CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 93/14

In the matter between:

VIRGINIA SARRAHWITZ Applicant

and

HERMANUS MARITZ N.O. First Respondent

MINISTER OF TRADE AND INDUSTRY Second Respondent

Neutral citation: *Sarrahwitz v Maritz N.O. and Another* [2015] ZACC 14

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Tshiqi AJ, Van der Westhuizen J and Zondo J

Judgments: Mogoeng CJ (majority): [1] to [78]
Cameron J and Froneman J (concurring): [79] to [101]

Heard on: 10 November 2014

Decided on: 4 June 2015

Summary: Alienation of Land Act 68 of 1981 — sections 21 and 22 — protection afforded to purchasers under instalment sale agreements

Constitutional challenge — section 9(1) of the Constitution — right to equal protection and benefit of the law

Section 26 of the Constitution — right of access to adequate housing — negative obligation — duty not to prevent or impair existing access to adequate housing

ORDER

On appeal from the Eastern Cape High Court, Port Elizabeth (Goosen J):

1. Leave to appeal is granted.
2. The appeal is upheld to the extent set out below.
3. The order of the Eastern Cape High Court, Port Elizabeth, in case number 819/2012 is set aside.
4. The failure by the Alienation of Land Act 68 of 1981 to provide for the transfer of a residential property from an insolvent estate to avoid the homelessness of a vulnerable purchaser, who paid the full purchase price within one year of the contract, is inconsistent with the Constitution and invalid.
5. From the date of this order:
   (a) The words "including residential property paid for in full within one year of the contract, by a vulnerable purchaser" are to be read into the definition of "contract" at the end of section 1(a).
   (b) The following is added to the definitions in section 1:
   "'Vulnerable purchaser' means a purchaser who runs the risk of being rendered homeless by a seller's insolvency".
   (c) The words "ON INSTALMENTS" in the title of Chapter II of the Alienation of Land Act 68 of 1981, are severed and section 4 reads as follows:
   "(1) This Chapter shall not apply in respect of a contract in terms of which the State, the Community Development Board established by section 2 of the Community Development Act, 1966 (Act 3 of 1966), the National Housing Commission mentioned in section 5 of the

Housing Act, 1966 (Act 4 of 1966), or a local authority is the seller.

(2) 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 a residential property paid the full purchase price within one year of the contract, before the seller's insolvency."

6. This order will apply only to a seller's insolvent estate that has not been finalised.

7. The first respondent is directed to take all steps necessary to effect transfer of the residential property situated at 23 Auburn Street, Booysens Park, Port Elizabeth to the applicant.

8. There is no order as to costs.

JUDGMENT

MOGOENG CJ (Moseneke DCJ, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Tshiqi AJ, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This case is about homelessness and vulnerability. One of the many painful and demeaning experiences that the overwhelming majority of our people had to contend with during the apartheid era was not having a place they could truly call home, and their vulnerability to the system's ever-abiding readiness to evict arbitrarily. Significant progress has since been made. Consequently, many previously homeless people have acquired residential property and eviction may no longer be carried out summarily but only in terms of a court order.

[2] A catalyst in the liberalisation of home-ownership has been section 26[1] of the Constitution which provides for access to adequate housing and its progressive realisation.[2] This section is also a damper on the rampant evictions from residential property.

[3] In addition to the systemic challenges alluded to above, many people were previously denied the opportunity to own a home by the insolvency of the seller. It generally extinguished their entitlement to transfer. The Alienation of Land Act[3] (Land Act) was subsequently enacted to facilitate transfer of residential property from the estate of an insolvent seller to a vulnerable instalment purchaser. It however does not extend this benefit to an equally vulnerable purchaser who bought residential property in terms of a cash sale agreement. The question is whether this is constitutionally defensible. Inextricably linked to that question is the probability of a purchaser becoming homeless in the event of non-transfer.

[1] Section 26 of the Constitution states:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[2] In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) this Court said the following at para 142:

> "Our Constitution bears a transformative purpose in the terrain of socio-economic rights. It evinces a deep concern for the material inequality closely associated with past exclusion and poverty that are manifested by lack of proper housing. That explains why section 26(1) of the Constitution provides in express terms that everyone has the right to have access to adequate housing. The State is required to take reasonable measures within its available resources to provide everyone with access to adequate housing. Section 26(3) in particular, creates an important shield to anyone who may be subject to eviction from their home or to have their home demolished. The Constitution makes judicial intervention mandatory by requiring that eviction from or demolition of a home must occur through a court order made after considering all relevant circumstances."

[3] 68 of 1981.

Parties

[4] The applicant is Ms Virginia Sarrahwitz (Ms Sarrahwitz), a poor and unemployed woman who is the head of a household that comprises her daughter and granddaughter. The first respondent is Mr Hermanus Maritz (trustee). He is cited in his capacity as the trustee of the insolvent estate of Mr Reynier Posthumus (Mr Posthumus). The second respondent is the Minister of Trade and Industry (Minister), cited in his capacity as the Cabinet member responsible for the administration of the Land Act. The Minister was joined in these proceedings in terms of this Court's order.[4]

Background

[5] On 17 September 2002, Ms Sarrahwitz entered into a written deed of sale with Mr Posthumus to acquire a house situated at 23 Auburn Street, Booysens Park, Port Elizabeth. Prior to concluding the deed of sale, she borrowed R40 000 from her employer and paid it to Mr Posthumus as the full purchase price of the house. She took occupation of the house on 1 October 2002. Mr Posthumus informed her that he would arrange for the transfer of the house into her name. He advised her to wait for a call from Ms Megan Fisher (Ms Fisher) of Friedman Scheckter Attorneys who would facilitate transfer. Ms Sarrahwitz made numerous fruitless enquiries to Ms Fisher about the transfer. By October 2003 she had still not heard from her. She again made several calls to Ms Fisher and Mr Posthumus about the status of the transfer.

[6] Eventually she felt constrained to approach another attorney in 2005 to enquire on her behalf from Friedman Scheckter Attorneys about the transfer of the property. The feedback was that Mr Posthumus had signed all the papers, necessary for transfer to be effected, during September 2005. The only outstanding item was said to be the amount of R2 778.88 which had to be paid before the municipal rates clearance certificate, required for transfer, could be issued in respect of the house.

[4] The order was dated 7 August 2014.

[7] Ms Sarrahwitz paid that amount in small but frequent instalments as and when she could until it was fully paid within a month. The certificate was however not issued since the municipality credited her payments, for outstanding rates and taxes, to one of the municipal accounts of Mr Posthumus. Apparently this error occurred because he owned a number of immovable properties.

[8] On 18 April 2006, which was about four years after Ms Sarrahwitz had paid for and taken occupation of the house, Mr Posthumus' estate was sequestrated. Mr Maritz was appointed as trustee of that insolvent estate. At the time of sequestration, the house had not been transferred to Ms Sarrahwitz. It therefore became part of the insolvent estate in terms of the common law.

Litigation history

[9] After unsuccessful attempts to have the trustee authorise the transfer of the house, Ms Sarrahwitz launched an application in the Eastern Cape High Court, Port Elizabeth (High Court) in 2012. She sought an order directing the trustee to give effect to the provisions of the deed of sale and have the house registered in her name in terms of sections 21 and 22 of the Land Act. The High Court held that it is the common law and not the Land Act that regulates the transfer of that property. Also that, in terms of the common law, a purchaser who had paid the full purchase price for a residential property does not have a right to have it transferred to her. The property vests in the seller's insolvent estate. The Court could not fault the trustee's decision not to transfer the house to her in terms of his common law powers. As a result it dismissed her application with costs.

[10] Aggrieved by this outcome, Ms Sarrahwitz launched an application for leave to appeal to the Full Court, alternatively the Supreme Court of Appeal. She, for the first

time, relied on constitutional grounds to challenge the validity of the relevant common law principle.[5]

[11] Her failure to do so in the main application denied the trustee the opportunity to deal with that issue properly at that stage. Raising that issue for the first time when leave to appeal was sought, denied the High Court and the Supreme Court of Appeal the opportunity to consider the development of the common law. The Court held that prospects of success were dim and leave was refused. Ms Sarrahwitz unsuccessfully petitioned the Supreme Court of Appeal, hence her application to this Court.

Prescription

[12] The sale agreement between Ms Sarrahwitz and Mr Posthumus was concluded about 10 years prior to the launch of her application to have the Court issue an order directing the trustee to transfer the house to her. The defence raised by the trustee, both in the High Court and in this Court, was that her claim had prescribed. The trustee has, however, since withdrawn his opposition to the application. And the Minister, who is the only remaining active respondent, does not rely on prescription as a defence. A question raised during the hearing is whether a court may of its own motion raise the defence of prescription. I think not.

[13] Section 17 of the Prescription Act[6] provides:

> "(1) A court shall not of its own motion take notice of prescription.

[5] She grounded the challenge on sections 9, 10, 25, 26 and 33 of the Constitution. Section 9 provides that everyone is equal before the law, has the right to equal protection and benefit of the law and proscribes unfair discrimination. No person, including the State, may unfairly discriminate directly or indirectly against anyone on one or more listed grounds unless it is established that the discrimination is fair. Section 9 provides further that national legislation must be enacted to prevent or prohibit unfair discrimination. Section 10 provides that everyone has inherent dignity and the right to have their dignity respected. Section 25(1) provides that no one may be deprived of property except in terms of a law of general application. It also prohibits arbitrary deprivation of property. Section 26 provides, in relevant part, that everyone has the right of access to adequate housing, and the State is obligated to take reasonable steps within its available resources to progressively realise this right. Section 33(1) provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

[6] 68 of 1969.

> (2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings."

No party to this litigation is invoking prescription in any document before us. The affidavit in which the trustee sought to invoke prescription ceased to be counted among documents to be considered in these proceedings when the trustee withdrew his opposition. And no party has since raised prescription at any stage of the proceedings.

[14] In *Mathobela*[7] the Court held that—

> "[s]ection 17(1) forbids that a court take *mero motu* cognizance of the fact that a claim had prescribed. Understandably so, because there may well be certain facts which are not placed before the court that may have interrupted the running of prescription. Prescription must be invoked by the party who raises it as a defence and it must be done in the relevant document."[8]

[15] The trustee's withdrawal of his opposition to this application means that prescription is no longer an issue. And since this Court may not of its own motion raise prescription as a possible obstacle to Ms Sarrahwitz's success, prescription has ceased to be an issue that should occupy us.

Leave to appeal

[16] Many South Africans, particularly the poor, do not have easy access to home loans and are therefore often forced to rely on credit agreements concluded with relatives, employers or even micro-lenders some of whom reportedly do so at unconscionably high interest rates.[9] And this matter affects the rights of vulnerable

[7] *Minister of Justice and Constitutional Development v Mathobela and Others* [2007] ZANWHC 5 (*Mathobela*).

[8] Id at para 11. See also *Shoprite Checkers v Pillay NO and Others* [2014] ZALCD 33 at para 10.

[9] See Pillay and Naudé "Financing Low-Income Housing in South Africa: Borrower Experiences and Perceptions of Banks" (2006) 30 *Habitat International* 872 and Pillay et al "Rights, Roles and Resources: An

purchasers who are exposed to the risk of losing their residential properties and the extremely limited resources poured out to secure them. It is about the need to protect the poor and vulnerable from homelessness. It seeks not to protect the well-resourced purchasers who have access to enough money to pay off a property immediately. Homelessness and vulnerability are therefore central to the determination of the issues in this matter.

[17] Several constitutional rights are implicated. They are the right of access to adequate housing, the right to dignity and the right to equality[10] in so far as it relates to the differential treatment of vulnerable purchasers of residential property. That differentiation excludes vulnerable purchasers, like Ms Sarrahwitz, who paid the full purchase price within a period of less than one year but protects equally vulnerable purchasers who paid at least two instalments over a period of, or in excess of, one year and are nevertheless entitled to transfer notwithstanding the seller's insolvency.

[18] The essence of Ms Sarrahwitz's application for leave to appeal to this Court is that the common law is constitutionally invalid to the extent that it excludes a person in her position from the category of vulnerable purchasers of residential property who are entitled to transfer in spite of the seller's intervening insolvency. She argues that this invalidity stems from the inconsistency of the common law with several constitutional rights.

[19] Ms Sarrahwitz argues that this unconstitutionality is particularly glaring because the Legislature altered the common law position by enacting the Sale of Land on Instalments Act.[11] The effect of this was to confer an entitlement to transfer of property, from an insolvent seller's estate, on some vulnerable instalment purchasers

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Analysis of Women's Housing Rights – Implications of the Grootboom Case" (Women's Budget Initiative, Cape Town, 2006), available at [http://www.academia.edu/6436563/RIGHTS_ROLES_AND_RESOURCES_ An_Analysis_of_Womens_Housing_Rights_-_Implications_of_the_Grootboom_case].

[10] Above n 5. The right to property and the right to just administrative action, also sought to be relied on by the applicant, are however not implicated in this matter.

[11] 72 of 1971.

while leaving purchasers like her unprotected. She submits that this differentiation also denies her equal protection and benefit of the law and is inconsistent with the right to equality, unjustifiable and therefore constitutionally invalid.[12] Based on that inconsistency, she contends that the common law has to be developed to accommodate a purchaser who has paid the full purchase price for a residential property but is prevented by the common law from enjoying the right of access to housing.

[20] It bears repetition that these grounds are different from those on which the application was initially launched in the High Court. Consequently, neither the High Court nor the Supreme Court of Appeal, which are reputed for their expertise in the common law, were afforded the opportunity to enrich the proposed development by being the first to grapple with the impugned common law principle.[13]

[21] It is only under exceptional circumstances that this Court would agree to be burdened with the development of the common law, as a court of first and last

[12] Section 9(1) of the Constitution provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law".

[13] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) at para 52:

> "Litigants who seek to invoke provisions of section 39(2) must ordinarily plead their case in the court of first instance in order to warn the other party of the case it will have to meet and the relief sought against it. The other obvious benefit is that the High Court and the Supreme Court of Appeal will be afforded the opportunity to help shape the common law and customary law in line with the normative grid of the Constitution." (Footnote omitted.)

See *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8. See also *S v Bequinot* [1996] ZACC 21; 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC) at para 15 where this Court held that:

> "It has been said before but needs to be restated that this Court is placed at a grave disadvantage if it is required to deal with difficult questions of law, constitutional or otherwise, and has to perform the balancing exercise demanded by section 33(1) of the Constitution virtually as a court of first instance." (Footnote omitted.)

instance.[14] Since no exceptional circumstances exist to justify a departure from this sound principle, this Court will uphold it.[15]

[22] The trustee's withdrawal from this matter leaves us with only the Minister's submissions to consider. And the Minister does not oppose the application for leave to appeal. On the contrary, he contends that the failure of the Land Act to confer on Ms Sarrahwitz the benefit enjoyed by similarly-positioned instalment sale purchasers is unconstitutional.[16] In his view the public policy considerations which prompted the creation of the protections set out in sections 21 and 22 of the Land Act apply with equal force to a person in the position of Ms Sarrahwitz. And there should, according to him, be no differentiation between the two categories of purchasers based purely on method of payment.

[23] These contentions find some reinforcement in the fact that a seller's insolvency has never served as an automatic bar to transfer. It has in principle always been open to a trustee to authorise transfer even to a person in the position of Ms Sarrahwitz. By parity of reasoning, the two equally vulnerable categories have always enjoyed similar treatment. Trengove JA articulates this position as follows:

> "The effect, at common law, of the insolvency of an owner, who had sold land in terms of an agreement under which the purchase price was payable in instalments, may be summed up as follows. His insolvency does not *ipso jure* terminate the contract. The trustee of his estate has an election – which he must exercise within a reasonable time – either to enforce the contract or to terminate it. He makes his election with due regard to the interests of the *concursus creditorum*, and neither the purchaser nor the cessionary, in a case such as the present, has any say in the matter if the trustee decides to terminate the contract, the purchaser cannot insist upon transfer

[14] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (*Carmichele*) at para 50. See also *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 33.

[15] *Lane and Fey NNO v Dabelstein* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC) at para 5.

[16] The Minister contended that, although he broadly agreed with Ms Sarrahwitz's contentions that the common law position is inconsistent with the Constitution, her reliance on administrative fairness was misplaced.

> of the land *even though he may already have paid a substantial portion or all of the purchase price thereof.* He would, in such a case, have no more than a concurrent claim for damages against the insolvent estate."[17] (Emphasis added.)

The fate of purchasers in both categories was in the absolute discretion of the trustee, prior to the introduction of the protective measures now enjoyed only by instalment purchasers.

[24] The Minister argues that it must have been the purpose of the Land Act to protect all vulnerable purchasers of residential property irrespective of their method of payment. He sees the legislative scheme of the Land Act and sections 21 and 22 in particular as under-inclusive. He also submits that, on a proper interpretation of the provisions of Chapter II of the Land Act, informed by the normative values of the Constitution, a purchaser who made a once-off payment of the full purchase price for a house, should enjoy the same protection and benefit of the Land Act as a purchaser who bought a house in terms of an instalment sale agreement. For this reason the Minister proposes that the Land Act should provide for transfer even to a purchaser who had made the full payment for a residential property at the time of the sequestration of the seller's estate.

[25] The remedy he proposes to cure this unconstitutional omission is the reading in of certain words with retrospective effect.[18] A reading in of those words is, in his view, faithful to the legislative scheme, given the historical development of the

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[17] *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (In Liquidation)* 1981 (1) SA 171 (A) (*Glen Anil Finance*) at 182D-H.

[18] The Minister referred to numerous judgments of this Court where this remedy was adopted including: *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (*Jaftha*); *Lawyers for Human Rights and Others v Minister of Home Affairs and Others* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (*Lawyers for Human Rights*); *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (*Khosa*); *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC); and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*).

existing protection. He considers it unnecessary to refer the Land Act back to Parliament to cure the constitutional defect he has identified.

[26] In line with these proposals, it must be recalled that Ms Sarrahwitz's cause of action has always been that vulnerable people in her position deserve legal protection. In her main application to the High Court, she placed reliance on sections 21 and 22 of the Land Act as the basis for the transfer of the house to her. Although that Court dismissed her application on the basis that it is the common law, not sections 21 and 22 of the Land Act, that governs the transfer she sought, her case has always been that a proper interpretation of this legislation holds the key to her relief. The Minister's compassionate proposition that the solution be found in the Land Act and that words be read into Chapter II of the Land Act, is therefore not far-removed from the substance of Ms Sarrahwitz's main case before the High Court.[19] It is more in line with her initial cause of action than with her desperation-borne attempt to have the common law developed.

[27] The cause of action in the main application has merely had a constitutional flavour expressly added to it at a leave to appeal stage, to achieve the same objective initially pursued via the route of a proper interpretation of sections 21 and 22 of the Land Act. It does become necessary at times to read the papers of a party – especially a vulnerable litigant – with a measure of compassion, when it is in the interests of justice to do so. If that were to be done in this case, in line with the Minister's approach, it would become evident that Ms Sarrahwitz has in essence always contended that a proper interpretation of the law would result in the house being transferred to her. And it follows from a proper reading of her papers that her case was at all times premised on certain constitutional rights. Although not specified in

[19] This is one of three remedies proposed by the Minister in the alternative. The Minister's main submission is that this Court read into Chapter II of the Land Act in order to provide the necessary protection to Ms Sarrahwitz and those similarly placed. In the alternative, the Minister proposes that the matter be referred back to the Supreme Court of Appeal and the common law position be developed. In the further alternative, the Minister proposes that should this Court find that the Land Act contains a lacuna, the lacuna should be rectified by Parliament.

her initial application, she has since indicated that some of those rights are her fundamental right of access to housing, the right to dignity and the right to equality.[20]

[28] The principle that a point of law must be raised timeously and not for the first time on appeal, as is the case with a reliance on specific constitutional rights in this matter, is not an inflexible one.[21] Allowing these constitutional points to be raised now, finds support in the approach we must adopt as we interpret Chapter II and sections 21 and 22 of the Land Act. That approach is laid down in section 39(2) of the Constitution which enjoins us to have particular regard to the Bill of Rights as follows:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[29] It is therefore a constitutional imperative that whenever legislation is interpreted and the common law or customary law is developed or its development is being considered, regard must be had to the Bill of Rights. It means in this case that the spirit, purport and objects of the right of access to adequate housing, the right to dignity and the right to equality, entrenched in our Bill of Rights, must be promoted through a proper interpretation of the Land Act to address the plight of Ms Sarrahwitz. The Land Act must be interpreted with due regard to the constitutional rights that are implicated here. When considering the common law in the main application as well as the Land Act in the application for leave to appeal, the High Court was thus enjoined by section 39(2) to have regard to the Bill of Rights. Unfortunately, it did not do so.

[30] In any event, this Court has acknowledged that "the mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to

[20] Above n 10.

[21] Below n 22-4.

consider it".[22] To resolve that, a court should be guided by three conditions: the point sought to be raised must be a point of law; it must be covered by the pleadings; and there should be no prejudice to the other party.[23] These conditions have been met.

[31] Ms Sarrahwitz raised a point of law that accords with the pleadings. There is no factual dispute and the factual basis for the relief sought has not changed.[24] Of great moment is that none of the parties, including the trustee, will suffer prejudice if leave to appeal were to be granted. Both Ms Sarrahwitz and the Minister agree that the exclusion of purchasers like her from the Land Act's protection is constitutionally invalid and that reading in is the solution. They do however differ on the section(s) in which reading in would be more appropriate. Equally important is that the trustee

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[22] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*) at para 39. See also *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC) at para 109; *Van der Merwe and Another v Taylor NO and Others* [2007] ZACC 16; 2008 (1) SA 1 (CC); 2007 (11) BCLR 1167 (CC) at paras 102-3; and *Shaik v Minister of Justice and Constitutional Development and Others* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at paras 24-5.

Under appropriate circumstances, this Court is at large to raise a pertinent point of law of its own motion. See *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68, where this Court said:

> "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the Commissioner's jurisdiction and to require argument thereon." (Footnote omitted.)

[23] *Barkhuizen* id:

> "*If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point*. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial." (Emphasis added.)

On the issue of prejudice, see also *Carmichele* above n 14 at para 31.

[24] *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* [2013] ZASCA 150; 2014 (3) SA 96 (SCA) at para 20:

> "The essential function of an appeal court is to determine whether the court below came to a correct conclusion. For this reason the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed. In fact, in such a situation the appeal court is bound to deal with it as to ignore it may 'amount to the confirmation by it of a decision clearly wrong', and not performing its essential function." (Footnotes omitted.)

chose not to oppose the application for leave to appeal after familiarising himself with the grounds for leave to appeal. In fact, given the long history of the matter and the time-lapse since the sequestration of Mr Posthumus' estate, it is in the interests of all affected parties that this Court brings finality to this matter. This would in turn lead to the finalisation of Mr Posthumus' estate.

[32] There are prospects of success and the interests of justice demand that leave to appeal be granted. Before the merits are considered, it is necessary to reflect on why the Legislature had to interfere with the common law.

Purpose of the legislative intervention

[33] Before 1971 none of the purchasers were, in terms of the common law, entitled to insist on transfer when a seller of an immovable property became insolvent. This applied to purchasers who had paid within a year and those who were paying or had paid the purchase price in instalments over a period of one year or longer.[25] As a result, many vulnerable purchasers of residential property lost the opportunity to own homes and the money paid to acquire that property.[26] Parliament set out to end the disastrous consequences of this law by enacting the Sale of Land on Instalments Act which provided for the entitlement of the instalment purchaser, to have the property transferred to her.

[34] Neither the Land Act nor its predecessor[27] singles out vulnerable instalment purchasers as beneficiaries of the right it creates for the transfer of property, from a seller who subsequently becomes insolvent. What the Land Act does, in the definition of "land", is indicate that the entitlement was created for purchasers of residential property. And this entitles any instalment purchaser however wealthy, even if it is the tenth or so house she is purchasing, to benefit from the Land Act's protection. All she

[25] *Glen Anil Finance* above n 17 at 174C-D. See also *Ten Brink NO and Another v Motala and Others* 2001 (1) SA 1011 (D) at 1014I-1015A.

[26] *Glen Anil Finance* id.

[27] Above n 11.

needs to do to qualify for the benefit is pay at least two instalments over a period of one year or longer.

[35] It could, however, never have been the purpose of the Land Act to protect all instalment purchasers regardless of the means at their command. The purpose could only have been to protect those who need protection. And these are vulnerable people who have no other place they could call home or lack the resources to acquire another, when the one they had is lost to the seller's insolvency. It defies logic that protection be extended even to those who have either more than one house or the capacity to acquire alternative decent accommodation. Otherwise all property, including business premises, should also have been saved from the harsh consequences of insolvency. The fact that protection from this hardship is confined to residential property, coupled with the challenges in relation to home-acquisition that prevailed at the time and still do, points very strongly to only vulnerable purchasers being the targeted beneficiaries of the legislative intervention. The legislation probably requires that clarification. Unfortunately, Parliament has not amended the Land Act in a way that would reflect the position set out in *Glen Anil Finance*[28] and *Merry Hill*.[29] Left as is, it creates a risk of insolvent estates' creditors being unduly disadvantaged by the exclusion of those properties that belong to purchasers who do not need protection.

[36] The Court in *Glen Anil Finance* explained the rationale for this legal development as follows:

> "According to the law as it stood in 1971, 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. *This often caused very real hardship and misfortune, particularly to purchasers of residential stands in newly established townships owned by companies*

[28] *Glen Anil Finance* above n 17 at 183F-H.

[29] *Merry Hill (Pty) Ltd v Engelbrecht* [2007] ZASCA 60; 2008 (2) SA 544 (SCA) (*Merry Hill*).

> *that were placed in liquidation on account of insolvency*. *This was, without question, the mischief which section 14 of the Act was intended to remedy*.
>
> Looking at the Act as a whole, it is quite 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 is payable in more than two instalments over a period of one year or longer. The principal purpose of the Legislature was obviously to protect the interests of a purchaser buying land under such a contract."[30] (Reference omitted and emphasis added.)

[37] Reasons for this development and the category of purchasers singled out for protection were further highlighted in *Merry Hill*:

> "Let me start with a proposition which appears to be beyond contention, namely, that the purpose of Chapter 2 of the Act, which includes section 19, is to afford protection, in addition to what the contract may provide, to a particular type of purchaser – a purchaser who pays by instalments – of a particular type of land – *land used or intended to be used mainly for residential purposes*. In this sense, Chapter 2, like its predecessor, the Sale of Land on Instalments Act 72 of 1971, can be described as a *typical piece of consumer protection legislation*. . . . *The reason why the legislature thought this additional statutory protection necessary is not difficult to perceive*. *It is because experience has shown this type of purchaser, generally, to be the vulnerable, uninformed small buyer of residential property* who is no match for the large developer in a bargaining situation."[31] (References omitted and emphasis added.)

[38] The purpose for the creation of the exception was to protect the interests of individuals who would 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. There was a risk of the purchaser having to endure the real hardship and misfortune of losing both the house and the money already paid, as a

[30] *Glen Anil Finance* above n 17 at 183F-H.

[31] *Merry Hill* above n 29 at para 13.

result of the common law position. Parliament saw the need to afford protection to those vulnerable and financially-constrained buyers by ensuring that they could still obtain transfer of the residential property when the seller becomes insolvent.

[39] A contextual and purposive interpretation of the Land Act identifies the mischief sought to be addressed by Parliament. That mischief is the loss of an opportunity to own a house and the money already paid to that end by the under-resourced. This legislation undoubtedly serves a purpose that is beneficial to a category of those most deserving of protection. It seeks to protect and benefit "the vulnerable, uninformed small buyers of residential property"[32] like Ms Sarrahwitz who are no match for well-resourced and informed property owners. That an instalment purchaser who is to benefit from this legislation is the one who pays the purchase price in at least two instalments over one year or longer, strengthens the proposition that the protection was meant for those who are vulnerable. The question does arise though, whether the Constitution countenances the differentiation between this category of vulnerable purchasers of residential property from those who are just as vulnerable but happen to make a once-off payment for a residential property.

Access to adequate housing

[40] Ms Sarrahwitz contends that the legislative scheme and the relevant provisions of the Land Act are unconstitutional to the extent of their under-inclusivity. In her view, the Land Act impairs some vulnerable purchasers' right of access to adequate housing even if it is unjustifiable. This is the case, so she says, where a would-be first time homeowner has made a once-off payment for a residential property or paid for it within a period shorter than one year. That category of purchasers is excluded by the Land Act from entitlement to transfer, in the event of the seller's insolvency, even if non-transfer would result in the purchaser's homelessness.

[32] Id.

[41] Section 26 of our Constitution was meant to put a permanent end to this indignity. It not only provides for access to adequate housing but also imposes an obligation on the State to take all reasonable measures to achieve the progressive realisation of the right of access to adequate housing.[33] The arbitrary eviction from a house or a demolition thereof is also proscribed. The other objective of the right of access to adequate housing is the facilitation of the nation's decisive break from the legacy of homelessness for multitudes of vulnerable women and poor people. It also helps us to embrace fully, the dispensation of access to adequate housing for all and serves as a deliberate limitation of interference with that access unless otherwise justified.[34]

[42] In *Jaftha*, this Court considered the import of the right to adequate housing.[35] A proper reflection on that case reveals a striking and material similarity between Ms Jaftha's plight and that of Ms Sarrahwitz. Both cases are about the right of access to adequate housing, a socio-economic right, which inevitably implicates the right to dignity.[36] Generally speaking, it is very difficult for a homeless person to keep her self-worth or dignity intact. She is at the mercy of any landlord, relative or friend who might be providing her with accommodation. And no vulnerable person who has

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[33] Above n 1.

[34] *Jaftha* above n 18 at paras 28-9.

[35] Id. This Court held that section 66(1)(a) of the Magistrates Court Act 32 of 1944 was unconstitutional to the extent that it failed to insist on judicial oversight of sales in execution against immovable property of judgment debtors. As a result the Act permitted vulnerable judgment debtors to be deprived of existing access to adequate housing in the absence of judicial determination which constituted an unjustifiable limitation of section 26(1) of the Constitution. (Although reference will only be made to Ms Jaftha in the text, that should not be understood to suggest that Ms Van Rooyen's case does not deserve equal attention. This is done only for the sake of brevity.)

[36] Id at paras 20-1. See also *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*) at para 23:

> "All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."

See also *Khosa* above n 18 at para 40 and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 705.

tasted what it means to have a place they can truly call home should be deprived of it without justification. Our painful history abounds with incidents of atrocious forced removals and heartless evictions of black and vulnerable people like Ms Sarrahwitz.

[43] Ms Jaftha and Ms Sarrahwitz's right of access to adequate housing was or is at grave risk of extinction as a result of the sale in execution or the insolvency of the seller, respectively. Both had been in occupation of their homes for many years. This Court expressed itself on these issues, within the context of our lamentable history in relation to lack of access to adequate housing and the consequential impairment of dignity, as follows:

> "The situation under apartheid demonstrates the extent to which access to adequate housing is linked to dignity and self-worth. Not only did legislation permit the summary eviction of people from their land and homes which, in many cases, had been occupied for an extremely long time, it branded as criminal anyone who was deemed to be occupying land in contravention of it. In this sense a person was made to suffer double indignity – the loss of one's home and the stigma that attaches to criminal sanction."[37] (Footnote omitted.)

[44] In Ms Sarrahwitz's case the double indignity she would be forced to endure, is the loss of a home she has occupied for about thirteen years and the loss of what is probably the largest investment she has ever made. What is even worse in her case is that, unlike Ms Jaftha, she was not assisted by the State to acquire her home and she does not even owe anybody anything that would explain the loss of her home. It is the seller to whom the full purchase price was paid many years prior to his insolvency, who is indebted. And it is because of his indebtedness that Ms Sarrahwitz runs the risk of losing her home and being evicted. This problem was compounded by the municipality's failure to credit her payment for rates and taxes correctly which allowed the seller's transfer-threatening insolvency, to catch up with her.

[37] *Jaftha* above n 18 at para 27.

[45] The very low income bracket within which she falls, the fact that she borrowed money from her then employer to buy the house, that she is unemployed and a financially under-resourced head of the family, means that she and her family would effectively be rendered homeless should the differentiation permitted by the scheme of the Land Act be left to live on. The negative obligation that section 26 imposes on both the State and a private person like the trustee of the insolvent estate, is that none of them should prevent or impair existing access to adequate housing.[38] Ms Sarrahwitz is not asking the State to take steps to realise her right of access to adequate housing progressively. She already has a home that she was not even assisted by the State to acquire. She innovatively defied the odds stacked up against her in relation to access to home loans, to acquire and renovate a home for her family.

[46] Having regard to the disturbingly high levels of homelessness, the virtual inaccessibility of home loans to the poor and the import of the right of access to adequate housing, it stands to reason that "any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1)".[39] But the right of access to adequate housing and the intrinsically implicated right to dignity are not the only constitutional rights intimately involved in this matter. The right to equal protection and benefit of the law also cries out for vindication.

Equality

[47] The right to equality is central to the question whether it is constitutionally permissible for legislation to benefit certain vulnerable instalment purchasers to the

[38] Id. See also *Grootboom* above n 36 at para 34. This Court has repeatedly acknowledged the negative obligation imposed by the socio-economic rights. See, for example, *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 46 and *Ex Parte Chairperson of the National Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 78.

[39] *Jaftha* above n 18 at para 34.

exclusion of equally vulnerable purchasers who make a once-off payment or pay within one year. Section 9 of the Constitution provides for this right in these terms:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[48] None of the grounds for discrimination listed in section 9(3) seems to apply to this case. And the ground for the differentiation between the two categories of purchasers, namely the method of payment, does not appear to be based on attributes or characteristics which have the inherent potential to impair the fundamental dignity of persons as "human beings".[40] One needs to dig deeper to conclude that it is. For this reason it will not be necessary to explore the possibility of developing "one or more grounds" envisaged by subsection (3). Subsection (1) will instead be used as a platform for reflection on the equality of treatment of various categories of purchasers.

[49] This subsection guarantees everyone the right to equal protection and benefit of the law. The concept of "equal protection and benefit of the law" suggests that purchasers who are equally vulnerable must enjoy the same legal endowments

[40] *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) (*Harksen v Lane*) at para 50.

irrespective of their method of payment. For this reason, the reach of the protection and benefits conferred by the Land Act upon vulnerable home-buyers must be extended to all other vulnerable purchasers unless the differentiation is justifiable.

[50] The scheme of the Land Act as well as sections 21 and 22 recognise and protect the fundamental right of access to adequate housing of only those who pay for a residential property in at least two instalments over a period of one year or longer.[41] This legislation effectively excludes those purchasers who settle the purchase price in full at once or within a period less than one year. Undoubtedly this amounts to a differentiation. Whether this differentiation is constitutionally acceptable is a matter that calls for further reflection. *Harksen v Lane* provides in relevant part step-by-step guidelines for doing so:

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) . . .
>
> (ii) If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2)."[42]

[51] Differentiation is the centrepiece of the equality jurisprudence including our constitutional right to equality. Section 9 of our Constitution seeks to uproot two kinds of differentiation from our legal landscape: (i) the one that results in unfair discrimination; and (ii) the one that results in mere differentiation. The latter requires

[41] Section 21 of the Land Act entitles the purchaser to be notified to take transfer of land when such land is attached or the owner becomes an insolvent. Section 22 entitles the purchaser to the transfer of land when such land is attached or the owner becomes an insolvent.

[42] *Harksen v Lane* above n 40 at para 53. In this case the Court applied the equality provision in section 8 of the interim Constitution. However, this Court has affirmed several times that the equality analysis under section 8 of the interim Constitution applies equally to the equality provision found in section 9 of the Constitution. For example, see *National Coalition* above n 18 at para 15. See also *Van der Merwe v Road Accident Fund and Another* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) (*Van der Merwe*) at para 42.

of the State to act rationally at all times and not in an arbitrary or whimsical way. State action must always be designed to advance a legitimate governmental purpose in consonance with the rule of law and the very essence of constitutionalism. This attribute of equality compels the State to regulate its affairs in a rational and justifiable manner. It speaks to the core business of the State which is equal treatment of its citizens and the pursuit of what redounds to the common good of all.[43] This case is about mere differentiation.

[52] Mere differentiation within the context of the right to equal protection and benefit of the law was dealt with in *Ngewu*.[44] The differentiation was about the failure to afford divorced spouses of members of the Post Office Retirement Fund, rights and benefits similar to those enjoyed by former spouses of members of funds regulated by the Pension Funds Act[45] and the Government Employee Pension Law.[46] The latter could claim their share of their former spouses' pension interest at the time of divorce (clean break principle) whereas the former were excluded from this entitlement. This was a self-evident case of legislation that gave rise to a differentiation between categories of divorcees. Whether there was justification for that will appear later in this judgment.[47]

[53] In *Van der Merwe* this Court also had occasion to grapple with the right to equal protection and benefit of the law in relation to a differentiation, occasioned by section 18(b) of the Matrimonial Property Act.[48] The differentiation was about claims for patrimonial and non-patrimonial damages and in turn between people in marriages

[43] *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) (*Prinsloo*) at paras 24-8.

[44] *Ngewu and Another v Post Office Retirement Fund and Others* [2013] ZACC 4; 2013 (4) BCLR 421 (CC) (*Ngewu*).

[45] 24 of 1956.

[46] 21 of 1996.

[47] See [60].

[48] 88 of 1984.

in and marriages out of community of property.[49] The question was whether this differentiation was constitutionally tolerable.[50]

[54] The Court held that a differentiation between people or classes of people will fall foul of the constitutional standard of equality, if it does not have a legitimate purpose advanced to validate it.[51] If the legislation under attack lacks that rational connection, then it violates the right to equal protection and benefit of the law as a result of the uneven conferment of benefits or imposition of burdens by the legislative scheme without a rational basis.[52] This "would be an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes inasmuch as it breaches the rational differentiation standard set by section 9(1) thereof."[53]

[55] All three cases, namely: (i) the impairment of existing access to adequate housing; (ii) the differentiation between those married in community of property and those married out of community of property in relation to a claim for patrimonial damages resulting from spousal violence; and (iii) the legislative exclusion of a claim to a share of the interest of former spouses of members of a particular pension fund, at the time of divorce, to which their similarly-placed counterparts were allowed by other legislation to lay immediate claim, still called for a justification analysis and that was done.[54]

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[49] *Van der Merwe* above n 42 at para 32.

[50] Id at para 33.

[51] Id at para 49.

[52] *Prinsloo* above n 43 at paras 25-6. Ackerman J explained the expectations of the constitutional state in respect to rationality at para 25.

[53] *Van der Merwe* above n 42 at para 49.

[54] See *Jaftha* above n 18 at para 39; *Van der Merwe* above n 42 at para 58; and *Ngewu* above n 44 at para 17 respectively.

[56] The corollary is that Ms Sarrahwitz is denied the protection and benefit to which a person in her shoes exactly, who happens to acquire a house through a different method of payment, is entitled. Added to that is the fact that she had to fend for herself to acquire this treasured family gem and stands to lose it because of the indebtedness of the seller and the errors of the municipality which diverted her payment for municipal rates to a wrong account, thus delaying transfer until the seller became insolvent. This is also worsened by the apparent lack of enthusiasm, on the part of Mr Posthumus and the lawyers over the years, to expedite the transfer process.

[57] Denying Ms Sarrahwitz the protection and benefit that the Land Act gives to certain instalment sale purchasers amounts to a differentiation. The real question is whether that differentiation bears a rational connection to a legitimate governmental purpose and whether it is justifiable. The limitation analysis in relation to the impairment of Ms Sarrahwitz's right of access to adequate housing, her right to dignity and her exclusion from the protection and benefit the Land Act offers to vulnerable instalment purchasers, will thus have to be embarked upon.

Justification analysis

[58] Moseneke DCJ had this to say about the justification analysis in *Van der Merwe*:

> "[O]rdinarily the starting point of a justification enquiry would be to examine the purpose the government articulates in support of the legislation under challenge. In this case the government did not proffer a purpose to validate the impugned provision."[55]

[59] He went on to say that—

> "[o]f course, the pursuit of a legitimate government purpose is central to a limitation analysis. . . . However, in this case there is no legitimate purpose to validate the

[55] *Van der Merwe* above n 42 at para 62.

> impugned law. The absence of a legitimate purpose means that there is nothing to assess. The lack of a legitimate purpose renders, at the outset, the limitation unjustifiable. I am satisfied that section 18(b) of the Act is inconsistent with the Constitution because it limits the equality provision of section 9(1) without any justification."[56]

[60] In line with that reasoning, Van der Westhuizen J ended the limitation analysis in *Ngewu* as follows:

> "Because of the omission of the 'clean break' principle there is a differentiation between the payment of divorced spouses' interests regulated by the Pension Funds Act and the Government Employees Pension Law Amendment Act on one hand, and the payment of divorced spouses' interest governed by the Post Office Act on the other. The differentiation is irrational as it has no basis. It does not meet the requirement of equality before the law and equal protection and benefit of the law contained in section 9(1) of the Constitution. The respondents furthermore did not submit that the legislation contains a reasonable and justifiable limitation of the right protected in section 9(1) and could hardly do so. Therefore, the omission of the 'clean break' principle from sections 10 to 10E of the Post Office Act renders those provisions invalid to the extent of this inequality."[57] (Footnotes omitted.)

The differentiation of Ms Ngewu from similarly-positioned people by different pieces of legislation was found to be unjustifiable and unconstitutional. It is worth noting that, unlike in this case and in *Van der Merwe*, the differentiation in *Ngewu* did not arise from the same legislation. Different Acts of Parliament provided differently for similarly-situated divorcees and that was the basis for the successful constitutional challenge. It is worse in this case because the same legislation effectively differentiates between equally vulnerable purchasers. I now turn to the present case.

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[56] Id at paras 54-5 and 63. In *Van der Merwe* this Court held that there was no rational basis for the scheme of the Act not to grant redress in the form of patrimonial damages covered by spousal violence in circumstances where the amount for those damages would in any event accrue exclusively to the battered spouse. The absurdity was worsened by the entitlement of those married out of community of property to those benefits to the exclusion of those married in community of property in circumstances where the claim lies against a third party. This rendered the anomaly and arbitrariness even more startling.

[57] *Ngewu* above n 44 at para 17.

[61] The Minister was unable to articulate a legitimate governmental purpose for the exclusion of vulnerable purchasers who pay the full purchase price for a house before transfer. He however alluded to the unlikeliness of that happening as the possible reason for their exclusion from the benefits of transfer. Broadly speaking, there is a deductible rational explanation for the exclusion of purchasers of homes who pay in full within a period of one year or in one instalment in the case of an instalment sale agreement. And that possible justification for their exclusion is, as the Minister said, the assumption that it is unlikely that any person of modest possessions could, considering how expensive residential properties are, be able to pay the full purchase price at once or within such a short period as one year. Those sought to be protected would be people who are under-resourced and who can ordinarily afford to purchase residential property by paying in excess of two instalments over a period of one year or longer.

[62] Sound as this assumption might be, it is not always correct as is evident from the case of Ms Sarrahwitz. And the impact of a rigid adherence to it on those vulnerable purchasers who are left out has such disastrous consequences as to warrant accommodation.

[63] Mokgoro J explained the impact of limiting the right of access to adequate housing, particularly on people like Ms Sarrahwitz, and the implications of this impairment on the right to dignity in these terms:

> "The importance of access to adequate housing and its link to the inherent dignity of a person has been well emphasised by this Court. In the present matter access to adequate housing already exists. Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where

> they might never again acquire such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity. Section 66(1)(a) is therefore a severe limitation of an important right."[58] (Footnote omitted.)

[64] It is difficult to conceive of an instance where the refusal to transfer a home to a vulnerable purchaser, who has paid in full, coupled with inevitable homelessness, would not outweigh the advantage to creditors of the seller's insolvent estate. The situation is compounded by the indignity to which the prospective homeowner is exposed and the denial of equal protection and benefit of the law to people like Ms Sarrahwitz.

[65] It must be reiterated that Ms Sarrahwitz borrowed money from her then employer to pay the full purchase price of the house. She is unemployed and of modest possessions. And she is the head of a single-parent household who has no other home of her own or the resources to buy another house to relocate to, should her constitutional challenge be dismissed. For all intents and purposes her position is not different from that of a vulnerable instalment purchaser whose interests are already protected by the Land Act. There is no rational basis for protecting a vulnerable instalment purchaser of a residential property who pays over a period of one year or longer, while leaving out an equally vulnerable purchaser who borrowed money, to pay the full purchase price at once or one who does so in one instalment or several instalments within one year.

[66] As at the time of changing the common law, the two categories were equally exposed to the same risk of losing the opportunity to access adequate housing and the money already paid, however substantial it might be. The refusal to transfer has as devastating an impact on purchasers in the one category as it has on the other. The consequential hardship and misfortune the beneficiary of the legislative accommodation is protected from, applies with equal force to the excluded

[58] *Jaftha* above n 18 at para 39.

Ms Sarrahwitz. Objectively, the differentiation that stems from her exclusion impairs her implicated fundamental rights. And there is no legitimate governmental purpose for the differentiation.

[67] So long as there exists a real risk within the legislative scheme for some vulnerable purchasers to be rendered homeless, the scheme is under-inclusive. It violates the right of access to adequate housing and limits purchasers' rights unjustifiably.[59] The difficulty lies in the under-inclusiveness of the legislative scheme. This is so because, in its commendable attempt to provide for vulnerable purchasers, it left out a small and yet important category of vulnerable purchasers. These are purchasers who happen to pour out all they have, however acquired, to give practical expression to their right of access to adequate housing. I am of the firm view that since these rights are constitutionally protected, the impugned provisions ought also to be restructured in such a way as to protect the homes of all vulnerable purchasers. This should be especially so when purchasers are exposed to the risk of becoming homeless as a result of their homes not being transferred to them from the seller's insolvent estate.

[68] The impugned provisions are unconstitutional to the extent that: (i) the differentiation they bring about is irrational in that it is not undergirded by a legitimate government purpose; and (ii) they exclude the transfer of a house from an insolvent estate to a vulnerable purchaser who has paid for it within one year even in circumstances where that exclusion is unjustifiable and could result in the homelessness of the purchaser.[60] What then is the appropriate remedy?

Remedy

[69] The impugned provisions need a surgical operation. That operation requires that section 4 of the Land Act be enhanced to yield an outcome that both parties desire

[59] See *Jaftha* above n 18 at para 48.

[60] Id at para 61.

and are in essence agreed on. For both would like to see the residential property that Ms Sarrahwitz has paid for in full transferred to her. That is the order to be made and it shall apply only to insolvent estates that are yet to be finalised.[61]

Severance and reading in

[70] The conclusion that the differentiation against Ms Sarrahwitz caused by the legislative scheme of the Land Act and sections 21 and 22 in particular is irrational, justifies the severance and reading in of the words that would remedy that constitutional invalidity.

[71] Doing so would not undermine separation of powers for at least two reasons. The remedy of severance or reading in has been part of our constitutional jurisprudence for many years now.[62] It was developed with due regard to the separation of powers principle.[63] And this continues to be so because a resort to these remedies has never precluded Parliament from amending the invalidated provisions whichever way it pleases, provided it does so mindful of the need to cure the

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[61] See *Mistry v Interim Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at para 41. See also *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32:

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants. . . . *As a general principle, therefore, an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity*." (Emphasis added.)

This passage, or parts of it, has been quoted with approval on numerous occasions. See *Engelbrecht v Road Accident Fund & Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at para 45; *National Coalition* above n 18 at para 94; *S v Mello* [1998] ZACC 7; 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at para 13; and *S v Ntsele* [1997] ZACC 14; 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC) at para 14. The reasoning has been followed in *Scagell and Others v Attorney-General, Western Cape & Others* [1996] ZACC 18; 1997 (2) SA 368 (CC); 1996 (11) BCLR 1446 (CC) at paras 35-6; *S v Julies* [1996] ZACC 14; 1996 (4) SA 313 (CC); 1996 (7) BCLR 899 (CC) at para 4; *Brink v Kitshoff NO* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 54 and *S v Mbatha; S v Prinsloo* [1996] ZACC 1; 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 31.

[62] *Ngewu* above n 44 at para 21; *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 162; *Lawyers for Human Rights* above n 18 at para 45; *Khosa* above n 18 at para 95; and *National Coalition* above n 18 at para 26.

[63] *National Coalition* id at para 66.

constitutional defect(s) identified by this Court. It is therefore open to Parliament to even enact an altogether new piece of legislation in response to this judgment.[64]

[72] Severance and reading in were resorted to by this Court in several cases where it was considered eminently suited to address a constitutional defect.[65] And this is one of those cases where this remedy is appropriate.

[73] The remedy that would meet the needs of Ms Sarrahwitz adequately is not one that seeks to determine an exhaustive list of instances to be accommodated by the reading in exercise. On the contrary, it must be flexible and applicable to diverse purchasing options left out of the Land Act's protection, which could leave unprotected purchasers exposed to the risk of losing their homes or security of tenure.[66] The crafting of the remedy should obviously be done with due regard to the interests of creditors to the seller's insolvent estate.[67]

[74] The starting point is the definition of the word "contract". Section 1 of the Land Act provides that "contract"—

> "(a) means 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;
> (b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take".

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[64] Id at para 76.

[65] See *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer Port Elizabeth Prison, and Others* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16 where the test for severance is set out:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute." (Footnote omitted.)

See also *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822D-E and *S v Lasker* 1991 (1) SA 558 (C) at 566A-C.

[66] *Jaftha* above n 18 at para 56.

[67] Id.

Left as it is, this definition is likely to stand in the way of the transfer of the house to Ms Sarrahwitz. For this reason and in order to provide for those who, like Ms Sarrahwitz, are likely to be homeless absent appropriate legislative accommodation, words must be read in at the end of paragraph (a) of the definition of "contract". Those words are "including residential property paid for in full within one year of the contract, by a vulnerable purchaser".

[75] "Vulnerable purchaser" should be defined as "a purchaser who runs the risk of being rendered homeless by a seller's insolvency".

[76] Chapter II of the Land Act also requires some tweaking to clear the way for the transfer of the house to Ms Sarrahwitz. The first part to be changed is the title of Chapter II. It currently reads "SALE OF LAND ON INSTALMENTS". In this form it could be understood as announcing the exclusion of transfer of property acquired in terms of upfront and once-off payment. It is therefore necessary that the words "ON INSTALMENTS" be severed from the heading.

[77] Finally, section 4 of the Land Act also requires some attention. The pre-existing provisions under it must become subsection (1). Subsection (2) must be inserted and it reads:

> "(2) 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 a residential property paid the full purchase price within one year of the contract, before the seller's insolvency."

Order

[78] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld to the extent set out below.

3. The order of the Eastern Cape High Court, Port Elizabeth, in case number 819/2012 is set aside.

4. The failure by the Alienation of Land Act 68 of 1981 to provide for the transfer of a residential property from an insolvent estate to avoid the homelessness of a vulnerable purchaser, who paid the full purchase price within one year of the contract, is inconsistent with the Constitution and invalid.

5. From the date of this order:

   (a) The words "including residential property paid for in full within one year of the contract, by a vulnerable purchaser" are to be read into the definition of "contract" at the end of section 1(a).

   (b) The following is added to the definitions in section 1:
   "'Vulnerable purchaser' means a purchaser who runs the risk of being rendered homeless by a seller's insolvency".

   (c) The words "ON INSTALMENTS" in the title of Chapter II of the Alienation of Land Act 68 of 1981, are severed and section 4 reads as follows:

      "(1) This Chapter shall not apply in respect of a contract in terms of which the State, the Community Development Board established by section 2 of the Community Development Act, 1966 (Act 3 of 1966), the National Housing Commission mentioned in section 5 of the Housing Act, 1966 (Act 4 of 1966), or a local authority is the seller.

      (2) 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 a residential property paid the full purchase price within one year of the contract, before the seller's insolvency."

6. This order will apply only to a seller's insolvent estate that has not been finalised.

7. The first respondent is directed to take all steps necessary to effect transfer of the residential property situated at 23 Auburn Street, Booysens Park, Port Elizabeth to the applicant.
8. There is no order as to costs.

CAMERON J AND FRONEMAN J:

[79] We have had the benefit of reading the judgment of Mogoeng CJ (main judgment), and are grateful for its exposition of the facts and the issues. We agree with the Chief Justice that the problem this case presents demands a solution. It would be a disgrace to the law if there was no answer to Ms Sarrahwitz's plight. The main judgment explains that the essence of Ms Sarrahwitz's claim throughout was that the law provides, or should provide her with a remedy. We agree. Nothing in fact or law will prejudice the other parties if we decide that the law provides her with a remedy. Although we concur in the order made, we do so with some reservation.

[80] The main judgment finds that the Constitution does not countenance the differentiation the Land Act makes in extending protection to instalment sale purchasers, but not to other purchasers. It concludes that the statute should also protect purchasers who have paid in full for their properties and who are at risk of becoming homeless. The main judgment concludes that legislation that serves the purpose of protecting vulnerable purchasers of residential property should not protect those who buy in terms of an instalment sale agreement spread over a year or more, while excluding equally vulnerable purchasers who make a once-off cash payment for a house, or pay off the purchase price within a year.

[81] In the present case, the Minister does not seek to articulate any legitimate government purpose for the exclusion of purchasers who pay the full purchase price at once or within one year. Instead, the Minister explains that most often transfer will happen at the same time (*pari passu*) – in which case there are protection mechanisms

built into the contractual and conveyancing processes. Thus, Ms Sarrahwitz is in a very rare class of purchasers and, the Minister submits, the Legislature probably did not consider vulnerable persons in her position. The Minister's approach constitutes a legitimate invitation to the Court to follow this route to help Ms Sarrahwitz.

[82] Still, we are not bound by the Minister's approach. Indeed, despite his tempting invitation to the Court, it is not difficult to find a rational purpose in the distinction the statute draws. One springs to mind. It is this: purchasers who have access to enough money to pay off a property purchase immediately, or within a year, are better-off than those who have to pay in instalments over a period of one year or more. Hence they need less protection than those whose financial circumstances oblige them to pay off their property debt more arduously, over a longer period.

[83] By contrast, the main judgment finds this distinction irrational – a conclusion the Minister's invitation encouraged. The Minister's approach gives the Court acquittance from worry about the separation of powers. We acknowledge this. But we sound a caution because of future cases. The Legislature constantly extends statutory protections to vulnerable groups. That is its almost daily work. Who needs statutory protection? How should the group be defined? What are the boundaries of the protection? Making these distinctions in determining the boundaries of beneficial consumer protection legislation is what Parliament is called to do. Is this Court at liberty, every time Parliament makes a differentiation, to find that the protection it has created is irrational because it is under-inclusive? We do not think that the fact that this Court has accepted a plain invitation from the Minister in this case entails that conclusion.

[84] In effect, the approach of the main judgment risks an interpretation that this Court is saying that any beneficial legislative distinction the Legislature draws in extending consumer protections may be struck down as irrational if all persons are not protected. Because of the unusual circumstances of this case, that would go too far. So, while we concur in the order made in the main judgment, we wish to make it clear

that we do so only because of the exceptional circumstances of the case, where the Minister has suggested and supports the remedy granted in the main judgment.

[85] In general terms, that kind of approach is risky for three broad reasons. First, it risks narrowing sharply what Parliament may do when it enacts beneficial consumer legislation. Second, the reading-in remedy takes over one of Parliament's essential functions. This is to craft policy pertinent to social needs, and, where necessary, to draw distinctions between groups in doing so. To do its job of enacting remedial consumer legislation, the Legislature needs some measure of latitude. The Minister submits that this can be done with relative precision but cautions that the "result achieved [must] interfere with the laws made by the legislature as little as possible". We endorse this caution.

[86] Then there is a third, narrower reason. It is connected to the danger courts face when they attempt to craft legislative distinctions through the remedy of reading them into existing legislation. It is at best a difficult task to define the limits of vulnerability that will entitle purchasers who paid the full purchase price to the same protection as instalment purchasers under the Land Act. The main judgment appears to find that limit in the risk of homelessness some purchasers will face. That statute does not, however, require that instalment purchasers face the risk of homelessness before affording them its protection. So, in the end, the comparison and outcome of the equality analysis in the main judgment creates the potential for further differentiation, and perhaps even discrimination.

[87] Section 9(1) of the Bill of Rights provides that everyone is equal before the law, and that everyone has the right to equal protection and benefit of the law. This Court has held that this section precludes government from regulating in an arbitrary manner, or manifesting "naked preferences" that serve no legitimate government purpose.[68] A naked preference constitutes an arbitrary differentiation that neither

[68] *Prinsloo* above n 43 at para 25.

promotes public good nor advances a legitimate public object.[69] Hence it is inconsistent with the rule of law and the fundamental premises of the constitutional state.[70] This feature of equality protection ensures that the State is bound to function in a rational manner. It requires that governmental action must relate to a defensible vision of the public good. It also enhances the coherence and integrity of legislation.[71]

[88] This Court has used the equality promise of section 9(1) to strike down statutory differentiations as irrational. But they are distant from Ms Sarrahwitz's situation. In *Van der Merwe*, this Court invalidated a statutory provision that permitted a spouse married in community of property to claim non-patrimonial damages for bodily injury from the other spouse, but precluded that same spouse from claiming patrimonial damages.[72] Spouses married out of community of property could claim both kinds of damages from each other. The law thus denied one class of married people a protection another class enjoyed.[73] The denial was irrational because its underlying basis, the sameness of the joint estate of spouses married in community of property, had itself been legislatively abolished: even for spouses married in community of property, damages would remain separate.[74] What was more, the distinction between patrimonial and non-patrimonial damages was also irrational.[75]

[89] In *Ngewu*, the Court struck down a differentiation between the payment of divorced spouses' interests regulated by two different statutes that had no discernible basis, and it was therefore irrational.[76] The facts there are distinct from those before us.

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[69] *Van der Merwe* above n 42 at para 49.

[70] *Prinsloo* above n 43 at para 25.

[71] Id.

[72] *Van der Merwe* above n 42 at para 80.

[73] Id at para 45.

[74] Id at paras 52-4.

[75] Id at paras 56-7.

[76] *Ngewu* above n 44 at para 17.

[90] This inherent difficulty in the attempt to locate a constitutional breach in discrimination and inequality arises from the fact that the Constitution does not protect against homelessness in absolute terms.[77] Instead, it seeks to provide that protection indirectly, by requiring the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of everyone's right to have access to adequate housing.[78] In addition, it does so by providing that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances, and that no legislation may permit arbitrary evictions.[79] Instead, we think the remedy lay within the existing law under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[80] (PIE).

[91] We would have assisted Ms Sarrahwitz in a way that risks less intrusion on the domains of the other arms of government. The main judgment's reminder of the lack of access to housing and ease of eviction in the past, illustrates the real problem Ms Sarrahwitz faces. She may lose possession of her home despite having paid for it in full. Safeguarding the possession of her home thus means that the problem is on the way to a solution. PIE, based on section 26(3) of the Constitution, provides a sharper and narrower remedy to safeguard her possession. Once possession of her home is secured, the impediment to transfer the property in her name will in all likelihood disappear.

[92] The property could have been transferred to her. That depended on a decision by the trustee of the estate, the first respondent. He could choose to affirm her

[77] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 21.

[78] Section 26(1) and (2).

[79] Section 26(3).

[80] 19 of 1998.

contract of sale, and give effect to it, or he could reject it.[81] If he rejected it, she was left only with a claim against the estate, which was broke.[82] It is here where Ms Sarrahwitz's constitutional right of access to housing envisaged in section 26(1) and protection against eviction contemplated in section 26(3) should have entered the picture. But it never did.

[93] The insolvent estate has only one other creditor. It is the South African Revenue Service (SARS). The trustee had to weigh SARS's claim to the unpaid tax liability against Ms Sarrahwitz's claim to transfer of her house. SARS has no interest in letting Ms Sarrahwitz get her house. It wants the unpaid taxes. So its interest is in the trustee selling the house, and using the proceeds to pay the tax debt.

[94] The trustee opted to support SARS's claim and refused to affirm Ms Sarrahwitz's contract and give her transfer. So when the insolvent estate is finalised, she will be left with only a tiny payment, if anything – and no house. There is nothing on record to indicate that the trustee gave consideration to Ms Sarrahwitz's constitutional right of access to housing and protection against eviction after cancellation of the contract in electing not to affirm the contract and give her transfer. SARS's claim for the unpaid tax liability appears to have been decisive.

[95] This Court should lay down a principle in cases like the present. It is this. Eviction from one's home, resulting in probable homelessness, where one has paid 100% of the purchase price of the property and lived there for a significant period of time as the "owner", will generally not be just and equitable, even when the seller is insolvent. In terms of PIE, a court may grant an order for eviction of an unlawful occupier who has been in occupation for more than six months only if it is "just and

[81] In general, a contract is not terminated by the sequestration of the estate of one of the parties. See Mars *The Law of Insolvency in South Africa* 9 ed (Juta & Co Ltd, Cape Town 2008) at 222.

[82] The purchaser's vulnerable position in an insolvency that takes place after the purchase is vividly described by Trengove JA in the passage quoted at [23] from *Glen Anil Finance* above n 17 at 182D-H.

equitable" to do so, after considering all the relevant circumstances.[83] This should apply also to Ms Sarrahwitz's family or heirs: they, too, should not be evicted from her home.

[96] Because she has not been given title to the property, and because the trustee has disavowed her contract, Ms Sarrahwitz is indeed, statutorily, an "unlawful occupier". But she has paid the purchase price in full. She did so well over a decade ago. And she has been living on the property, as its owner, since 2002. It is very hard indeed to conceive how, in these circumstances, it could be just and equitable to evict her from her own home. Ms Sarrahwitz and her heirs should be secure in this home because eviction from it will be grossly unfair, in defiance of both justice and equity.

[97] Even protecting Ms Sarrahwitz's possessory rights by not granting an eviction order would not give her the title she seeks, namely her name on the property's title deed. But she would be only a short step away from that prize. Once it has been determined that no eviction order can justly and equitably be granted against an occupier in her circumstances, or that occupier's heirs, the property will lose its economic value in the estate. The other creditors – here, only SARS – will have no interest in it. It will be sterilised of any value in the insolvency.

[98] It appears the trustee did not take into account that eviction might be grossly unjust and inequitable. At first glance, his failure to do so amounts to a reviewable error of law. Unless he has an adequate answer, a review of his decision should readily set this right.

[99] In these unusual circumstances, we would have been inclined to order the parties to furnish further information on whether an eviction order has been granted

[83] Section 4(6).

against Ms Sarrahwitz.[84] In addition further written argument could have been sought on what order should be made in the light of this information and whether the trustee should be ordered to give transfer to Ms Sarrahwitz. If he had further reason to refuse, it would have emerged. If he did not, then the order requiring him to give transfer should follow. This procedure would have delayed, for a few weeks, the finalisation of the matter. That would have been a small price to pay to give Ms Sarrahwitz secure occupation of her own home and subsequent probable transfer of the property to her.

[100] In other words, a simpler possessory remedy would have sufficed. We would have preferred this route along with calling for the information and further argument on the eventual remedy.

[101] These considerations are assuaged, in our view, by the extraordinary circumstance that the Minister suggested and supported the reading-in solution. Had that not been so, we would have proposed, rather, the possessory remedy explained above.

[84] The trustee's answering affidavit states that "[a]n order for the eviction of the applicant was brought and was in fact granted. That order stands." However, Ms Sarrahwitz's founding papers in this Court merely allude to the application for eviction but do not record it as in fact granted. Neither do the trustee's opposing papers in the High Court explicitly state that the eviction order was actually granted. Therefore, additional evidence about when the eviction order was granted and by which court is pertinent.

For the Applicant:	E Crouse instructed by Legal Aid South Africa.
For the Second Respondent:	C J Mouton SC and A Rawjee instructed by the State Attorney.