



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES:  
**NO**
- (3) REVISED.
- (4) Date: 11 May 2026

Signature: \_\_\_\_\_

**CASE NO: 2023/078800**

In the matter between:

**NOMUSA VIRGINIA DLOMO**

First Applicant

**LEFA DAVID DLOMO**

Second Applicant

and

**KOBUS DE KLERK**

First Respondent

**ELAINE DE KLERK**

Second Respondent

**MINISTER OF TRADE, INDUSTRY AND COMPETITION**

Third Respondent

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## JUDGMENT / REASONS FOR ORDER

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**NYATHI J;**

### **Introduction**

1. This is an unopposed application in which the applicants seek an order declaring section 2(1) of the Alienation of Land Act 68 of 1981 (“the Act”) unconstitutional, to the extent that it fails to recognise or permit the transfer of residential immovable property pursuant to an oral or verbal agreement, even where a vulnerable purchaser has paid the full purchase price or a substantial portion thereof and faces the risk of homelessness.
2. The application implicates the rights to access to adequate housing under section 26 of the Constitution, as well as the rights to dignity (section 10), equality (section 9), and the best interests of the child (section 28(2)).
3. The relief sought includes a declaration of constitutional invalidity, a reading-in to section 2(1) of the Act, the suspension of the declaration pending confirmation by the Constitutional Court, and a referral to that Court in terms of section 172(2)(a) of the Constitution.
4. The matter was enrolled on the unopposed roll. The first and second respondents did not oppose the application. The third respondent, the Minister of Trade, Industry and Competition, filed a notice to abide and advanced no justification for the impugned legislative scheme.

## **Factual Background**

5. The factual narrative is largely common cause and appears fully from the founding affidavit.
6. The applicants are former spouses and parents of two minor children. They have been in occupation of the residential property forming the subject of the dispute for several years.
7. Although an initial written offer to purchase was concluded, it was later terminated by agreement and replaced with a subsequent oral agreement in terms of which the applicants agreed to purchase the property for R1 000 000.00 (One Million Rand). The applicants paid almost the entire purchase price, largely from pension benefits, directly to the first respondent.
8. Despite payment, transfer was not effected. The respondents later refused to proceed with transfer on the sole basis that section 2(1) of the Act requires a written deed of alienation.
9. The applicants and their children remain in occupation of the property and face the ongoing risk of eviction and resultant homelessness.

## **Issues for determination**

10. The principal issues are:

1. Whether section 2(1) of the Alienation of Land Act unjustifiably limits constitutional rights by excluding vulnerable purchasers who acquire residential property through oral agreements; and If so,
2. whether the provision is unconstitutional by reason of under-inclusivity and, if so, what the appropriate remedy is.

### **Constitutional Framework: Access to Adequate Housing**

11. Section 26 of the Constitution guarantees everyone the right of access to adequate housing and proscribes arbitrary evictions.
12. The Constitutional Court has repeatedly emphasised that legislation which permits the loss of an existing home, particularly by indigent or vulnerable persons, constitutes a grave limitation of section 26(1) and is closely bound up with the right to dignity.<sup>1</sup>
13. In *Jaftha v Schoeman* the Court held that any measure which allows people to be deprived of existing access to adequate housing limits section 26 and must be constitutionally justified.<sup>2</sup>
14. More recently, in *Sarrahwitz v Maritz NO* the Court stressed that legislative schemes must not expose vulnerable home owners to homelessness through technical exclusions or rigid formal requirements.<sup>3</sup>

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<sup>1</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 17.

<sup>2</sup> *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) paras 34–35.

<sup>3</sup> *Sarrahwitz v Maritz NO* 2015 (4) SA 491 (CC).

15. The applicants in the present matter are in an analogous position. They are not seeking access to housing for the first time; they already have a home, acquired through considerable personal sacrifice, and now face the loss of that home solely due to the operation of section 2(1) of the Act.

### **Equality and Legislative Under-Inclusivity**

16. Section 9(1) of the Constitution guarantees everyone equal protection and benefit of the law.

17. Section 2(1) of the Act distinguishes between vulnerable purchasers who conclude written agreements and those who conclude oral agreements, notwithstanding that both may have paid substantial amounts and face identical risks of homelessness.

18. This differentiation amounts to legislative under inclusivity. As the Constitutional Court has held, under inclusive legislation that fails to protect a vulnerable group in materially similar circumstances may violate section 9(1).<sup>4</sup>

19. The test for constitutionally permissible differentiation is whether it bears a rational connection to a legitimate governmental purpose.<sup>5</sup> Where no such purpose exists, the differentiation is arbitrary and unconstitutional.

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<sup>4</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 40.

<sup>5</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25.

20. No governmental purpose has been advanced—either in the papers or in argument—to justify excluding vulnerable purchasers who acquire residential property through oral agreements. In these circumstances the differentiation is irrational and offends the right to equality.

21. As Mogoeng CJ stated in *Sarrahwitz*, there is no rational basis for protecting one category of vulnerable purchasers while excluding another equally vulnerable category from statutory protection.<sup>6</sup>

### **Dignity and Children's Rights**

22. The right to dignity is inseparable from the right to have a place one can call home. Homelessness or the threat thereof has consistently been recognised as profoundly demeaning.<sup>7</sup>

23. The applicants' minor children reside in the property. Section 28(2) of the Constitution requires that a child's best interests are of paramount importance in every matter concerning the child. The threatened loss of their home would plainly implicate those interests.

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<sup>6</sup> *Sarrahwitz* supra paras 65-67.

<sup>7</sup> *Japha* supra para 27.

## Justification and Limitation Analysis

24. Where a limitation of constitutional rights cannot be shown to serve a legitimate governmental purpose, the limitation fails at the outset.<sup>8</sup>

25. In the present matter, the Minister has offered no justification for the exclusion created by section 2(1). In the absence of any justification, the limitation of sections 26, 10 and 9 of the Constitution is unreasonable and unjustifiable.

## Remedy

26. Section 172(1)(b) of the Constitution empowers this Court to grant “any order that is just and equitable”.

27. Reading in has long been recognised as an appropriate remedy where a statutory provision is constitutionally defective by reason of an omission, and where the insertion of words cures the defect without usurping the legislative function.<sup>9</sup>

28. A reading-in to section 2(1) of the Act is appropriate, as it preserves the overall structure and purpose of the Act while extending protection to a hitherto excluded class of vulnerable purchasers.

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<sup>8</sup> *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) para 62.

<sup>9</sup> *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 16.

29. As this Court has declared an Act of Parliament constitutionally invalid, the order is subject to confirmation by the Constitutional Court and must be suspended pending such confirmation in terms of section 172(2)(a).

## **Order**

30. The following order is made:

1. The failure by the Alienation of Land Act 68 of 1981 to provide for the transfer of residential property pursuant to an oral or verbal agreement, so as to prevent the homelessness of vulnerable purchasers who have paid the full purchase price or a reasonable portion thereof, is inconsistent with the Constitution and invalid.
2. From the date of this order, section 2(1) of the Act is read as including the following words:

“The alienation of land after the commencement of this section shall include a deed of alienation signed by the parties or by their agents acting on their written authority. The verbal or oral agreement for the transfer of residential property shall be binding and enforceable.”
3. The declaration of invalidity and the reading-in are suspended pending confirmation by the Constitutional Court.
4. The judgment is referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.

5. The third respondent is ordered to pay the costs of the application, including the costs reserved on 12 June 2025, on a party-and-party scale.



J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of Order: 02 October 2025

Date of reasons: 11 May 2026

**Appearances:**

On behalf of the Applicant: Mr. Marweshe

Applicant's attorneys: Marweshe Attorneys.

On behalf of the Respondents: None

**Delivery:** This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 11 May 2026.