.

²⁸ *Formalities in Respect of Contracts of Sale of Land Act* 71 of 1969 (hereafter *Formalities Act*).

²⁹ Cohen *Section 19 of the Alienation of Land Act* 15.

prescribed.³⁰ Moreover, it did not provide for purchasers paying in instalments who were unable to obtain transfer when the seller became insolvent.³¹

During the 1960s South Africa's economy experienced increased growth,³² which created a greater demand for township development and a resultant increase in the use of instalment-sale agreements.³³ Instalment-sale agreements were often opted for because of the difficulty of acquiring finance for purchasing property.³⁴ Many new entrants into the market were not necessarily aware of the risks associated with instalment-sale agreements.³⁵ Standard forms of contracts were used that did not provide protection for purchasers.³⁶ The *Instalments Act* was subsequently enacted in 1971.³⁷ Its long title read 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.³⁸

In line with Brand AJ's depiction of the *Land Act* and its predecessor as consumer protection legislation in *Merry Hill (Pty) Ltd v Engelbrecht*,³⁹ the purpose of the *Instalments Act* has been compared to that ascribed to the

³⁰ Cohen *Section 19 of the Alienation of Land Act* 16; Van Rensburg and Treisman *Practitioners' Guide to the Alienation of Land Act* 73.

³¹ Cohen *Section 19 of the Alienation of Land Act* 17.

³² Natrass and Seekings "Economy and Poverty"; De Vynck 2003 http://www.rode.co.za/publications/demos/RT_2003-1_-_07_-_Property_C.pdf.

³³ Cohen *Section 19 of the Alienation of Land Act* 14.

³⁴ Brummer 1993 http://www.housingfinance.org/uploads/Publicationsmanager/9306_Sou.pdf. At that point, mortgage finance could be obtained from a building society. Unlike banks, building societies are mutual institutions, meaning that the persons using the services of the society are also members of the society. Barclays, a commercial bank, started providing mortgage finance in South Africa only after the mid-1960's, which meant the end of building societies. Verhoef "Financial Intermediaries in Settler Economies" 424.

³⁵ Van Rensburg and Treisman *Practitioners' Guide to the Alienation of Land Act* 4-5. As illustrated in *Sarrahwitz*, the common-law principle providing the trustee of the insolvent estate with the discretion to abide by the instalment-sale agreement or not puts the purchaser in a precarious position.

³⁶ Cohen *Section 19 of the Alienation of Land Act* 15.

³⁷ *Sale of Land on Instalments Act* 72 of 1971 (hereafter *Instalments Act*). Cohen *Section 19 of the Alienation of Land Act* 16; Van Rensburg and Treisman *Practitioners' Guide to Alienation of Land Act* 4.

³⁸ Cohen *Section 19 of the Alienation of Land Act* 17.

³⁹ *Merry Hill (Pty) Ltd v Engelbrecht* 2008 2 SA 544 (SCA) par 13 (hereafter *Merry Hill*). On the Act's being depicted as consumer-protection legislation, see further 3.3 below.

*Hire Purchase Act*⁴⁰ by Millin J in *Smit and Venter v Fourie*,⁴¹ namely to protect against

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.

The *Instalments Act* contained section 14, which specifically protected the rights of the instalment-sale purchaser where the seller became insolvent⁴² in the same manner that sections 21 and 22 of the *Land Act* do.⁴³ It also made provision for the recording of the contract⁴⁴ by the Registrar of Deeds, providing the purchaser with a preferential claim in respect of the proceeds from the sale of land in the event of a sale in execution due to the insolvency of the seller.⁴⁵

The *Instalments Act* was not without its problems, however,⁴⁶ and was amended on a number of occasions.⁴⁷ The legislation faced its most challenging test when the property industry experienced a significant downward turn in the 1970s,⁴⁸ causing the collapse of many township-development companies.⁴⁹ It became evident that the *Instalments Act* was not able to fulfil its purpose, which was to protect purchasers against abuse by large property developers.⁵⁰ In 1982 it was repealed by the *Land Act*⁵¹

⁴⁰ *Hire Purchase Act* 36 of 1942.

⁴¹ *Smit and Venter v Fourie* 1946 WLD 9; Cohen *Section 19 of the Alienation of Land Act* 17.

⁴² Cohen *Section 19 of the Alienation of Land Act* 18; Van Rensburg and Treisman *Practitioners' Guide to the Alienation of Land Act* 6.

⁴³ Sarrahwitz par 36.

⁴⁴ Section 20 of the *Instalments Act*.

⁴⁵ Cohen *Section 19 of the Alienation of Land Act* 19.

⁴⁶ *Botha v Rich* 2014 4 SA 124 (CC) (hereafter *Botha*) par 30.

⁴⁷ Van Rensburg and Treisman *Practitioners' Guide to the Alienation of Land Act* 1. The *Instalments Act* was amended almost immediately after coming into effect by Act 72 of 1972 to rectify certain drafting errors. A further *Amendment Act* 49 of 1975 replaced eight of the sections of the original *Instalments Act*.

⁴⁸ Cohen *Section 19 of the Alienation of Land Act* 21; Van Rensburg and Treisman *Practitioners' Guide to the Alienation of Land Act* 2.

⁴⁹ *Botha* par 30.

⁵⁰ Cohen *Section 19 of the Alienation of Land Act* 21; Van Rensburg and Treisman *Practitioners' Guide to the Alienation of Land Act* 2, 7-9. Also see Otto 2010 *Fundamina* 266.

⁵¹ The discussion on the *Land Act* which follows refers to the Act before the amendments were made in terms of Sarrahwitz.

as a result of the recommendations of a commission of inquiry appointed to investigate its efficacy.⁵²

The preamble of the *Land Act* determines that its purpose is:

(T)o regulate the alienation of land in certain circumstances and to provide for matters connected therewith.

"Alienate" is defined as to sell, exchange or donate land irrespective of the sale, exchange or donation being subject to a suspensive or resolutive condition.⁵³ The meaning of "land" depends on the relevant chapter of the *Land Act*. In other words, not all the chapters of the *Land Act* are applicable to all the categories of land. For the purposes of Chapter II - that contains sections 21 and 22 - land refers mainly to land used for residential purposes, as was also confirmed by Mogoeng CJ in *Sarrahwitz*.⁵⁴ The meaning of "certain circumstances" in the preamble to the *Land Act*, therefore, will depend on the chapter of the *Land Act* that is relevant.

Since the preamble to the *Instalments Act* (and its title) made specific mention of instalment-purchase agreements, it follows that the ambit of the *Land Act* is broader than that of the *Instalments Act*. The distinction between an instalment sale and a once-off payment sale, however, remains.

The *Land Act* differentiates between a "deed of alienation" and a "contract".⁵⁵ A "deed of alienation" is a document or documents in terms of which land is alienated. A "contract" is a deed of alienation whereby the purchase price is paid in more than two instalments over a period exceeding one year.⁵⁶ Thus, whereas a contract is always a deed of alienation, a deed of alienation is not always a contract. The provisions of the *Land Act* referring to a deed of alienation, therefore, will include contracts. Where the *Land Act* specifically refers to contracts, the provision will however be applicable only to a "contract"; namely, where the purchase price is paid in more than two instalments over a period exceeding one year.

The structure of the *Land Act* also confirms this differentiation. Chapter I deals with the formalities in respect of the deed of alienation that would

⁵² Botha par 31; Van Rensburg and Treisman *Practitioners' Guide to the Alienation of Land Act 2*. The *Development Schemes Bill* (GN 1964 in GG 5745 of 23 September 1977) attempted to address the inadequacies of the *Instalments Act*. The Commission of Inquiry into the *Development Schemes Bill* was created to investigate the subject matter of the bill and the *Land Act* was the result of these investigations.

⁵³ Section 1(1) of the *Land Act*.

⁵⁴ Section 1(1) of the *Land Act*, definition of "land"; *Sarrahwitz* par 34.

⁵⁵ Section 1(1) of the *Land Act*.

⁵⁶ The definition as it was before the amendments ordered in *Sarrahwitz*.

include a "contract". Chapter II's heading states that it deals with the sale of land on instalments, yet throughout the chapter, reference is made to a contract. Consequently, only contracts, or instalment sales, will fall within the ambit of Chapter II.⁵⁷

Section 20 determines that a contract must be recorded by the registrar of deeds within a certain time. If a contract is recorded, the registrar may not register the transfer of land to which the contract relates to any person other than the purchaser.⁵⁸ The recording of a contract also provides the purchaser with a preferential claim in certain instances regarding the proceeds of the sale of the land to which the contract relates.⁵⁹ Sections 21 and 22 provide protection for persons who purchase land in terms of a contract where the land becomes attached or the owner becomes insolvent.

Chapter III includes general provisions, which pertain to deeds of alienation. Section 27, which forms part of Chapter III, provides for the right of the purchaser who has paid at least 50 per cent of the purchase price to demand from the seller the transfer of the land.⁶⁰

The legislative development leading up to the *Land Act* and the current structure of the *Land Act* articulate a certain kind of vulnerability that the legislator attempted to protect. In *Botha v Rich*,⁶¹ the only other case that required the interpretation of the *Land Act* by the CC, Nkabinde J considered the background and reason for the enactment of the Act.⁶² She concluded that the *Land Act*, and specifically section 27(1), is aimed at the protection of the rights of a purchaser who has paid the purchase price for immovable property in part.⁶³

The structure provided by the *Land Act* is still often used by property developers to earn interest on their capital investment or to pay off a

⁵⁷ Van Rensburg and Treisman *Practitioners' Guide to the Alienation of Land Act* 91 confirms that the objective of Chapter II is to afford instalment-sale purchasers protection against the hardships caused for such purchasers, specifically where the seller becomes insolvent or if the land is attached by a judgment creditor of the owner.

⁵⁸ Section 20(2)(b) of the *Land Act*.

⁵⁹ Section 20 of the *Land Act*.

⁶⁰ Section 27 of the *Land Act*.

⁶¹ *Botha v Rich* 2014 4 SA 124 (CC). The CC had to interpret s 27 of the *Land Act*. It provides for the right of a purchaser to demand transfer of the land purchased and paid for in instalments, if it has paid not less than 50 per cent of the purchase price.

⁶² *Botha* pars 30-31.

⁶³ *Botha* par 40. Nkabinde J confirmed that the "(Land) Act is premised on an instalment-sale agreement of immovable property between a purchaser and seller".

development bond where a development takes place in phases.⁶⁴ Purchasers opt for purchasing property in terms of instalment-sale agreements when finance cannot be obtained from a commercial bank due to the stringent requirements of the *National Credit Act* 34 of 2005, or if sufficient cash for a deposit required by a commercial bank before finance is provided is unavailable.⁶⁵ The *Land Act* and the instalment-sale mechanism it provides, therefore, serve an important purpose today still, to provide access to the property market to many who would otherwise not be able to enter it.⁶⁶

3.3 *The CC's approach to the Land Act*

In *Sarrahwitz Mogoeng CJ* bases his understanding of the vulnerability for which the Land Act provides on *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation)*⁶⁷ and *Merry Hill*.⁶⁸ These cases refer specifically to "contracts" as defined in the *Instalments Act*⁶⁹ and *Land Act*⁷⁰ respectively, namely contracts in terms of which the purchase price is paid in at least two instalments over a period of longer than a year. Although both *Glen Anil*⁷¹ and *Merry Hill*⁷² refer to the hardship and misfortune coupled with losing a residential stand, it seems as if these cases associate the unfortunate consequences of the common-law provision specifically with instalment-sale purchasers.

In *Glen Anil*, Trengove AJ scrutinised section 14 of the *Instalments Act*. According to him, the "mischief" at which it was directed was to avoid the hardship and misfortune suffered by the purchasers of residential property because of the common law (as it was before the enactment of the *Instalments Act*).⁷³ The common law caused an instalment-sale purchaser to be at risk of losing the land and the instalments already paid where the

⁶⁴ Krüger *Instalment Sales Agreement* 48, 49.

⁶⁵ Krüger *Instalment Sales Agreement* 15, 41.

⁶⁶ See in general Krüger *Instalment Sales Agreement*.

⁶⁷ *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation)* 1981 1 SA 171 (A) (hereafter *Glen Anil*); *Sarrahwitz* par 36. In *Glen Anil* the court had to determine the rights and duties of a cessionary of the rights of an owner of land subject to a deed of sale falling within the definition of a "contract" provided for in the *Instalments Act*.

⁶⁸ *Sarrahwitz* par 37.

⁶⁹ In *Glen Anil*.

⁷⁰ In *Merry Hill*.

⁷¹ *Glen Anil* 183F-H.

⁷² *Merry Hill* par 13.

⁷³ *Glen Anil* 183G; *Sarrahwitz* par 36. In *Glen Anil* the court had to determine the rights and duties of a cessionary of the rights of an owner of land subject to a deed of sale falling within the definition of a "contract" provided for in the *Instalments Act*.

seller of the land became insolvent or where the relevant land was sold in execution.⁷⁴ Trengove AJ found that Parliament changed the law with the intention to provide for contracts where land to be used for residential purposes⁷⁵ was sold and the purchase price paid in more than two instalments over a period of more than one year.⁷⁶ Mogoeng CJ agreed with Trengove AJ's description of the "mischief" at which the Instalments Act was directed.⁷⁷ However, he only emphasised the section speaking to the use of the property purchased for residential purposes – no mention is made of the fact that Trengove AJ's argument also pertained specifically to instalment-sale purchasers.⁷⁸

In *Merry Hill* Brand AJ held that Chapter II of the *Land Act*, containing sections 21 and 22, specifically protects a purchaser paying in instalments for land to be used for residential purposes.⁷⁹ He described the Act as "consumer protection legislation" that ought to protect "the vulnerable, uninformed small buyer of residential property who is no match for the large developer in a bargaining situation".⁸⁰

Consequently, the *Land Act* can be compared with legislation such as the *Consumer Protection Act*,⁸¹ the *National Credit Act*,⁸² the *Rental Housing Act*⁸³ and other consumer protection legislation.⁸⁴ Each of these statutes identifies a specific "consumer", usually based on such a person's vulnerable position because of the nature of the transaction it enters into and its potential lack of knowledge.⁸⁵ Consumer protection legislation serves to protect consumers against exploitation by the industry to which the specific legislation applies.⁸⁶ The *National Credit Act* and the *Consumer*

⁷⁴ *Glen Anil* 183F-H; *Sarrahwitz* par 36.

⁷⁵ Section 1 of the *Instalments Act*, definition of "land".

⁷⁶ *Glen Anil* 183H.

⁷⁷ *Sarrahwitz* par 38; s 1 of the *Instalments Act*, definition of "land".

⁷⁸ *Sarrahwitz* par 36.

⁷⁹ *Merry Hill* par 13. Brand AJ also referred to Trengove JA in *Glen Anil*.

⁸⁰ *Merry Hill* par 13.

⁸¹ *Consumer Protection Act* 68 of 2008.

⁸² *National Credit Act* 34 of 2005.

⁸³ *Rental Housing Act* 50 of 1999.

⁸⁴ The *Long Term Insurance Act* 52 of 1998 and the *Short Term Insurance Act* 53 of 1998.

⁸⁵ *Woker* 2010 *Obiter* 226; *Otto* 2010 *Fundamina* 266. An instalment-sale purchaser is, for instance, a consumer protected in terms of the *Land Act* against, amongst other things, unfair contract terms, abuses and malpractices similar to those to which hire-purchasers have been subjected, and the insolvency or liquidation of the seller.

⁸⁶ For instance, in terms of s 3 of the *National Credit Act* the purposes of the Act include, amongst other aspects, "addressing and correcting imbalances in negotiating power between consumers and credit providers" ((3)(e)), "improving consumer credit

Protection Act, were introduced after the enactment of the *Constitution* and operate from a basis of constitutional values.⁸⁷ Nevertheless, these acts cannot protect against vulnerability in the broadest sense possible. Each of them identifies a specific consumer who is vulnerable in a specific manner, and lays down mechanisms to protect the rights afforded to such a consumer.

The authors agree with Mogoeng CJ that the "uninformed small buyer" referred to by Brand AJ in *Merry Hill* may "have spent the little money they had to secure residential property, in terms of an instalment-sale agreement, when the seller of that property became insolvent" and may very well be a "vulnerable and financially constrained buyer".⁸⁸ Is there not, however, a specific risk the instalment-sale purchaser faces that creates a specific kind of vulnerability the *Land Act* wishes to address? A purchaser paying the purchase price for land in instalments faces a risk that is different from a purchaser paying the purchase price in one lump sum. Whereas a lump-sum purchaser can claim transfer immediately after payment of the purchase price, years can go by before an instalment-sale purchaser has paid all the instalments and becomes eligible to take transfer.⁸⁹ The chances of the seller's becoming insolvent during the period between entering into the sale agreement and the payment of the final instalment are therefore bigger than in the case of a lump-sum purchaser. A lump sum or cash purchaser can claim transfer upon payment, thereby mitigating the risk of being exposed to the seller's insolvency.⁹⁰ Clearly, an instalment purchaser requires specific protection that a purchaser making a lump-sum payment does not necessarily require.

information" and "addressing and preventing over-indebtedness of consumers" ((3(g)).

⁸⁷ Chapter 2 of the *Consumer Protection Act* provides for the consumer's fundamental rights and s 8(1) refers to the right to equality protected in terms of s 9 of the *Constitution*. The *National Credit Act* acknowledges historically disadvantaged persons, disadvantaged by unfair discrimination on the basis of race, in so far as it relates to the credit industry, and refers to the *Constitution* in this regard in s 2(6).

⁸⁸ *Sarrahwitz* par 38.

⁸⁹ In terms of the *Land Act*, a transaction will qualify as a "contract" if payments are made over more than one year. It can therefore be assumed that the period over which instalments are paid will be longer than one year.

⁹⁰ Van Rensburg and Treisman *Practitioners' Guide to the Alienation of Land Act* 183; *Ghandi v SMP Properties (Pty) Ltd* 1983 1 SA 1154 (D) pars 1157F-1158E confirmed that if a contract determines that a purchase price is payable in cash, the purchaser will effect payment of the purchase price against the transfer of the land into the purchaser's name, except if the contract includes a provision which explicitly provides to the contrary. The obligation of the purchaser may be fulfilled by providing the seller with an acceptable guarantee.

It could be argued, however, that once the seller does, in fact, become insolvent and transfer has not yet taken place, the lump-sum purchaser is in the same or even worse position than the instalment-sale purchaser. Upon the insolvency of the seller, the lump-sum purchaser stands to lose not only the opportunity to own the property it has purchased, but also the entire purchase price already paid, as was the case in *Sarrahwitz*.

Could the latter argument then justify extending the protection of Chapter II of the *Land Act* to a vulnerable lump-sum purchaser? It has to be emphasised once again that Chapter II of the *Land Act* is a response to a specific situation where purchasers cannot obtain finance to purchase property.⁹¹ The structure of Chapter II, therefore, is aimed at instalment-sale purchases. To extend the protection provided for in Chapter II to a purchaser in Sarrahwitz's situation would be nonsensical, as is explained in section 3.4 below. If the *Land Act* is to provide for lump-sum purchasers as well, it cannot do so in Chapter II. Qualifying the inclusion to pertain to a purchaser who is able to pay the entire purchase price "within one year of the contract"⁹² and who would face homelessness because of the seller's insolvency⁹³ also does not justify an extension. As will be argued in section 5 below, the legislation in place to prevent homelessness will be more suitable to provide protection to someone in Sarrahwitz's situation.

It can be argued further that while the CC in its majority decision has broadened the purpose of the *Land Act* by making provision for vulnerable lump-sum purchasers, it has simultaneously narrowed the purpose of the *Land Act*. Mogoeng CJ argues that the purpose of the *Land Act* could never have been to protect all instalment-sale purchasers, irrespective of their financial situation.⁹⁴ The protection the *Land Act* affords is meant only for "vulnerable people who have no other place they could call home or lack the resources to acquire another".⁹⁵ Is it possible, however, for the CC to reformulate the purpose of the *Land Act* in this manner? Firstly, by providing for instalment-sale purchasers Chapter II of the *Land Act* already caters for persons with limited financial means, who cannot obtain finance to purchase property. As indicated earlier, it is quite clear that the *Land Act* provides for a specific kind of vulnerability that instalment-sale purchasers face.

⁹¹ See s 3.2 above.

⁹² The definition of "contract" was amended to include "residential property paid for in full within one year of the contract, by a vulnerable purchaser" at the end of paragraph (a).

⁹³ The definition of "vulnerable purchaser".

⁹⁴ *Sarrahwitz* par 35.

⁹⁵ *Sarrahwitz* par 35.

Secondly, to argue that homelessness justifies the reformulation of the purpose of the *Land Act* is also problematic, as is discussed below.

While Mogoeng CJ indicated that "a contextual and purposive interpretation" of the *Land Act* identifies its purpose, he considered the legislative history of the *Land Act* only as it had been dealt with in *Glen Anil* and *Merry Hill*.⁹⁶ He did not attempt to describe the structure of the *Land Act* or sections 21 and 22, or the context within which the *Land Act* and the sections came into being. These aspects all clearly show an intention to provide specifically for instalment-sale purchasers. It is equally surprising that *Botha v Rich*,⁹⁷ the only other case that required the CC to interpret the *Land Act*, was not referred to, especially in view of the fact that the CC had emphasised the importance of the purpose and background of the *Land Act*, and that its legislative history could assist in interpreting the impugned legislative provision.⁹⁸

It is submitted that the CC should have performed a deeper analysis of the purpose of the *Land Act*, the policy considerations that resulted in its (and its predecessors') creation, and the vulnerability for which the *Land Act* provides. Only then would the CC have been qualified to consider extending the scope of the *Land Act* in the manner it did in *Sarrahwitz*.

3.4 Effect of the amendment ordered by the CC

The CC ordered that certain words be severed from and others read into the *Land Act*.⁹⁹ These amendments took effect on 4 June 2015. Mogoeng CJ held that the remedy should not "seek to determine an exhaustive list of instances to be accommodated" but had to be "flexible and applicable to diverse purchasing options left out of the *Land Act*'s protection".¹⁰⁰ Without providing any guidance on the practical effect thereof in future and in the case of *Sarrahwitz*, Mogoeng CJ also held that regard had to be given to the interests of the creditors of the sequestrated estate.¹⁰¹

The *Land Act* was accordingly amended as follows: The definition of "contract" was amended by adding the words "including residential property

⁹⁶ *Sarrahwitz* par 39.

⁹⁷ The CC had to interpret s 27 of the *Land Act*. It provides for the right of a purchaser to demand the transfer of the land purchased and paid for in instalments, if it has paid not less than 50 per cent of the purchase price.

⁹⁸ *Botha* par 29; Van Rensburg and Treisman *Practitioners' Guide to Alienation of Land Act*.

⁹⁹ *Sarrahwitz* pars 70-78.

¹⁰⁰ *Sarrahwitz* par 73.

¹⁰¹ *Sarrahwitz* par 73.

paid for in full within one year of the contract, by a vulnerable purchaser" to the end of paragraph (a) of the definition.¹⁰² Section 1 now includes the definition of "vulnerable purchaser" as "a purchaser who runs the risk of being rendered homeless by a seller's insolvency". Chapter II was amended by the removal of the words "on instalments" in the title of the chapter, to now read: "Sale of Land", indicating that the chapter no longer exclusively deals with instalment-sale agreements. Section 4 was amended by adding subsection (2) which reads:

Sections 21(2) and 22 shall, however, apply, with the necessary changes, to a deed of alienation in terms of which a vulnerable purchaser of residential property paid the full purchase price within one year of the contract, before the seller's insolvency.¹⁰³

As a result, Chapter II now regulates the transaction entered into by a vulnerable purchaser with a seller where the purchase price is paid over a period of less than one year, because such a transaction is included in the definition of "contract". It is uncertain, however, why the new section 4(2) is necessary. Does section 4(2) imply that the transaction of the vulnerable purchaser paying the purchase price in less than one year is regarded as a contract for the purposes of sections 21(2) and 22 only, and not for the purposes of the rest of Chapter II? Alternatively, is section 4(2) an exception to the position reflected in section 4(1)?¹⁰⁴ Why does section 4(2) speak of the "deed of alienation" entered into by the vulnerable person if the definition of contract includes this type of deed of alienation?

The definition of a "vulnerable purchaser" causes a further complication. It is not clear at which point the purchaser will qualify as vulnerable or when it must be assessed if the purchaser is in fact vulnerable. Should a basic financial means test be performed upon entering into the contract and whose responsibility is it to ensure that this assessment is performed? The *Land Act* does not at present provide for this. Alternatively, it may be that sections 21(2) and 22 become applicable only if it becomes apparent upon the impending insolvency of the seller that the purchaser is vulnerable (because he or she risks becoming homeless). In other words, the pending

¹⁰² Sarrahwitz par 74.

¹⁰³ Sarrahwitz par 77.

¹⁰⁴ Section 4(1) determines that Chapter II is not applicable to contracts in terms of which the state, the Community Development Board established in terms of the *Community Development Act* 3 of 1966, the National Housing Commission mentioned in s 5 of the *Housing Act* 4 of 1966 or the local authority is the seller. The *Housing Act* of 1966 has been repealed and the *Land Act* does not refer to the *Housing Act* 107 of 1997, which is based on s 26 of the *Constitution* and deals with the housing development process.

insolvency may be the event triggering the application of the *Land Act*. The latter interpretation is probably more accurate, if we take into consideration that the order of the CC is based on the failure of the *Land Act* to provide for the transfer of the property from the insolvent estate to avoid homelessness.

It is then not clear why the vulnerable purchaser's transaction is included as a contract. Without an explicit indication to the contrary, it must be accepted that the entire Chapter II (and any other provision of the *Land Act* dealing with contracts) will be applicable to the vulnerable purchaser's transaction. On the latter assumption, section 20 of the *Land Act* would then also be applicable. As a result, the seller must see to the recording of the contract at the Registrar of Deeds within a period of 90 days of the contract. In *Sarrahwitz* this would have been absurd because at that stage she was already entitled to take transfer of the property. It may therefore not make sense if Chapter II in its entirety applies to a vulnerable purchaser.

The argument that a lump-sum purchaser should be included within the ambit of the *Land Act* because it faces an even bigger risk than the instalment-sale purchaser faces upon the insolvency of the seller, therefore, cannot stand. The structure of Chapter II is clearly aimed at an instalment-sale purchaser, and incorporating lump-sum purchasers by merely tweaking definitions does not change this fact. It actually creates uncertainty as to how the act should be implemented. If the CC wished to redefine the purpose of the act by changing the purpose from regulating the alienation of land to preventing homelessness, it would have made more sense to provide a separate provision regulating such instances. Moreover, it can be asked if it is suitable for the CC to partake in such a redefinition exercise, given that there is legislation in place to protect against homelessness.

The minority judgment pointed out that by extending the protection provided by the *Land Act*, as was done by the majority judgment, the potential for more differentiation and possibly even discrimination was created.¹⁰⁵ For example: A purchaser, making a once-off payment for a property who struggles to obtain transfer of the property because of a delay on the part of the seller, but who does not necessarily face homelessness as a result of the insolvency of the purchaser will be excluded from the protection of the amended *Land Act*. This purchaser may also have expended all available financial means to purchase the property but may be able to acquire assistance from a family member to avoid homelessness. If the purpose of

¹⁰⁵ *Sarrahwitz* par 86.

the *Land Act* is considered,¹⁰⁶ the differentiation between the latter type of purchaser and one such as Sarrahwitz cannot be justified purely because the first mentioned purchaser does not technically face homelessness.

The amendments create many questions, not all of which can be considered here. These questions not only point to the uncertainty caused by the amendments but also emphasise the fact that the amendment of the *Land Act* was not the suitable remedy here. Perhaps it is not the *Land Act* that caused Sarrahwitz's unfortunate position, but rather the common law. The next section interrogates issues around the development of the common law.

4 The common law

Mogoeng CJ regarded Sarrahwitz's application to have the common law developed as a "desperation-born attempt" and aligned it with the proposal of the Minister of Trade and Industry to amend the *Land Act* by showing that her case had always been about the proper interpretation of sections 21 and 22.¹⁰⁷ Consequently, the CC did not deal with the particulars of Sarrahwitz's application for the development of the common law. It considered neither the purpose of the common law principle nor whether it is unconstitutional for the reasons alleged by Sarrahwitz. The CC furthermore did not consider how and if the common law principle could possibly be developed.

It is submitted that it is the common law principle that could violate Sarrahwitz's right to access to adequate housing and her right to take transfer of the property she had purchased. If it is accepted that the *Land Act* causes differentiation for a legitimate purpose, which does not include protection against homelessness, it also follows that it is not necessarily the *Land Act* that caused Sarrahwitz to face homelessness. The common law principle, which affords the trustee of an insolvent estate the discretion to cancel the sale agreement,¹⁰⁸ seems to be the more obvious culprit, and requires consideration.

Sarrahwitz also realised this after her application based on sections 21 and 22 was denied by the HC.¹⁰⁹ She subsequently based her case before the CC on the alleged unconstitutionality of the common law for excluding

¹⁰⁶ See 3.3 above.

¹⁰⁷ *Sarrahwitz* pars 10, 26; fn 5.

¹⁰⁸ *Gordon* 219-220. Also see *Harris* 108-109.

¹⁰⁹ *Sarrahwitz* par 9. The High Court held that the common law and not the *Land Act* applied to Sarrahwitz's situation.

someone in her position from a group of purchasers of residential property, who, in spite of the seller's insolvency, is entitled to take transfer of the property purchased.¹¹⁰ She also argued that the alleged unconstitutionality was even more evident from the fact that legislation such as the *Land Act* and its predecessors was enacted to exclude only certain persons from the effects of the common-law position.¹¹¹ Consequently, an entitlement to transfer property from an insolvent seller's estate was conferred on some vulnerable instalment-sale purchasers while leaving purchasers like her unprotected. This differentiation also denied her equal protection and benefit of the law and was inconsistent with the right to equality.¹¹²

If the CC were to have dealt with the application for the development of the common law, it would have done so as a court of first and last instance. Mogoeng CJ acknowledged that the CC would act as such in exceptional circumstances only,¹¹³ but seemingly avoided this situation by directing the focus to the *Land Act*.¹¹⁴ *Sarrahwitz*, however, was not the first time that the CC had had to consider the development of the common law as a court of first instance.¹¹⁵ In *Carmichele v Minister of Safety and Security*¹¹⁶ the CC proceeded as a court of first instance because, although it could have grave disadvantages, the question before it raised issues of considerable importance for the development of common law in line with constitutional values.¹¹⁷ The CC's judgment in *Carmichele* has been lauded for providing a basis for reforming the law and for imagining the *Constitution's* impact on the common law.¹¹⁸ It also confirmed that the court has a "general obligation" to develop the common law in an appropriate manner whenever "it (the common law) ... is deficient in promoting the section 39(2) objectives".¹¹⁹

¹¹⁰ *Sarrahwitz* par 18.

¹¹¹ *Sarrahwitz* par 19.

¹¹² *Sarrahwitz* par 19.

¹¹³ *Sarrahwitz* par 21.

¹¹⁴ *Sarrahwitz* pars 20-21; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) par 52.

¹¹⁵ Dugard 2006 *SAJHR* 266-267, 272-273, 275, 278, 281-282.

¹¹⁶ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) (hereafter *Carmichele*). In this case, the courts *a quo* (the High Court and the Supreme Court of Appeal) failed to consider the development of the common law by broadening the concept of "wrongfulness" in the law of delict in the light of the state's constitutional duty to protect women and children. Davis and Klare 2010 *SAJHR* 413.

¹¹⁷ *Carmichele* par 50.

¹¹⁸ Davis and Klare 2010 *SAJHR* 413, 414.

¹¹⁹ *Carmichele* par 39; Davis and Klare 2010 *SAJHR* 424. S 39(2) provides that every court, tribunal or forum must promote the values and purpose of the Bill of Rights when it interprets legislation or develops the common law or customary law.

Nevertheless, not every common-law problem will necessarily have a specific "transformative" solution to be extracted from the *Constitution's* values.¹²⁰ As Davis and Klare¹²¹ put it, section 39(2) is not an "oracle" and does not determine solutions or remedies, but is rather concerned with how legal problems are framed and which values and sensitivities are considered in addressing these problems.

If, as argued here, the *Land Act* ought not to have been utilised to provide relief for Sarrahwitz, should the CC be criticised for not entertaining the development of the common-law argument? The justification provided for not considering the development of the common law seems rather thin. Mogoeng CJ noted the CC's duty as provided for in section 39(2), but did not indicate whether this duty related to the interpretation of the legislation or the development of the common law.¹²² It was the (unarticulated) policy considerations for the enactment of the *Land Act* and its predecessors referred to by the Minister of Trade and Industry that justified the inclusion of someone in Sarrahwitz's position in the group of purchasers protected by the *Land Act*.¹²³ As a result, Sarrahwitz's argument for the development of the common law was converted into a constitutional attack of the *Land Act*, based on the infringement of section 26 of the *Constitution*, before the argument was discussed in any detail, making it unclear how she proposed that the common law should be developed.

However, in the instance where the infringement of a constitutional right is averred, a litigant cannot directly resort to the relevant provision in the *Constitution* if it means that legislation, enacted to give effect to the constitutional provision would be bypassed.¹²⁴ Furthermore, if there already is legislation enacted to address or remedy a common-law defect, the

¹²⁰ Davis and Klare 2010 *SAJHR* 412.

¹²¹ Davis and Klare 2010 *SAJHR* 412.

¹²² *Sarrahwitz* pars 27-29.

¹²³ *Sarrahwitz* pars 22, 24. By the time that the matter came before the CC, the Trustee had withdrawn from the matter. The submissions of the Minister therefore were the only submissions available for the CC's consideration.

¹²⁴ Van der Walt 2008 *CCR* 100-101; *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) (hereafter *SANDU*) pars 51-52; *Chirwa v Transnet Ltd* 2008 2 SA 24 (CC) (hereafter *Chirwa*) par 59 (Skweyiya J), 69 (Ngcobo J); *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) (hereafter *Sidumo*) par 248.

litigant must rely on the legislative provision concerned and not the common law,¹²⁵ as per the subsidiarity principle.¹²⁶

Applied to Sarrahwitz's case, the subsidiarity principle can work on two levels. First, where the *Land Act* is attacked for creating homelessness and therefore infringing section 26 of the *Constitution*, the subsidiarity principle requires that it be determined whether there is existing legislation that protects against homelessness. If such legislation exists, a claim cannot be made in terms of section 26.¹²⁷ Only if it is argued that such legislation contravenes a constitutional principle can its validity be challenged by directly invoking the relevant constitutional principle.¹²⁸

Second, the subsidiarity principle influences Sarrahwitz's case in the following manner. If legislation has been enacted to protect a constitutional right, the application or development of the common law is excluded.¹²⁹ That is not to say that the common law does not matter. As far as it is consistent with the *Constitution*, it should be used to interpret the relevant legislation in accordance with section 39(2) of the *Constitution*, and therefore to promote the Bill of Rights.¹³⁰

A good example of legislation enacted to protect a constitutional right is the *PIE Act*, as it specifically aims to give effect to section 26(3) of the *Constitution*.¹³¹ Since the judgment very clearly focuses on homelessness, the effect of the subsidiarity principle in Sarrahwitz's case is therefore that the *PIE Act* is the relevant legislation that should have been focused on. The CC, however, did not follow its own jurisprudence¹³² regarding

¹²⁵ Van der Walt 2008 CCR 100-101; *Chirwa* par 23, 103; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) (hereafter *Bato Star*) par 25.

¹²⁶ Van der Walt 2008 CCR 99, 104. Van der Walt refers to Lourens du Plessis' notion of the subsidiarity principle implying that a court will avoid making a decision that can be made by a lower court or will avoid taking a constitutional issue where the issue can be addressed on a non-constitutional basis. See Du Plessis 2000 *Stell LR* 385-394, 388-389.

¹²⁷ *SANDU* pars 51-52; Van der Walt 2008 CCR 100.

¹²⁸ Van der Walt 2008 CCR 101.

¹²⁹ Van der Walt 2008 CCR 103; *Chirwa* par 23; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) par 37; *Bato Star* par 25; *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae)* 2006 2 SA 311 (CC) (hereafter *New Clicks*) par 96.

¹³⁰ Van der Walt 2008 CCR 103.

¹³¹ Van der Walt 2008 CCR 104.

¹³² *SANDU*; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC); *Chirwa*; *Walele v City of Cape Town* 2008 6 SA 129 (CC); *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC); *New Clicks*; *Sidumo*; *Engelbrecht v Road Accident Fund* 2007 6 SA 96 (CC).

subsidiarity. Sarrahwitz's case was based on the argument that the *Land Act* had to protect against homelessness. As has been reiterated throughout this piece, the *Land Act* does not have the purpose of protecting against homelessness. Directing an attack in terms of section 26 against the *Land Act* is therefore contrary to the subsidiarity principle, since the *PIE Act* is the existing legislation to prevent homelessness and give effect to section 26(3) of the *Constitution*. The development of the common law was therefore not necessary.

The manner in which Sarrahwitz framed the legal problem, as relayed by Mogoeng CJ, further confirms that the development of the common law would not have been suitable in this instance. Sarrahwitz argued that the common law excludes someone in her position from the group of persons who can take transfer of a property purchased from a seller who has become insolvent.¹³³ It is difficult to see how the common-law principle itself creates this distinction. In terms of the common law, property sold but not yet transferred, will upon the insolvency of the seller vest in the trustee of the insolvent estate. The trustee acquires the prerogative to either give effect to the sale agreement and to transfer the property to the purchaser or to cancel the agreement. Should a trustee elect to cancel the sale agreement, the purchaser has a concurrent claim against the insolvent estate only for the restitution of the money already paid to the seller and the damages incurred as a result of the breach.¹³⁴ The common law principle provides protection to the creditors of the insolvent estate¹³⁵ and, therefore, does not differentiate between different purchasers. The *Land Act* and its predecessors effectively took a group of purchasers out of the ambit of the common-law provision, but for a specific reason, as has been illustrated above.

The CC acknowledged its duty to approach the court papers of a vulnerable party "with a measure of compassion when it is in the interests of justice to do so".¹³⁶ In doing so, it is possible that the CC realised that it would have been difficult to pursue the development of the common-law argument along the lines set out in Sarrahwitz's application. If the common-law principle does not create different classes of purchasers, can it be challenged for infringing Sarrahwitz's constitutional right to equality and subsequently causing an infringement of her right to access to adequate housing and

¹³³ Sarrahwitz par 18.

¹³⁴ Gordon 215, Harris 108.

¹³⁵ Harris 109.

¹³⁶ Sarrahwitz par 27.

dignity? Considering Davis and Klare's¹³⁷ argument that section 39(2) requires lawyers to consider how legal problems are framed, the CC cannot be faulted on its approach. It did not fixate on Sarrahwitz's reasoning but rather phrased the legal problem in such a manner as to serve the constitutional ideal it had identified as cardinal in the case: the protection of the vulnerable against homelessness.

Nevertheless, there may have been another basis on which the common-law principle could have been approached. While Sarrahwitz's right to equality was not necessarily at stake, her case shows that the common law can cause homelessness if the trustee elects to cancel the sale agreement and attempts to evict the purchaser.¹³⁸ This will not be the case where the purchaser is allowed to stay in the property after the trustee has cancelled the sale or if the purchaser has not yet taken occupation of the property before the seller became insolvent. If the property has already served as a home for the purchaser, however, the relevant provisions of PIE¹³⁹ can be invoked to protect against eviction, as was also argued by justices Cameron and Froneman in their minority judgment.¹⁴⁰ The minority judgment rightly confirmed that an eviction of someone such as Sarrahwitz would not be just and equitable and would fall foul of PIE's requirements for eviction to proceed.¹⁴¹ By applying PIE, the CC therefore would in fact have reformed the manner in which a trustee can exercise its discretion in this regard, thereby effectively developing the common law.¹⁴²

A further effect of the common law is that the purchaser is deprived of its right to take transfer of the property. Even though this right is a personal right, it relates to land and for the purposes of this paper it is assumed that this right to take transfer can be regarded as "property" for the purposes of section 25(1) of the *Constitution*.¹⁴³ Section 25(1) protects against a deprivation of property which does not take place in terms of a law of general application or which is arbitrary. Deprivation will be arbitrary if it is

¹³⁷ Davis and Klare 2010 *SAJHR* 412.

¹³⁸ It is not certain from the facts in *Sarrahwitz* whether an eviction order had been granted against her by the time the CC heard the matter.

¹³⁹ Sections 4(6) and 4(7) of PIE.

¹⁴⁰ *Sarrahwitz* par 90.

¹⁴¹ *Sarrahwitz* par 95. This argument of Cameron J and Froneman J is further discussed below.

¹⁴² See the discussion of the minority judgment below.

¹⁴³ See the discussion below.

procedurally unfair or if the law of general application does not provide sufficient reason for the deprivation.¹⁴⁴

To determine whether the cancellation of the sale agreement would amount to a deprivation of the property of the purchaser, the creditors' interest in the trustee's prerogative not to transfer valuable property out of the insolvent estate of the seller would have to be weighed against the interest of the purchaser to obtain transfer of the purchased property. In *Sarrahwitz* the majority judgment determined, based on the indignity that accompanies homelessness,¹⁴⁵ that the rights of someone in Sarrahwitz's position would most likely outweigh the interests of the creditors of the insolvent estate.¹⁴⁶ The only other mention of the creditors' interests in the judgment is that these must be considered in the "crafting of the remedy".¹⁴⁷ As proposed here and in the minority judgment, the consequence of homelessness, and therefore the accompanying indignity, can be avoided by invoking the provisions of PIE. The deprivation of property does not create homelessness. Mogoeng CJ's argument that the purchaser's interests outweigh those of the creditors will furthermore not necessarily be applicable. It falls outside the scope of this paper to do a proper analysis of the deprivation caused by the common law. The protection of the creditors' interests, however, may very well serve as sufficient reason for the deprivation, especially if the indignity and homelessness of the deprived purchaser are not an issue.

That is not to say that the inability to own property is not accompanied by indignity, especially where this inability forms part of the legacy of racial discrimination. In instances where a seemingly neutral common-law principle unintentionally perpetuates the effect of racial discrimination in favour of the creditors of insolvent estates, it should be scrutinized. However, it seems as if the CC in *Sarrahwitz* was not in the position to undertake such an exercise.

¹⁴⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) (hereafter *FNB*) pars 61-67.

¹⁴⁵ *Sarrahwitz* par 64. This paragraph follows an extract from Mokoro J's judgment in *Jaftha* setting out the link between dignity and the right to access to adequate housing.

¹⁴⁶ *Sarrahwitz* par 64.

¹⁴⁷ The remedy ordered to assist Sarrahwitz. *Sarrahwitz* par 73.

5 Homelessness and property

Sarrahwitz initially based her application before the CC on various constitutional rights (including section 9 - the right to equality, section 25 - the right not to be arbitrarily deprived of property and section 26 – the right to access to adequate housing).¹⁴⁸ The majority judgment, however, confirmed in its very first sentence that the case was about homelessness and vulnerability, thereby excluding the other rights cited by Sarrahwitz.¹⁴⁹ Sarrahwitz certainly was vulnerable because of her lack of financial means and she would have been unable to procure another home, should she be evicted. She therefore faced homelessness because of the common-law principle providing the trustee of the insolvent seller with the prerogative to cancel the sale agreement, which would render her occupation of the property unlawful. There is, consequently, agreement that Sarrahwitz's vulnerability and pending homelessness were paramount in this case.

In considering whether leave to appeal should be granted, Mogoeng CJ confirmed that the constitutional rights that were implicated were the right to access to adequate housing, the right to dignity and the right to equality.¹⁵⁰ A footnote mentions that the rights to property and administrative justice were also relied upon, but it was stated without elaboration that these rights were not implicated in the matter.¹⁵¹

On a number of occasions the CC has accommodated applicants facing eviction or challenges to obtaining housing.¹⁵² This may explain why

¹⁴⁸ *Sarrahwitz* fn 5. The sections are listed: s 9 (everyone is equal before the law); s 10 (everyone has inherent dignity and the right to have their dignity respected); s 25(1) (no one may be arbitrarily deprived of property); s 26 (everyone has the right to access to adequate housing) and s 33 (everyone has the right to administrative justice that is lawful, reasonable and procedurally fair) of the *Constitution*.

¹⁴⁹ *Sarrahwitz* par 1.

¹⁵⁰ *Sarrahwitz* par 17.

¹⁵¹ *Sarrahwitz* fn 10. In *Sarrahwitz* fn 16 it is stated that the Minister of Trade and Industry "broadly agreed" with Sarrahwitz's contentions regarding the common law, but that the reliance on administrative fairness was misplaced. It is assumed that s 33 and the *Promotion of Administrative Justice Act* 3 of 2000 were not applicable due to the absence of administrative action.

¹⁵² *Grootboom*; *Jaftha*; *Fischer v Persons Unknown* 2014 3 SA 291 (WC); *Motswagae v Rustenburg Local Municipality* 2013 2 SA 613 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC); *Abahlali base Mjondolo Movement of South Africa v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC); *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC); *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 5 BCLR 475 (CC); *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (SCA); *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 8 BCLR 872 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC);

Mogoeng CJ focussed on homelessness and not on Sarrahwitz's rights in terms of section 25(1) of the *Constitution*. Considering that the constitutionality challenge is directed at the *Land Act*, this is peculiar. The *Land Act* regulates the alienation of land and provides for the right to claim transfer of ownership. To repeat what has already been said, Sarrahwitz was in a vulnerable position and did possibly face homelessness. She was, however, also about to lose her right to claim the transfer of the ownership of the property she had purchased and paid for in full.

Mogoeng CJ described section 26, which provides for the right to access to adequate housing, as a "catalyst in the liberalisation of home-ownership" in the context of the legacy of apartheid.¹⁵³ He referred to the inability to own a home because of the insolvency of the seller, a situation that had been remedied for purchasers paying in instalments in terms of the *Land Act*. However, this protection is not afforded to purchasers paying the purchase price as a lump sum. His question was then whether this situation is constitutionally defensible, taking into account the fact that a purchaser may be rendered homeless if transfer does not take place.¹⁵⁴ It therefore seems as if the CC regarded section 26 as a means to achieve ownership or a property right.

Considering the purpose and background of the *Land Act*, the link Mogoeng CJ drew between home ownership and the right to access to adequate housing requires further contemplation. Can section 26 of the *Constitution* serve as means to obtain the right to transfer in terms of legislation that may relate more to the rights protected in terms of section 25(1) of the *Constitution*? We have argued above that the *Land Act* identifies a specific "consumer" (an instalment-sale purchaser) who faces a specific risk and accordingly provides protection for this consumer against the harsh consequences of the common law. This risk, however, does not necessarily relate to being rendered homeless. This consumer entered into a transaction in terms whereof land is alienated, and the *Land Act* regulates this alienation. It dictates which information should be provided to the consumer and under which circumstances the consumer can claim transfer of the ownership of the land. Very little is said about the actual possession

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 5 SA 3 (CC); *Khosa v Minister of Social Development* 2004 6 SA 505 (CC); *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5, City of Cape Town v Rudolph* 2003 11 BCLR 1236 (C); *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 7 BCLR 652 (CC).

¹⁵³ Sarrahwitz par 2.

¹⁵⁴ Sarrahwitz par 3.

of the land.¹⁵⁵ Even though "land" for the purposes of Chapter II means land used mainly for residential purposes, there is no indication that this ought to be interpreted as only being the home of the purchaser.

The instalment-sale purchaser at common law had a personal right to claim transfer only once the purchase price had been paid in full.¹⁵⁶ Van der Merwe¹⁵⁷ classifies the right this consumer obtains in terms of section 22 of the *Land Act* as one of the "new" real rights *sui generis*, arguing that this development was needed to "improve the disadvantageous position of a certain category of persons". He describes this category as purchasers paying for land in instalments who may take transfer of the land so purchased only upon the full and final payment of the purchase price. Furthermore, he emphasises the risk a purchaser runs (as was mentioned earlier) of the seller's becoming insolvent before the final payment of the purchase price is made.¹⁵⁸ Due to the effect of recording the contract in terms of section 20 at the Deeds Office,¹⁵⁹ the right afforded to the consumer in terms of section 22 possesses the characteristics of a real right: it is protected against third parties, it provides its bearer with preference on insolvency, and the first-in-time principle applies.¹⁶⁰ It can also be argued that the recording of the contract at the Deeds Office serves as publicity, even though it is not technically registered.

It is not the focus of this paper to question whether Sarrahwitz was deprived of property arbitrarily and in contravention of section 25(1). It will suffice, however, to say that the right provided for in section 22 of the *Land Act* will most likely constitute property for purposes of section 25(1) if it is considered that the nature of the right is, in essence, a real right and the object of the right is land.¹⁶¹ By protecting constitutional property, the *Land*

¹⁵⁵ Section 6(k) of the *Land Act* determines that the contract must stipulate the conditions and date on which the purchaser may take possession and occupation of the land. S 28(1)(b), which regulates the consequences of a void deed of alienation, determines that the alienator may recover from the alienee reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land.

¹⁵⁶ *Gordon* 215, 219-220. Also see *Harris* 106, 108, 109.

¹⁵⁷ Van der Merwe 2002 *SALJ* 813.

¹⁵⁸ Van der Merwe 2002 *SALJ* 812.

¹⁵⁹ The contract is recorded against the title deed of the land purchased. The purchaser of land in instalments obtains the right to claim registration in the event of the insolvency of the seller or the attachment of the property in execution or it acquires a preferential claim on the proceeds of the sale if the land is sold in execution.

¹⁶⁰ Van der Merwe 2002 *SALJ* 813.

¹⁶¹ In *FNB* par 51 the CC held that regard should be had to both the nature of the right as well as to the object, to determine if we are dealing with property. The CC also held that the ownership of land lies at the heart of the constitutional concept of property. In *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) the "purported

Act may also prevent the homelessness of the instalment-sale purchaser, but this is an unintended (and fortunate for the instalment-sale purchaser) consequence of the *Land Act*. As was argued above, it is difficult to interpret the purpose of the *Land Act* as protection against homelessness.

Mogoeng CJ emphasised that section 26 requires us to do away with the indignity coupled with homelessness. The state, therefore, should take "all reasonable measures" to realise the right to access to adequate housing and should limit the "interference with that access unless otherwise justified".¹⁶² For Mogoeng CJ, the *Land Act*, like the *Magistrates' Court Act* in *Jaftha v Schoeman; Van Rooyen v Stolz*,¹⁶³ presented such interference. He argued that Sarrahwitz's situation was similar to that of Jaftha: both Sarrahwitz and Jaftha were vulnerable, poor persons who had lived with their families in their homes for many years before facing eviction.¹⁶⁴ The manner in which the respective impugned acts affected Sarrahwitz and Jaftha, however, differed. Whereas Jaftha's situation clearly fell within the ambit of section 66(1) of the *Magistrates' Court Act*, the same cannot be said for Sarrahwitz's situation. In Jaftha's case, the legislative provision¹⁶⁵ allowed for the sale in execution that would lead to eviction – bearing in mind that any eviction must still take place in terms of PIE. The *Land Act* did not affect Sarrahwitz in the same manner. In fact, Sarrahwitz's situation did not fall within the ambit of the *Land Act* – that is what gave rise to the issue before the court. The *Land Act* protects a designated purchaser against the consequences of the common-law principle, which consequences may entail eviction. It is, however, not the *Land Act* in itself, which allows for the cancellation of the sale agreement that may lead to eviction. Consequently, it is submitted that the effect of the *Land Act* in *Sarrahwitz* cannot be compared with that of the *Magistrates' Court Act* of 1944 in *Jaftha*, and that

rights" of a credit provider under a credit agreement "to recover any money paid or goods delivered" as provided for in s 89(5)(c) of the *National Credit Act* 34 of 2005 was held to be property for the purposes of s 25 and a commercial trading licence authorising the sale of wine in a grocery store was held to be property for the purposes of s 25(1) in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC).

¹⁶² *Sarrahwitz* par 41.

¹⁶³ *Sarrahwitz* par 42 and fn 35. In *Jaftha* s 66(1) of the *Magistrates' Court Act* 32 of 1944 was declared unconstitutional. Due to the failure of the act to prescribe judicial oversight of the sales of execution against the immovable property of judgment debtors, vulnerable judgment debtors such as Jaftha and Van Rooyen were left homeless as a result of small amounts of debt they were unable to pay. S 66(1) was therefore declared unconstitutional for infringing the right to access to adequate housing of Jaftha and Van Rooyen.

¹⁶⁴ *Sarrahwitz* par 43.

¹⁶⁵ Section 66(1) of the *Magistrates' Court Act* 32 of 1944.

the approach the CC took in *Jaftha* is not necessarily apt in the case of *Sarrahwitz*.

Thus far, we have argued that the judgment does not sufficiently substantiate the point that the *Land Act* intends to protect against homelessness. It has been shown that the purpose of the *Land Act*, and specifically sections 21 and 22, is to mitigate the risk an instalment-sale purchaser faces and that the unintended consequence of this protection is also to avoid the homelessness of the instalment-sale purchaser. Hence, it is difficult to argue that the *Land Act*, in fact, should make provision for someone such as *Sarrahwitz*.

The *Land Act*, however, is now required to give effect to the provisions of section 26. In other words, in the event of the insolvency of the seller, ownership should be transferred in order to prevent homelessness. Whereas Mogoeng CJ argued that the right to access to adequate housing serves as a "catalyst in the liberation of home-ownership", the judgment now has the opposite effect: home-ownership serves as a catalyst for the realisation of the right to access to adequate housing.¹⁶⁶ *Sarrahwitz* already had a home and in terms of her contractual or personal right to claim performance from the seller, she could have obtained ownership of it long before. Someone in her position requires protection as a vulnerable consumer in the sense that there should be consequences for sellers who exploit the vulnerability of ill-informed and financially constrained purchasers. The *Land Act* could serve such a purpose, but not based on impending homelessness.

6 Minority judgment

The relevant legislation to prevent eviction and homelessness is the PIE, as Cameron J and Froneman J held in their minority judgment.¹⁶⁷ They concurred with the order made by the majority because of the unusual circumstances of the case, but not without reservations.¹⁶⁸ Whereas the majority judgment was a response to the suggestion made by the Minister,¹⁶⁹ the minority judgment considered the matter from the stance

¹⁶⁶ *Sarrahwitz* par 2.

¹⁶⁷ Because the Trustee had cancelled the sale agreement, *Sarrahwitz* would have been an illegal occupier for the purposes of PIE, and would therefore qualify for protection in terms of PIE.

¹⁶⁸ *Sarrahwitz* par 79.

¹⁶⁹ *Sarrahwitz* par 22. Due to the withdrawal from the matter by the Trustee, the Minister's submissions were the only submissions the CC could consider in this regard.

that the CC was not bound to follow the approach proposed by the Minister.¹⁷⁰ In its submissions before the CC, the Minister did not use the opportunity to expose a legitimate reason for the *Land Act's* differentiating between instalment-sale purchasers and other purchasers. Rather, he contended that the legislator must have omitted extending protection to a vulnerable purchaser of residential property such as Sarrahwitz due to her unique and rare situation.¹⁷¹

The minority judgment, however, advanced another possible reason for the differentiation caused by the *Land Act*. Usually, a purchaser who is capable of paying for a residential property in one lump sum or within a year is in a stronger financial position than a purchaser who must make smaller payments over a longer period. It would therefore make sense that the former would require less protection than the latter.¹⁷² Judges Cameron and Froneman furthermore argued that Parliament was ultimately in the best position to determine the extent of the group of vulnerable persons who ought to be protected by legislation.¹⁷³ The approach adopted in the majority judgment may be regarded as providing the CC with the authority to declare that any legislative protection created is irrational if not everyone is protected. The latter intervention would go too far. It would be risky to adopt the approach as a rule because it would reduce Parliament's ability to enact consumer protection legislation. Applying the reading-in remedy also effectively entailed performing the function of drafting policy determined by social needs, a function that ought to be performed by Parliament.¹⁷⁴ The difficulty for the courts to determine the extent of vulnerability that deserved protection was, according to the minority, well-illustrated in the majority judgment. According to the minority, the majority found that homelessness was the basis on which lump-sum purchasers deserved the same protection as instalment-sale purchasers in terms of the *Land Act*, in spite of the fact that the *Land Act* does not determine that the instalment purchaser should face homelessness in order to qualify for protection.¹⁷⁵

Cameron J and Froneman J further argued that whereas the CC had in the past used section 9(1)¹⁷⁶ of the *Constitution* to strike down sections of

¹⁷⁰ *Sarrahwitz* par 82.

¹⁷¹ *Sarrahwitz* par 81.

¹⁷² *Sarrahwitz* par 82.

¹⁷³ *Sarrahwitz* par 83.

¹⁷⁴ *Sarrahwitz* par 85.

¹⁷⁵ *Sarrahwitz* par 86.

¹⁷⁶ Mogoeng CJ argued that by differentiating between an instalment-sale purchaser and someone such as Sarrahwitz, the *Land Act* infringes on Sarrahwitz's right in terms of s 9(1) of the *Constitution* to receive equal treatment, protection and benefit

legislation that irrationally differentiate between persons, these cases differed significantly from Sarrahwitz's situation.¹⁷⁷ Because the *Constitution* does not provide protection against homelessness in an absolute sense,¹⁷⁸ it was difficult to determine a constitutional breach in terms of an equality analysis.¹⁷⁹ Section 26(3), however, does determine that no one may be evicted from his or her home without a court order. Accordingly, as was mentioned above, they found that PIE provided Sarrahwitz with the necessary protection against eviction.¹⁸⁰ According to them, Sarrahwitz's situation provided the CC with the opportunity to establish a principle that would protect persons in similar situations in future. The principle was that, irrespective of the seller's insolvency, it would not be just and equitable to evict a person from a home he or she has lived in as the "owner" for a significant period and for which he or she has paid the full purchase price, if such an eviction will result in the person's homelessness.¹⁸¹

As is also held in the minority judgment,¹⁸² it is submitted that the proposed amendments to the *Land Act* ordered in the majority judgment were not the only means of assisting Sarrahwitz. If the possession of Sarrahwitz's home had been secured, the obstacles frustrating transfer, according to Cameron J and Froneman J, would probably disappear.¹⁸³ If Sarrahwitz could not be evicted from the property, it would most likely lose its economic value and the creditors would not be interested in it any more. The Trustee could give effect to the sale agreement and transfer the property into Sarrahwitz's name if the creditors had lost interest in the property.¹⁸⁴ Judges Cameron

of the law. The CC described this differentiation as "mere differentiation", and decided that no legitimate governmental purpose was served by this differentiation. Mogoeng CJ disregarded the Minister's argument that Sarrahwitz's situation was highly improbable and concluded that the impugned provisions were unconstitutional since there was no rational basis for the differentiation. *Sarrahwitz* pars 49-68.

¹⁷⁷ *Sarrahwitz* par 88; *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC); *Ngewu v Post Office Retirement Fund* 2013 4 BCLR 421 (CC).

¹⁷⁸ Section 26 of the *Constitution* determines that the state ought, through legislation and by other means within its reasonable resources, progressively to realise every person's right to access to adequate housing.

¹⁷⁹ *Sarrahwitz* par 90.

¹⁸⁰ *Sarrahwitz* par 90. Ss 6 (applicable where the unlawful occupier has occupied the land in question for fewer than six months) and 7 determine that a court may order eviction only if it is of the opinion that it is just and equitable to do so after it has considered all the relevant circumstances.

¹⁸¹ *Sarrahwitz* par 95. S 4(6) of PIE determines that a court may grant an order for eviction of an unlawful occupier who has been in occupation of the relevant premises for more than 6 months only if it would be just and equitable, considering all relevant circumstances.

¹⁸² *Sarrahwitz* par 90.

¹⁸³ *Sarrahwitz* par 91.

¹⁸⁴ *Sarrahwitz* par 97.

and Froneman, therefore, argued that the CC should have ordered the parties to furnish further information as to the whether an eviction order had been obtained against Sarrahwitz.¹⁸⁵ The majority judgment did not make mention of an eviction order at all.

It would seem as if the minority judgment also regarded the realisation of the right to access to adequate housing as promoting the "liberation of home-ownership" but rather opted to use legislation intended to protect against homelessness. It is submitted that the approach of the minority judgment creates better constitutional jurisprudence for acknowledging the purpose of the *Land Act* and effectively separating the issue of the transfer of property from eviction from the property.

7 Conclusion

In conclusion, the views of Davis and Klare¹⁸⁶ must be reiterated. In their opinion, section 39(2) of the *Constitution* requires judges to promote constitutional values when developing the common law or interpreting legislation, and not just to ensure strict adherence to laws. Judges should concern themselves not only with the coherence of the legal order, but also with its character.¹⁸⁷ Davis and Klare¹⁸⁸ stress that the common law requires re-imagining, because it still "largely reflects, constitutes, and sustains existing social relationships, power structures, and inequalities".

Nowhere are these inequalities more visible than in the warped patterns of access to land and housing in South Africa. Both sections 25 and 26 of the *Constitution* serve to address these patterns, but each protects or advances a different kind of relation to land. Protection of the one right will in some instances lead to the promotion of the other, but the two rights should not be conflated, as has inadvertently been done by the CC in *Sarrahwitz*. We do not wish to propose a formalistic distinction between the protection of property and the provision of housing, but in framing legal problems pertaining to land and housing, cognisance should be taken of the difference.

¹⁸⁵ *Sarrahwitz* par 99; fn 84 indicates that the Trustee claimed in its answering affidavit that an eviction order was granted, but its opposing papers in the High Court do not state that the order had been granted. Sarrahwitz's founding papers before the CC mentioned only the application for obtaining an eviction order. No mention was made of an order for eviction granted against her. The minority judgment therefore found that further information was required on whether or not Sarrahwitz had been evicted.

¹⁸⁶ Davis and Klare 2010 *SAJHR* 410.

¹⁸⁷ Davis and Klare 2010 *SAJHR* 410.

¹⁸⁸ Davis and Klare 2010 *SAJHR* 411.

Not only the common law but also legislation created before the enactment of the *Constitution* should be interrogated, based on its underlying political or ideological basis. Even though the role the legislature must play in transformation must be respected in this regard,¹⁸⁹ pre-constitutional legislation must be approached with care, for it may still reflect the policies of a previous age.¹⁹⁰ Should such implicit policies be in conflict with the values of the *Constitution*, the legislation must be developed. Legislation such as the *Land Act*, however, is not unconstitutional for not protecting against homelessness if its purpose is to protect vulnerable consumers against risks other than impending homelessness. If the *Land Act* ought to be developed to provide for protection against homelessness, the development cannot entail a few seemingly minor amendments without considering its actual purpose and the major consequences the amendments may have for the practical implementation of the Act and constitutional jurisprudence.

The majority judgment's approach to Sarrahwitz's dire situation speaks of an honest, maybe even desperate, attempt to comply with the duties provided for in section 39(2), but more importantly, to assist Sarrahwitz. If the CC cannot assist someone in Sarrahwitz's position, we should question the significance of the rights entrenched in the Bill of Rights. Fortunately, the CC found a way in which to protect Sarrahwitz's home and to make her a property owner. The legislative amendments ordered in *Sarrahwitz*, however, effectively provide property in order to avoid homelessness. The amendments also create ambiguity and uncertainty, and will have unintended consequences, because they cater for a very unlikely scenario within a legislative framework ill-suited to the intended purpose of the amendments.

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List of Abbreviations

CC	Constitutional Court
CCR	Constitutional Court Review
HC	High Court
PIE	Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review