

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 93/14

In the matter between:

VIRGINIA SARRAHWITZ

Applicant

and

HERMANUS MARITZ N.O.

First Respondent

MINISTER OF TRADE AND INDUSTRY

Second Respondent

INDEX: SECOND RESPONDENT'S HEADS OF ARGUMENT

Item No.	Description	Page Number
1	Introduction	1 – 2
2	The relief sought by the applicant	2 – 3
3	The second respondent's position in these proceedings	3 – 5
4	The background	5 – 8
5.	The common law position	8 – 9
6.	The scheme of the Act	9 – 12

7.	Statutory interpretation in a constitutional dispensation	13 – 17
8.	Our proposed reading in remedy	17 – 18
9.	Development of the common law in order to meet the omission in the Act	18 – 19
10.	List of authorities	20 – 21

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SECOND RESPONDENT'S HEADS OF ARGUMENT

Introduction

1. This is an application to this Honourable Court for leave to appeal against the judgment of Goosen J in the Port Elizabeth High Court (South Eastern Cape Local Division) on 7 February 2013 under Case No 819/2012¹ ("the judgment").

¹ Record: pages 37-46

2. The second respondent, as the administrator of the Alienation of Land Act, 68 of 1981 as amended ("the Act"), was joined by the applicant in these proceedings.²

The relief sought by the applicant

3. The applicant seeks, *inter alia*, the following relief :³
 - 3.1. leave to appeal to this Honourable Court;
 - 3.2. in conflict with paragraph 3.1 above, that the applicant be granted leave to appeal to the Full Court of the Eastern Cape Division against the judgment;
 - 3.3. alternatively, that :
 - 3.3.1. this Honourable Court hear this appeal in the event of leave to appeal being granted;
 - 3.3.2. this Honourable Court declare unconstitutional the common law position (which is trite) that an immovable property which had

² Order by this Honourable Court dated 7 August 2014

³ Record: Notice of Motion at page 4

been sold but not yet transferred to the purchaser prior to the seller's insolvency, vests in the trustee of the seller's insolvent estate who has an election whether to honour the contract of sale or not and, if such trustee decides to terminate the contract, the purchaser has no recourse in law to obtain registration of transfer in his/her/its name, but has to be content with a concurrent claim against the insolvent estate; and that

- 3.4. the applicant is entitled to registration of the property concerned in the instant matter into her name once all the legal requirements set by the Registrar of Deeds and the law have been met.

The second respondent's position in these proceedings

4. The second respondent was joined in these proceedings in his capacity as administrator of the Act. We respectfully point out that the applicant did not seek a declaration of unconstitutionality of the Act, but of the aforesaid common law position.
5. However, the applicant does rely on the alleged distinction made in the Act (specifically in Chapter II thereof) between purchasers who had paid some instalments in an instalment purchase of immovable property, and purchasers

in her position who had paid the full purchase price without registration of transfer having taken place.

6. In the circumstances, the second respondent did not deem it appropriate to file a notice of opposition to the application. Issues such as whether the applicant is entitled to condonation and whether her claim has become prescribed, are, with respect, not seen to be relevant to the second respondent and we make no submissions in that regard.
7. At the time of drafting these heads, we understand that the first respondent has withdrawn his opposition to the application, although we have not yet received formal notice to that effect. We nevertheless, and with respect, anticipate that this Honourable Court expect of us to make objective submissions on the law to it in considering the main issues in this matter.
8. In these heads our **main submission** will be that, on a proper interpretation of the provisions of Chapter II of the Act, informed by the normative values laid down by the 1996 Constitution, the position of a purchaser like the applicant, who has paid the full purchase price in a "regular" transaction (i.e., not in an instalment sale), should be similar, *mutatis mutandis*, to the position of the purchasers on instalments envisaged in Chapter II, and that Chapter II of the Act should be subjected to such a "reading in" interpretation.

9. In the **alternative**, if this Honourable Court is of the view that such a reading in is not appropriate, but that the common law should be developed in this regard to meet the exigencies of the applicant's situation, it will be contended that the matter should first be referred to the Supreme Court of Appeal for that purpose.

10. In the **further alternative**, we shall contend that, whilst the Act is not unconstitutional, it does contain a *lacuna* in that it does not deal with situations such as that in which the applicant finds herself, and that such *lacuna* should be rectified by the legislature.

The background

11. On or about 17 September 2002, the applicant entered into a contract with a Mr Reynier Posthumus ("Posthumus") to purchase immovable property situated at 23 Auburn Street, Booyens Park, Port Elizabeth ("the property").⁴

12. The applicant had paid the full purchase price in the amount of R40 000,00 to Posthumus prior to concluding the deed of sale.⁵

⁴ Agreed Statement of Facts at page 19, para 3.1

⁵ Agreed Statement of Facts at page 19, para 3.2

13. On 18 April 2006, some 3½ years later, Posthumus' estate was sequestrated and the first respondent was appointed as trustee of his insolvent estate.⁶
14. At that time the applicant had still not taken transfer of the property.⁷
15. On 9 March 2012 the applicant brought an application in the Port Elizabeth High Court to have the property registered in her name.⁸
16. The applicant's application was founded on the provisions of sections 21 and 22 of the Act.⁹
17. Her application was dismissed, the Court *a quo* having found that her reliance on the provisions of sections 21 and 22 of the Act was misplaced in that those provisions regulate sale of land **by instalments**. Goosen J went on to deal with the common law position set out hereinbefore.¹⁰
18. In this regard we respectfully submit that the applicant's counsel is not correct in her submission that the decision by the trustee whether to proceed with a partially executed contract or whether to abandon same, is based on a

⁶ Agreed Statement of Facts at page 19, para 3.3

⁷ Agreed Statement of Facts at page 19, para 3.4

⁸ Agreed Statement of Facts, at page 19, para 3.5

⁹ Agreed Statement of Facts, page 20, para 3.6

¹⁰ Agreed Statement of Facts, page 20, para 3.8

"*whim*". It is clear, we submit, that in each case the trustee would act on the instructions of the body of creditors in the insolvent estate and in their best interests. Nothing turns on this, however, in the instant matter.

19. On 25 February 2014 the applicant lodged a late application for leave to appeal against this decision and accordingly sought condonation in that regard.¹¹
20. The applicant's condonation application was dismissed on the basis that she had no prospects of success on appeal.¹²
21. We respectfully point out that the application for leave to appeal was not only dismissed on the basis that the applicant had no prospects of success on the common law position set out hereinabove, but also on the basis that she raised a "*wholly different cause of action premised upon a different set of facts*" in raising constitutional issues.¹³
22. We interpose, with respect, to submit that whilst Goosen J was correct that it is preferable that constitutional issues be raised in the papers and argued before a Court of first instance, there are special circumstances attached to the instant matter and, in any event, no new material facts were raised and no new "*cause of action*" was sought to be made out : on our understanding of the papers,

¹¹ Agreed Statement of Facts, page 21, para 3.10

¹² Agreed Statement of Facts, page 21, para 3.11

¹³ Judgment by Goosen J on application for leave to appeal at para [12].

the applicant at that stage sought to advance a further argument to the Court *a quo*, based on constitutional law, but on substantially the same facts.¹⁴

23. In the circumstances we respectfully submit that the Court *a quo*, when faced with the “new” argument based on constitutional values, should have granted leave to appeal to the Supreme Court of Appeal insofar as the merits are concerned (we are at pains, however, to point out that we take no stance in respect of the lateness of the application for leave to appeal or the reasonableness or otherwise of the applicant’s explanations in that regard, neither do we make submissions in respect of the prescription issue).

The common law position

24. In terms of the common law “*(i)nsolvency does not automatically terminate an executory or partly performed contract lying outside the category specifically covered by the (Insolvency) Act. Whether or not the contract continues to operate depends on a decision of the trustee, who is allowed and indeed required to choose which shall happen. He is, of course, responsible to the creditors for his choice. ... The results of the trustee’s decision to bring the contract to a halt are that he may not insist on its further performance by the other party, and that he is not himself expected to fulfil the insolvent’s outstanding obligations under it. Like any creditor owed an ordinary debt which the insolvent incurred before sequestration, the other party is left with*

¹⁴ See, e.g., the authority referred to in footnote 28 below ([Everfresh](#)) at para [28]

*nothing more than a concurrent claim against the estate, entitling him to share in the distribution of its free residue.”*¹⁵

The scheme of the Act

25. Apart from dealing with the statutory formalities prescribed in respect of the alienation of land in sections 2 and 3 of the Act, the bulk of the Act is found in Chapter II which deals with the sale of land on instalments.
26. The Act was preceded by the Sale of Land on Instalments Act, 72 of 1971, as amended.
27. A perusal of the parliamentary debates in Hansard, during the presentation of the Bill in 1971, as well as the replacement of the 1971 Act with the Act in 1981, makes it abundantly clear that the legislature had a deep concern for the position in which purchasers of land on instalments found themselves in the event that they had paid certain instalments (especially in respect of new township development schemes), but had not yet been able to take transfer. This was, with respect, neatly summarised by Trengove JA in Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation) :¹⁶

¹⁵ Bryant & Flanagan (Pty) Ltd v Muller and Another NNO 1977 (1) SA 800 (N) at 804 F – H; original judgment by Goosen J, at para [14].

¹⁶ 1981 (1) SA 171 (A) at 182 D – H

"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 concursum 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 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."
(emphasis provided).

28. We submit that it is clear that this situation led directly to the passing of the 1971 Act, as well as the passing of the 1981 Act. As Trengove JA remarked in Glen Anil (supra) : ¹⁷

"To sum up. According to the law as it stood in 1971, a purchaser, who had bought land under a contract in terms of which the purchase

¹⁷ At 183 F to the end of the page

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 sequestered 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 that were placed in liquidation on account of insolvency. This was, without question, the mischief which s14 of the Act (the 1971 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." (Emphasis provided).

29. From the foregoing we submit with a high degree of confidence that it was the intention of the legislature, even in the pre-constitutional dispensation, to come to the aid of purchasers of immovable property who had paid either the full purchase price or a substantial portion thereof before registration of transfer could take place, but who are then faced with the situation where the sellers are declared insolvent or the relevant property is attached.

30. In this regard we also respectfully refer to the provisions of section 27 of the Act (**which falls outside Chapter II**), which provides that any purchaser who had undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller not less than 50% of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on certain conditions.
31. We submit that what appears from the foregoing is that whilst the legislature sought to protect the interests of "innocent" purchasers in such circumstances, it was never foreseen that a situation such as developed in the instant matter, would arise. That is probably due to the fact that it is a very rare occurrence to find that a purchaser of land pays the full purchase price prior to taking transfer since these two actions normally take place *pari passu*. We submit that it is therefore clear that the legislature at that time only foresaw (and clearly was aware of) the situation where numerous purchasers of land (especially residential properties in new township developments) could not take transfer simultaneously with paying the purchase price (usually because such transfer was not yet registrable) and ended up paying several instalments prior to registration of transfer being capable of being effected.

Statutory interpretation in a constitutional dispensation

32. Section 173 of the 1996 Constitution provides that this Honourable Court, the Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process and "*to develop the common law taking into account the interests of justice*".
33. Section 8(3)(a) of the Constitution further provides that a Court, when applying a provision (or provisions) of the Bill of Rights to a person, such Court must, in order to give effect to such a right or such rights, apply, or if necessary develop, the common law to the extent that legislation does not give effect to such right/s.
34. It is furthermore trite that section 39(2) of the Constitution obliges the Courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights.
35. Whilst, with respect, we do not agree with the applicant's reliance, *inter alia*, on administrative fairness, we broadly support the applicant's contentions that the common law position is not in conformity with constitutional norms.
36. In our respectful submission, however, the legislature had largely addressed such unconstitutionality in the Act (and its predecessor), but the unique circumstances of the applicant have now brought to light an **omission** in the

Act. We submit that by reason of the fact that the legislature has sought to protect purchasers on instalments, vulnerable purchasers such as the applicant who had paid the full purchase price without obtaining registration of transfer, should *a fortiori* also be protected.

37. In this regard we submit the appropriate words must be read into the Act in order to cure any inconsistency in the Act with constitutional principles.¹⁸
38. In deciding whether words should be read into a statutory provision, a Court pays careful attention first, to the need to ensure that the provision which results from reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws made by the legislature as little as possible.¹⁹
39. Furthermore, in deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading

¹⁸ *"Reading-in is predominantly used when the inconsistency is caused by an omission, and it is necessary to add words to the statutory provision to cure it."* (The Bill of Rights Handbook, by Currie and De Waal (6th Edition) at page 187 (emphasis provided))

¹⁹ National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at para [74]

in a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution.²⁰

40. In our submission such a reading in in the instant matter is capable of being formulated with sufficient precision to bring it both within the parameters of constitutionality and within the legislative scheme of the Act.

41. The legislature has already recognised the unfairness of the common law position with regard to a large section of purchasers of immovable property by the introduction of the 1971 and 1981 Acts, and in our submission the suggested reading in would leave the legislature's policy behind the introduction of Chapter II in the Act intact with little, or no, budgetary implications.²¹

42. The view has been expressed (correctly in our submission) that "*reading-in is invoked by the Constitutional Court with increasing frequency and scope. One cannot help but surmise that this is caused, in part, by some of the disappointing outcomes that have ensued from the use of the suspension order [in terms of section 172(1)(b)(ii) of the Constitution] ... Reading-in has the advantage of putting a constitutionally compliant regime immediately in place, which can be amended by the legislature at any time. It is accordingly*

²⁰ National Coalition for Gay and Lesbian Equality (*supra*) at para [75]

²¹ National Coalition for Gay and Lesbian Equality (*supra*) at para [80]

*not as intrusive as it was originally considered to be in the early case law."*²²

(Footnotes excluded)

43. Reading in has been employed as a remedy in several cases by this Honourable Court.²³

44. We submit that the case of Jaftha v Schoeman (*supra*) is particularly instructive and to some extent comparable with the instant matter :

In that matter this Honourable Court held that the failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in terms of section 66 of the Magistrates' Court Act, 32 of 1944, was unconstitutional and invalid.²⁴ However, instead of declaring section 67 of the Magistrates' Court Act unconstitutional to the extent that it does not provide for a blanket prohibition against sales in execution of houses below a certain value, this Honourable Court, *inter alia* referring to the provisions of section 26 of the Constitution, remedied the defect in section 66(1)(a) of the Magistrates' Court Act by reading in the words "*a Court, after consideration of*

²² The Bill of Rights Handbook (*supra*) at page 189

²³ E.g., Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC) at para [45]; Khosa v Minister of Social Development 2004 (6) SA 505 (CC) at para [88]; Jaftha v Schoeman 2005 (2) SA 140 (CC) at paras [62] – [64]; and Mabaso v Law Society, Northern Provinces 2005 (2) SA 117 (CC) at paras [47] – [48]

²⁴ At paras [54] and [55]

all relevant circumstances, may order execution” before the words “*against the immovable property of the party*”.²⁵

45. We further submit that it is instructive to what extent this Honourable Court was prepared to read in “*a fairly sophisticated mechanism*”²⁶ in order to allow more than one spouse in a polygynous Muslim marriage to inherit intestate.²⁷

Our proposed reading in remedy

46. We respectfully submit that a detailed attempt at re-writing or tinkering with the definition clauses in section 1 of the Act and in the extensive provisions of Chapter II of the Act, are not called for. On the assumption that this Honourable Court finds that there is indeed a *casus omissus* in Chapter II of the Act, the Court can make such a finding and remedy same by ordering that section 4 of the Act be amended to read as follows :

“4 Application of Chapter. -

- (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 No 3

²⁵ At paras [63] and [67]

²⁶ Bill of Rights Handbook (*supra*) at page 189, footnote 72.

²⁷ Hassam v Jacobs NO and Others 2009 (5) SA 572 (CC) at paras [51] – [57]

of 1966), the National Housing Commission mentioned in section 5 of the Housing Act, 1966 (Act No 4 of 1966), or a local authority is the seller.

(2) This Chapter shall, however, apply, *mutatis mutandis*, to a deed of alienation in terms of which the purchaser has paid the full purchase price to the seller prior to obtaining registration of transfer.”

47. We respectfully submit that any such reading in remedy must be provided with retro-active effect.

Development of the common law in order to meet the omission from the Act

48. We respectfully submit that although this is the relief sought by the applicant, it is undesirable and not necessary in the circumstances of this case.

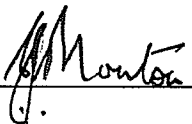
49. We are aware, with respect, of the exhortation by this Honourable Court that the major engine for law reform should be the legislature and not the judiciary.²⁸ The High Courts and the Supreme Court of Appeal are primary

²⁸ Cf. Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) at para [36]; Masiya v Director of Public Prosecutions, Pretoria, 2007 8 BCLR 827 (CC) at para [31]

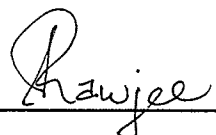
vehicles for developing the common law.²⁹ Only in rare instances will this Honourable Court sit both as a Court of first and last instance.³⁰

50. We respectfully submit, however, that in the circumstances of this case, this matter should not be referred to a Full Bench or the Supreme Court of Appeal in order to develop the common law, particularly since a remedy (albeit an incomplete one) has already been enacted by the legislature in Chapter II of the Act.
51. For the same reason we respectfully submit that the matter should not be referred to the legislature for amendment to the relevant legislation.

DATED AT PORT ELIZABETH THIS 16TH DAY OF OCTOBER 2014



C J MOUTON SC



A RAWJEE

Counsel for the Second Respondent

²⁹ Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers 2012 (3) BCLR 219 (CC) at para [41]

³⁰ Carmichele v Minister of Safety and Security (*supra*) at para [51]

of THE STATE ATTORNEY
Second respondent's attorneys
29 Western Road
Central
PORT ELIZABETH
Ref: Mr W Breytenbach 502/2014/H
Tel: 041 585 7921
Fax: 041 585 2687
E-mail: WBreytenbach@justice.gov.za

TO : THE REGISTRAR
Constitutional Court
1 Hospital Street
Constitutional Hill
Braamfontein
JOHANNESBURG
Per e-mail : registrar@concourt.org.za

AND TO : THE REGISTRAR
High Court
PORT ELIZABETH

AND TO : MR ATTORNEY ROCHE VAN AS
Applicant's attorney
Legal Aid South Africa
Port Elizabeth Justice Centre
(Ref: Roche v A/LC)
c/o IMPACT LITIGATION (MR MAYET)
29 De Beer Street
Braamfontein
Tel: 011 877 2121
Cell : 082 576 0270
E-mail: rocheVA@legal-aid.co.za
E-mail : LillaC@legal-aid.co.za
E-mail : AchmedM@legal-aid.co.za

List of Authorities

Statutes

1. Constitution of the Republic of South Africa, 1996
2. Sale of Land on Instalments Act, 72 of 1971, as amended
3. Alienation of Land Act, 68 of 1981, as amended.

Text books

1. The Bill of Rights Handbook, by Currie and De Waal (6th Edition) (at page 14, footnote 17; page 15, footnote 21; page 17, footnote 25)

Publications

1. Debates of the House of Assembly (Hansard), 29 March 1971 – Sale of Land on Instalments Bill (second reading)
2. Debates of the House of Assembly (Hansard), 21 August 1981 – Alienation of Land Bill (second reading)
3. Debates of the House of Assembly (Hansard), 18 April 1983 – Alienation of Land Amendment Bill (second reading)

Case Law

1. Bryant & Flanagan (Pty) Ltd v Muller and Another NNO 1977 (1) SA 800 (N) (at page 9 footnote 14)
2. Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in liquidation) 1981 (1) SA 171 (A) (at page 9, footnote 15; page 10, footnote 16)
3. National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) (at page 14, footnote 18 and 19; page 15, footnote 20)
4. Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC) (at page 16, footnote 22)
5. Khosa v Minister of Social Development 2004 (6) SA 505 (CC) (at page 16, footnote 22)
6. Jaftha v Schoeman 2005 (2) SA 140 (CC) (at page 16, footnotes 22 – 24)
7. Mabaso v Law Society, Northern Provinces 2005 (2) SA 117 (CC) (at page 16, footnote 22)
8. Hassam v Jacobs NO and Others 2009 (5) SA 572 (CC) (at page 17, footnote 25)
9. Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) (at page 18, footnotes 26 and 28)
10. Masiya v Director of Public Prosecutions, Pretoria, 2007 (5) SA 30 (CC) (at page 18, footnote 26)

11. Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers 2012 (3) BCLR 219
(CC) (at page 18, footnote 27)