

**RESOLVING THE TENSION BETWEEN THE SECTION 25 RIGHT TO
PROPERTY AND SECTION 26 RIGHT TO HOUSING: THE
CONSTITUTIONAL COURT OF SOUTH AFRICA'S SUBSIDIARITY
METHODOLOGY**

by

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Summary

In this dissertation, I identify the tension between the s25 right to property and s26 right to access to adequate housing. This tension is a result of the historical narrative of the Republic of South Africa where forced evictions were a weapon in the arsenal of Apartheid and the common law right of property was practised in a discriminatory manner.

With the advent of a constitutional dispensation four sources of law were created. The Constitution of the Republic of South Africa, 1996 as the supreme law of the nation, from which all other laws derive their legitimacy; legislation enacted by parliament; common law and to a limited extent indigenous law. Further, how the Constitutional Court deals with the different sources of law in eviction cases has an impact on the outcome of the case.

The subsidiarity methodology entails that when deciding a given matter one first looks to the legislation enacted to give effect to a right in the Bill of Rights; if the matter is not adequately covered by legislation, the courts consider the common law and only if the constitutional validity of the legislation is attacked does one make direct resort to a right in the Bill of Rights.

I argue that the subsidiarity methodology is the most appropriate tool to assist the courts in dealing with the various sources of law from analysing CC eviction cases from 2007 to 2015. The implications of this dissertation are the that constitutional adjudication needs to develop the subsidiarity methodology further and that academic commentary should do same.

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Summary

In this dissertation, I identify the tension between the s25 right to property and s26 right to access to adequate housing. This tension is a result of the historical narrative of the Republic of South Africa where forced evictions were a weapon in the arsenal of Apartheid and the common law right of property was practised in a discriminatory manner.

With the advent of a constitutional dispensation four sources of law were created. The Constitution of the Republic of South Africa, 1996 as the supreme law of the nation, from which all other laws derive their legitimacy; legislation enacted by parliament; common law and to a limited extent indigenous law. Further, how the Constitutional Court (CC) deals with the different sources of law in eviction cases has an impact on the outcome of the case.

The subsidiarity methodology entails that when deciding a given matter one first looks to the legislation enacted to give effect to a right in the Bill of Rights; if the matter is not adequately covered by legislation, the courts consider the common law and only if the constitutional validity of the legislation is questioned does one make direct resort to a right in the Bill of Rights.

I argue that the subsidiarity methodology is the most appropriate tool to assist the CC in dealing with the various sources of law by analysing CC eviction cases from 2007 to 2015. The implications of this dissertation are that constitutional adjudication and academic commentary should develop the subsidiarity methodology further.

Chapter 1: Introduction

1 1 Research Problem

The broad problem statement of this dissertation is to investigate and critically evaluate the methodology of the Constitutional Court of South Africa (CC) in dealing with the sources of law, specifically in eviction cases, through the subsidiarity methodology of interpreting legislation and developing the common law in line with the spirit, purport and objects of the Bill of Rights, with the view to ultimately propose further development of the interpretive tools of the CC.

The research questions to be investigated are as follows: Is there a problem in adjudication when with dealing with the different sources of law available to decide eviction disputes and if so what is the precise nature of that problem? Does a subsidiarity methodology exist and what exactly does it entail? What solution does the subsidiarity methodology offer to eviction disputes and is it a comprehensive solution?

1 2 Assumptions

The thesis of this dissertation is based on four main assumptions, the assumptions are as follows:

Firstly, the courts consider four main sources of law when deciding eviction cases. The main source of law in the Republic of South Africa is the Constitution.¹ The courts also consider statutory enactments of parliament; the common law; and to a limited extent indigenous law. More importantly, how the Court deals with the sources of law has an impact on the outcome of cases.² For instance, there is the danger that if the courts are resistant to developing the common law in line with the values of a transformative constitution, common law would be allowed to develop as a parallel system of law running contrary to the objects, spirit and purport of the Bill of Rights.³

Secondly, there is tension between s25 Right to Property and s26 Right to Housing due to the historical narrative of absolute ownership of property resulting in

¹ Constitution of the Republic of South Africa 1996 (hereafter 'the Constitution').

² AJ Van der Walt *Property and Constitution* (2012) at 19.

³ *Ibid* at 16.

discriminatory practises, forced evictions and depriving marginalised groups of land.⁴ In a constitutional democracy the tension is seen through balancing of the land owners' (whether public or private) right to the use and enjoyment of their land; with the right of unlawful occupiers not to be evicted without consideration of all the circumstances.⁵

Thirdly, the subsidiarity methodology has been developed in order to provide a systematic method of dealing with the sources of law.⁶ It provides a starting point of analysis and an order in which to consider the sources of law.⁷ This method entails that in a given matter (for our purposes eviction cases) the court first looks at the statutory enactments related to the issue at hand: *inter alia* the Prevention of Illegal Evictions Act (PIE),⁸ or Extension of Security of Tenure Act (ESTA),⁹ and if these statutes do not answer the question or do not cover it sufficiently, the court then considers the common law stance on the matter.¹⁰ If it is possible to develop the common law in order to answer the question then the courts should do so.¹¹ If all else fails, the last step is direct reliance on a right in the Bill of Rights, which for our purposes would be direct reliance on the Section 25 Right to Property or the section 26 Right to Housing, by questioning the constitutional validity of the legislation giving effect to the right.¹²

Fourthly, the subsidiarity methodology does not provide a comprehensive method to deal with the various sources of law related to eviction cases as it does not offer substantive solutions but rather presents an order in which the substantive options should be selected.¹³ Furthermore, the subsidiarity methodology creates the possibility of constitutional avoidance if the courts only opt for direct reliance on a constitutional right as a matter of last resort.¹⁴

⁴ AJ Van der Walt *Constitutional Property Law* (2005) at 310.

⁵ Van der Walt *supra* note 2 at 14.

⁶ Van der Walt *supra* note 2 at 15, 26 & 35.

⁷ Van der Walt *supra* note 2 at 37.

⁸ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (hereafter PIE).

⁹ Extension of Security of Tenure Act 62 of 1997 (hereafter ESTA).

¹⁰ Van der Walt *supra* note 2 at 36.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Van der Walt *supra* note 2 at 97.

¹⁴ *Ibid* at 37.

1 3 Motivation

The motivation for this dissertation is found in section 25 and 26 of the Constitution, which states *inter alia*:

25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property...

*26(1) Everyone has the right to have access to adequate housing.*¹⁵

There are few sections in the South African Constitution that have garnered as much attention as the section 25 right to property and the section 26 right to housing. As a product of the transition of a nation from Apartheid into a constitutional democracy, these sections represent the desire to eliminate the injustice of the past.¹⁶

During the democratic negotiations there was much academic discussion on whether to include a property clause, due to scepticism concerning the effect of the clause on individual rights, however once the 'political realities' had established that there would be a property clause in the Constitution the issue became the content thereof.¹⁷

Section 25 was designed to achieve the following purposes: firstly, it recognised the right to ownership through section 25(1),¹⁸ which eased the fears of white land owners and traditional common law scholars. According to the common law, property owners had entitlements to *inter alia* the control, use and enjoyment of their property.¹⁹ Sections 25(2) - 25(3) dealt with the parameters within which expropriation of property may occur.²⁰ One of the strongest weapons in the arsenal of Apartheid was the statutory deprivation of land which weakened the land rights of

¹⁵ Constitution of the Republic of South Africa, 1996.

¹⁶ Van der Walt *supra* note 4 at 2: During the democratic negotiations there was much academic discussion on whether to include a property clause due to scepticism concerning the effect of the clause on individual rights, however once the 'political realities' had established that there would be a property clause in the Constitution the issue became the content thereof.

¹⁷ Van der Walt *supra* note 4 at 2.

¹⁸ D P Visser 'The 'Absoluteness' of Ownership: The South African Common Law in Perspective' (1985) 39 Acta Juridica 39 (Visser disputes that the element of 'absoluteness' originated from the Roman-Dutch system even though it is so often attributed to it. For our purposes it is sufficient to note that an absolute right is a right that cannot be impeded upon by any other lesser right referred to as limited real rights).

¹⁹ L Neil Van Schalkwyk & P De W Van der Spuy *The Law of Things 7ed.* (2008) 86-87.

²⁰ Van der Walt *supra* note 4 at 12.

marginalised groups.²¹ This provision constitutionally ensured that no such weapon could be used in an open and democratic society without: a law of general application; the expropriation being in the public interest; and compensation.²²

Section 25(4) concerns the parameters of interpretation for the property clause, while sections 25(5) – 25(9) concern land reform.²³

On the other hand the section 26(1) guarantees the right to have access to adequate housing. Furthermore, section 26(2) places a duty on the state to take reasonable legislative measures to achieve the progressive realisation of that right. Moreover, no one may be evicted from their home or have their home demolished without an order of court taken in light of all relevant circumstances in terms of s26(3).

Understanding the tension between sections 25 and 26 cannot be adequately apprehended outside the context of South African history. During the years of Apartheid, the political landscape of the country was entrenched in two sources of law: firstly, the statutorily enacted apartheid legislation and secondly, the common law, which was mostly judge-made law.²⁴ This was a result of the fact during the apartheid years; South Africa was under a system of parliamentary sovereignty, which made the relationship between the legislature and judiciary resemble a one-sided power relationship.²⁵ The statutory enactments that entrenched apartheid were implemented by the judiciary and the common law was developed in line with the undemocratic policies of the time, without much leeway for variation between one and the other.²⁶

It was inevitable that with the abolition of Apartheid there would need to be redress for the inequalities created by Apartheid inspired legislation and the judicial

²¹ Sue-Mari Maas & AJ Van der Walt 'The Case in Favour of Substantive Tenure Reform in the Landlord-Tenant Framework: The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele; City of Johannesburg Metropolitan Municipality v Blue Moonlight' (2011) 128 South African Law Journal at 437.

²² Section 25(2)(a) and (b).

²³ Van der Walt *supra* note 4 at 12.

²⁴ Anton Fagan 'The Secondary Role of the Spirit, Purport and Objects of the Bill in the Common Law's Development' (2010) 127 South African Law Journal 611 at 612.

²⁵ Heinz Klug *Constituting Democracy: Law Globalism and South Africa's Political Reconstruction* (2000) 34.

²⁶ *Ibid.*

development of the laws that kept marginalised populations from enjoying secure land tenure.²⁷

The advent of a Constitutional dispensation in 1994 not only meant the end of a repressive regime but it also created a new power balance that would inevitably cause a shift in property law.²⁸ Firstly, the Constitution replaced the one sided power relationship under parliamentary sovereignty with a constitutional democracy that established a doctrine of separation of powers. Under this separation of powers doctrine three co-equal branches of government were established, each with their own role, as well as checks and balances to ensure that all three branches acted legitimately.²⁹ The legislature held the power to enact legislation, while the judiciary held the power to interpret the legislation (as well as exercise judicial review) and the executive was tasked with the execution of the legislation enacted by the democratically elected body.³⁰ And with the new system of power, came the responsibility to ensure that one branch did not encroach on the mandate of another.

Particularly, the counter-majoritarian dilemma is concerned with the issue of whether the courts can carry out functions that are specifically left to the democratically elected body that represents the will of the majority.³¹ One of the courts' responses to this dilemma is the application of judicial deference. Deference occurs when a court admits it lacks the competency, capacity or legitimacy to remedy a specific situation and consequently defers to the judgment of the branch which it deems is most suitable for providing an answer or remedy.³² Although it will not be discussed in this dissertation it should be noted that deference could be seen as a form of institutional subsidiarity among branches of government.³³

Secondly, the shift in the power balance resulted in the establishment of four sources of law: the Constitution, legislation, common law and to a limited extent indigenous

²⁷ Maas & Van der Walt *supra* note 21 at 437.

²⁸ Van der Walt *supra* note 2 at 14, 20.

²⁹ Constitution of the Republic of South Africa sections 1, 40, 43, 83, 85 and 165.

³⁰ *Ibid.*

³¹ Klug *supra* note 25 at 19.

³² Danie Brand 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' (2011) 3 Stellenbosch Law Review 618.

³³ Karl Klare 'Legal Subsidiarity & Constitutional Rights: A Reply to A J Van der Walt' (2008) 1 Constitutional Court Review at 134 (It is important to distinguish subsidiarity in this context from that of EU law which refers to the "mandate for downward devolution of decision making to the lowest level at which a particular decision may be taken. The idea is to harvest local knowledge, facilitate public participation and empowerment, and respect local concerns").

law.³⁴ The Constitution, with its own transformational values, was declared as the supreme law of the country and established that all other law derived its legitimacy from the Constitution.³⁵ According to section 8(1), the Bill of Rights applies to all law and binds the legislature, executive, judiciary and all organs of state. Moreover, when applying a provision in the Bill of Rights to a natural or juristic person, the courts must apply, or if necessary, develop the common law to the extent that legislation does not give effect to that right.³⁶

The shift in the power balance created the necessity for a manner in which to deal with the sources of law. In 1995 the courts began to grapple with this issue and a new dialogue in this regard began.

1 4 Literature Review

Professors AJ Van der Walt³⁷ and L Du Plessis³⁸ have endorsed a framework for dealing with the sources of law called the subsidiarity principles.³⁹

*“The subsidiarity principles should not be seen or used as restrictions upon constitutional review, interpretation of legislation or development of the common law; they indicate an angle of approach, a starting point for reflection, a methodological discipline to avoid arbitrary resort to established and comfortable ways of thinking and not general avoidance of constitutional influence”.*⁴⁰

Professor Du Plessis made the distinction between institutional subsidiarity,⁴¹ jurisdictional subsidiarity⁴² and adjudicative subsidiarity.⁴³ Adjudicative subsidiarity is defined as:

³⁴ Van der Walt *supra* note 2 at 19.

³⁵ Section 8(1) read with section 1(c) and section 2 of the Constitution.

³⁶ Section 8(3)(a).

³⁷ Van der Walt *supra* note 2 at 35.

³⁸ L Du Plessis “Subsidiarity”: What’s in the Name for Constitutional Interpretation and Adjudication? [Accessed at: www.chr.up.ac.za/chr_old/closa/chapters/Subsidiarity.pdf on 11 October 2014].

³⁹ Van der Walt *supra* note 2 at 35.

⁴⁰ *Ibid* at 37.

⁴¹ Du Plessis *supra* note 38 at 6. Ernst Benda, Werner Maihofer and Hans Jochen Vogel (eds) *Handbuch des Verfassungsrechts* 2nd ed 1995 Berlin De Gruyter (2 vols) 1051 quoted therein: “According to this principle a comprehensive, superordinate community ought not to take for its account any matter that a smaller, subordinate community can deal with and bring to a good end”.

“mode’ or ‘issue-centric’: It enjoins one and the same forum to prefer an aconstitutional (or, at least, an indirectly constitutional) to a strictly constitutional mode of adjudication whenever the solution of a legal question admits of the former (and does not of necessity require the latter). The highest authority of the Constitution is, in other words, not to be overused to decide issues that can be disposed of with reliance on specific, subordinate and non-constitutional precepts of law.”

Although Van der Walt and Du Plessis both speak the language of subsidiarity, their dialects are different. Where Du Plessis sees adjudicative subsidiarity as a way to avoid resorting to a constitutional question by relying on non-constitutional laws, based on the *Mhlungu principle*,⁴⁴ Van der Walt argues that the correct narrative for dealing with the sources of law is by relying on the legislation that gives effect to the right in the Constitution before resorting to the Constitution directly, based on the *SANDU principle*,⁴⁵ further when legislation has been promulgated to codify an aspect of the common law, the *Bato Star principle*,⁴⁶ precludes resort to the common law in those instances.⁴⁷ As an overarching theme, Professor Du Plessis sees adjudicative subsidiarity as a bottom-up means to infuse the spirit, purport and objects of the Bill of Rights into non-constitutional law at grassroots level.⁴⁸ Van der Walt promotes subsidiarity under the banner of transformative constitutionalism, which begins at the top (with the Constitution) and filters down into every law.⁴⁹

⁴² Du Plessis *supra* note 38 at 8. “Jurisdictional subsidiarity as an instance of institutional subsidiarity is concerned with the apportionment of responsibility and power to adjudicating fora. It’s opposite number, instantiated by strategic subsidiarity, adjudicative subsidiarity.”

⁴³ Du Plessis *supra* note 38 at 14. “Adjudicative subsidiarity guides adjudication of substantive issues of law.”

⁴⁴ *S v Mhlungu and Others* 1995 (7) BCLR 793, 1995 (3) SA 867 (CC) par 59: *I would lay it down as a general rule that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed*. Du Plessis *supra* note 38 at 1- 2.

⁴⁵ *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) pars 51: “*In my view, this approach is correct: where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard*”.

⁴⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) par 25: “*The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past*”.

⁴⁷ AJ Van der Walt ‘Normative Pluralism and Anarchy: Reflections of the 2007 Term’ 2008 (1) Constitutional Court Review at 100-103.

⁴⁸ Du Plessis *supra* note 38 at 32.

⁴⁹ Van Der Walt *supra* note 2 at 32.

The *Pharmaceutical Manufacturers*⁵⁰ case propelled the notion of subsidiarity when the CC adopted the *single system of law* principle to deal with the sources of law.⁵¹

*There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to the constitutional control.*⁵²

In the new dispensation, the conundrum was how to reconcile the constitutional (albeit limited) guarantee of property;⁵³ with the common law property remedies inspired by Apartheid values; with the right to adequate housing and not to be evicted from ones dwelling; with the enactment of legislation such as PIE and ESTA. Without a methodology to reconcile these conflicting interests, there is a danger that the interests of justice will not be adequately served; or that a hierarchy of interests might be created.⁵⁴

Although I argue that the subsidiarity methodology is the most appropriate way to deal with the different sources of law, it is not without its pitfalls. The *Mhlungu principle* of raising a constitutional issue only as a matter of last resort raises the danger of constitutional avoidance.⁵⁵ Also, according to Professor Karl Klare, as a starting point for legal analysis, the subsidiarity principles offer what he described as the threshold for legal analysis, but to their undoing, without answering the substantive questions.⁵⁶

1 5 Structure

In this chapter, I introduce the research topic and set out the parameters of the research objective. Beginning with the effects of South Africa's apartheid era on

⁵⁰ *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) (hereafter *Pharmaceutical case*).

⁵¹ Van der Walt *supra* note 2 at 20.

⁵² *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) at par 44.

⁵³ Property is inherently limited in the property clause by the qualification that a law of general application may allow for the deprivation of property; as well as by section 36 which places a limitation on every right in the Bill of Rights to the extent that the limitation is reasonable and justifiable in an open and democratic society.

⁵⁴ Van der Walt *supra* note 2 at 22.

⁵⁵ Van Der Walt *supra* note 47 at 126. Stu Woolman quoted therein raised five objections against the principle of constitutional avoidance described in the *Mhlungu* case.

⁵⁶ Klare *supra* note 33 at 146.

legislation and common law as well as the change introduced by the constitutional dispensation of 1994.

In chapter 2, I define the subsidiarity methodology in the South African context. According to this narrative there is a single system of law and in ensuring that single system of law algorithm, the courts must interpret all legislation to promote the spirit, purport and objects of the Bill of Rights and develop the common law to do the same.⁵⁷ When carrying out this task the courts first look to the legislation that governs a certain matter, when legislation does not cover that issue then the courts look to the common law.⁵⁸

An analysis of the methodology of the CC must include the constitutional provisions that set the parameters for the interplay between the constitution, legislation and common law; in particular sections 8, 39, 172 and 173. With regard to the development of the common law I consider the section 8 Application of the Bill of Rights, and section 39 Interpretation of the Bill of Rights. In respect of section 8 the extreme view is that the constitutional mandate to promote the spirit, purport and objects of the Bill of Rights acts only as a tie-breaker and not a reason to develop the common law.⁵⁹ The more appropriate view is that courts are under a duty to develop the common law in terms of section 8. The questions to be answered in this respect are: (1) Does section 8(3) implicitly impose a duty to the court to develop the common law and (2) when does it become “necessary” for the courts to develop the common law if this duty does not exist.

As the last step in the subsidiarity methodology, only where the validity of legislation that gives effect to a right in the Bill of Rights is questioned, can the plaintiffs then make a direct challenge on the basis of a constitutional provision.⁶⁰ The variations of this framework are also discussed in light of legislation enacted to give effect to a right in the Bill of Rights or has the effect of giving effect to a right; where more than one act gives effect to the same right; where there is non-property legislation gives effect to a property right; where there is pre-constitutional legislation; where there is no legislation that gives effect to a right in the Bill of Rights;

⁵⁷ Van der Walt *supra* note 2 at 23.

⁵⁸ *Ibid.*

⁵⁹ Fagan *supra* note 24 at 612.

⁶⁰ *Ibid.*

In chapter 3, I consider the eviction cases of the CC between the years 2007 to 2015, and analytically discuss the methodology used in these cases. The tentative proposal is that (1) Subsidiarity only answers threshold questions in some instances but should not be altogether disregarded (2) the courts have developed other interpretive methods in conjunction with the subsidiarity principles to carry the analysis of constitutional interpretation further.

In chapter 4, I make conclusions based on the earlier sections and reflect on the assumptions made in this study. Particularly, I conclude that the subsidiarity methodology exists; further that it offers some solutions to eviction disputes but that the inconsistency in application of the methodology and the form in which eviction cases are brought are not always conducive to the development of the methodology. I will also make recommendations as to how the courts can improve the application of the subsidiarity methodology particularly in adjudicating eviction disputes.

1 6 Limitations

For the purposes of this study legal subsidiarity is not discussed in terms of the European Union definition,⁶¹ which DuPlessis defines as institutional subsidiarity.⁶²

I also do not consider the question of direct or indirect horizontal application of the Bill of Rights in much depth.⁶³ At most it is noted that most of South African jurisprudence has abandoned discussion on the direct application in favour of indirect application of the Bill of Rights.⁶⁴ Secondly, the discourse of indirect horizontal application should be balanced with discourse on the state duty to protect fundamental rights doctrine.⁶⁵

Lastly, this dissertation will be limited to an exposition of eviction cases decided by the CC during the period of 2007-2015.⁶⁶

⁶¹ Klare *supra* note 33 at 134.

⁶² Du Plessis *supra* note 38 at 6.

⁶³ Van der Walt *supra* note 47 at 116.

⁶⁴ AJ Van der Walt 'Transformative Constitutionalism and the Development of South African Property Law (Part 1)' (2005) 4 TSAR 666.

⁶⁵ *Ibid* at 667.

⁶⁶ The period was selected following the article by Prof Van Der Walt, *supra* note 47, which reviewed the 2007 term of the CC. It therefore seemed useful to carry on the analysis after that period.

Chapter 2: What is the Subsidiarity Methodology?

2 1 Introduction

What is the subsidiarity methodology and what principles does it entail and how have these principles developed in South African jurisprudence? In this chapter I consider three broad issues: Firstly, a definition of subsidiarity as developed through case law; secondly, the basic assumptions that must be held for subsidiarity to find application; and lastly, the major criticisms laid against the subsidiarity methodology.

As a general rule of subsidiarity (and legal interpretation) specific legislation (*lex specialis*) should be considered before general legislation (*lex generalis*).⁶⁷ The following exposition considers the development of subsidiarity in CC case law.⁶⁸

The subsidiarity principle was first verbalised in *S v Mhlungu*.⁶⁹

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

As previously stated this paper will primarily concern itself with what Professor Du Plessis’s describes as adjudicative or issue centric subsidiarity. This category of issue centric subsidiarity is designed to assist in the identification and implementation of which normative means should be applied in any given situation.⁷⁰ Professor Du Plessis describes this method as a negotiation of normative means.⁷¹ This negotiation begs the question whether there could be a normative hierarchy⁷² created by subsidiarity. Du Plessis in his analysis neither concludes nor excludes the possibility that subsidiarity may create a hierarchy or variation in the scope of the norms.⁷³

⁶⁷ Van der Walt *supra* note 2 at 43.

⁶⁸ *Ibid.*

⁶⁹ Du Plessis *supra* note 38 at 1.

⁷⁰ *Ibid* at 3.

⁷¹ *Ibid.*

⁷² The concept of a normative hierarchy is extensively discussed in the context of international law in D Shelton “Normative Hierarchy in International Law” *The American Journal of International Law* Vol. 100 No.2 (Apr 2006) pp 291 – 323.

⁷³ Du Plessis *supra* note 38 at 3.

It [subsidiarity] simply states that subsidiarity manifests as the laws preference for legal norms A and B and C for- and the exclusion of legal norm X from- possible application in a given situation.

Although this may have been true of the subsidiarity principle as articulated in *Mhlungu*, development of the concept thereafter clarifies that there is no normative hierarchy created between the constitutional rights themselves. Rather it is apparent that what are promoted are the spirit, purport and objects of the Bill of Rights as whole. Further, it merely reiterates the supremacy of the Constitution over the other sources of law.

The notion of the spirit, purport and object of the Bill of Rights has seen progressive development. Increasingly in CC decisions and academic commentary the notion of a transformative constitution has become a central theme:⁷⁴ the basic premise being that the Constitution has a transformative goal and that all law must pass constitutional scrutiny, i.e. that it must be filtered through the spirit, object and purport of the Bill of Rights.⁷⁵

Although Klare is unconvinced by the Van Der Walts's idea that the constitution provides some direction giving purpose (transformation),⁷⁶ it is clear from the preamble of the Constitution that there are guiding purposes;⁷⁷ and further the CC has considered these purposes in guiding its analysis of the sources of law.

One of the principles inspired by the desire to achieve a transformative Constitution is the promulgation of a single system of law in the *Pharmaceutical Case*:

⁷⁴ Van Der Walt *supra* note 2 at 97;

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* Klare was unconvinced by Van Der Walt's assumption that the constitution provides a direction giving purpose. For our purposes the same assumption as Van Der Walt is held as will be elucidated through the reasoning in the Constitutional Court case law.

⁷⁷ Preamble of the Republic of South Africa:

We therefore through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

“There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”⁷⁸

This statement is in one sense unsurprising in that the supremacy of the Constitution is guaranteed in section 2; and section 8(1) makes it clear that the Bill of Rights applies to all law and binds all spheres of government. However, the practical application of this section is far reaching. Most importantly this statement precludes the development of a parallel system of law. It makes it impossible to have rules and remedies developing separately in legislation, common law and customary law. Further, it ensures that a litigant does not have free reign to decide under which source of applicable law he can raise his cause of action or defence;⁷⁹ there is only one system of law that binds all the sources of law in a unified constitutional system.

2 2 The Rules of Subsidiarity Methodology

Professor AJ Van Der Walt unpacks the subsidiarity methodology as having two basic rules, both with their own provisos.

2 2 1 Subsidiarity Rule 1

Rule 1: A litigant who avers that a right protected by the Constitution has been infringed must rely on legislation specifically enacted to protect that right and may not rely on the constitutional provision directly when bringing an action to protect the right.⁸⁰

Proviso 1: However, the litigant may rely directly on the constitutional right when she attacks the legislation for being unconstitutional or inadequate in protecting her right.⁸¹

Rule 1 with its accompanying proviso can be seen in the *SANDU* case which stated the following:

⁷⁸ *Pharmaceutical* at 44.

⁷⁹ Van Der Walt *supra* note 47 at 102.

⁸⁰ Van Der Walt *supra* note 2 at 36.

⁸¹ *Ibid.*

“Where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.”⁸²

The first rule established that all inquiries must begin with the legislation that gives effect to a constitutional right (it can also be said that the inquiry begins and ends with the Constitution; in order to find the law giving effect to the constitutional right, we first ask the question which constitutional right is it at stake and then secondly which piece of legislation was promulgated to give effect to that right).

The principle in *SANDU* also deals with the issue of the counter-majoritarian dilemma, in that it recognises the legitimacy of the legislature being the constitutionally elected body to create laws.⁸³ Therefore, *Rule 1* adds a bulwark to the legislative authority of the legislature and discourages the notion that judges usurp the doctrine of separation of powers.⁸⁴

2 2 2 Subsidiarity Rule 2

Rule 2: A litigant who avers that a right protected by the Constitution has been infringed must rely on legislation enacted to protect that right and may not rely on the common law directly when bringing action to protect that right.⁸⁵

Proviso 2: However, the litigant may rely on the common law instead of legislation in so far as the legislation was not intended to cover that particular aspect of the common law and in so far as the common law is not in conflict with the constitutional provision or with the scheme introduced by the legislation or can be developed through interpretation to that effect.⁸⁶

Rule 2 also affects the counter-majoritarian dilemma in that it steers away from bypassing legislation in favour of the judge made common law. *Proviso 2* also adds a wide range of qualifications for the instances where resort to the common law must

⁸² *SANDU* at 51-52.

⁸³ Van Der Walt *supra* note 47 at 102.

⁸⁴ *Ibid.*

⁸⁵ Van Der Walt *supra* note 2 at 36.

⁸⁶ *Ibid.*

be made and when the common law should be developed in order to augment a given situation.⁸⁷

In Van der Walt's view, the common law may fill the gap filler when: (1) the legislation has not covered the field adequately, or at all, and (2) there is a common law position that may solve the conundrum; or the common law can be constitutionally developed in order to cover that aspect of law.⁸⁸

2 3 Subsidiarity Assumptions

The interpretation of sections 8, 39 and 173 of the Constitution has direct bearing on the functioning of subsidiarity methodology as will be discussed below.

Section 8(3)⁸⁹ states that the court has a duty to develop the common law when by doing so it gives effect to a right in the Bill of Rights. The court must apply and if necessary develop the common law to the extent that the legislation does not give effect to that right. In this regard the *duty to apply* the common law must be distinguished from the *necessity to develop* the common law.⁹⁰ The principle of necessity is insightful as to when it would be *necessary* to develop the common law.⁹¹ This would require three steps in order to trigger the necessity of the development of common law: (1) The court first considers the legislation giving effect to the right in the Bill of Rights (at this step the court has all its interpretive tools to preserve the legislation) (Van Der Walt's *Rule 1*); (2) When the legislation giving effect to the right fails then the court must apply the common law as it stands, which

⁸⁷ Van Der Walt *supra* note 47 at 104.

⁸⁸ *Ibid* at 110: "The governing principle should not be that the common law survives where it remains unaffected by constitutional or legislative provisions, but rather that the common law survives only if and in so far as it is consistent with the Bill of Rights, consistent with existing legislation, and capable of complementing the legislation in giving effect to constitutional rights, either as it stands or through being developed for the purpose."

⁸⁹ 8(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

⁹⁰ This must be distinguished from Fagan *supra* note 24 at 622 (Fagan interprets section 8(1) and 8(2) as providing independent reasons for developing the common law that triggers the obligation to promote the objects of the Bill of Rights).

⁹¹ CR Snyman Criminal Law 5ed (2008) 117 ('Necessity is a ground of justification if X finds herself in an emergency situation, has to weight two conflicting interests against each other and then infringes the interest which is of less importance according to the legal convictions of the community, in order to protect the interest which is of greater importance').

for the purpose of this study is termed “as is” common law (*Rule 2*); (3) When common law “as is” does not cover the situation it will then become necessary for the court to develop the common law, if, in light of the legal convictions of the community, doing so would protect a right of greater importance (*Proviso 2*).⁹²

The necessity to develop the common law in section 8(3) must also be distinguished from the inherent power to develop the common law in section 173 as they have a different effect on the extent to which the common law might be developed.⁹³ Section 173 states that the courts have the inherent power to develop the common law if the interests of justice so permit. The CC stated in *Zantsi v Council of State, Ciskei*,⁹⁴ confirmed that it will develop the common law if the interests of justice so require.⁹⁵ The “interests of justice” is a broad term and will depend on the circumstances of each case to ascertain its meaning.

It is therefore tenable that the interests of justice entail a broader concept than *necessity* and that the interest of justice may require development of the common law even where there is no *necessity* to do so. This would occur in situations where the common law is facially valid (therefore section 8(3) would require that it must be applied “as is”) but the interests of justice require its development. For example, the common law right of the owner to evict unlawful occupiers from their property is facially valid but the interest of justice (as elucidated through PIE) indicate that all relevant circumstances of the unlawful occupier need to be considered before an eviction may be granted. Therefore, the common law related to the property owner’s right must be developed in order to align with the spirit, object and purport of the Bill of Rights.

Further, section 173 read with section 39(2): “*When interpreting any legislation and when developing the common or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights,*” indicates that the courts have the power to develop the common law and when doing so it must align the

⁹² *Ibid.*

⁹³ s173: *The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.*

⁹⁴ *Zantsi v Council of State, Ciskei* 1995 4 SA 615 (CC).

⁹⁵ Van Der Walt *supra* note 47 at 96; Du Plessis *supra* note 38 at 16 phrases it more strongly: adjudicative subsidiarity cannot stand in the way of the “interests of justice”.

spirit, purport and objects of the common law with that of the spirit, purport and objects of the Bill of Rights.⁹⁶

Although the discussion of direct and indirect horizontality falls outside the scope of this dissertation, the alleged contradictions between sections 8 read with s172 and 39(2) read with s173 are reconciled under subsidiarity and are briefly summarised here.⁹⁷

Section 172 carves out the powers of the courts in constitutional matters; it sets the boundaries for the courts in declaring any law or conduct inconsistent with the constitution invalid.⁹⁸ This is similar to reiterating the supremacy clause in section 2 and the application of the Bill of Rights (binding al law) under section 8(1).

Section 8(2) and 8(3) merely give further detail to the application of the Bill of Rights to natural and juristic persons, whereas section 172 sets out the powers of the court in deciding invalidity.

Similarly, section 39(2) bridges the gap between sections 8 and 173, in that it gives instruction to the courts on how to conduct its analysis of interpreting legislation or developing the common law. Section 173 then describes the inherent power of the courts, in that the superior courts have the inherent power, *inter alia*, to develop the common law. This section reinforces the analysis already being conducted under section 8(3) and s39(2).

Read together these sections can be said to mean: The courts have the power to declare law, legislation, and conduct inconsistent and invalid. When carrying out this investigation of invalidity, as it applies to juristic and natural persons, the courts must apply or if necessary develop the common law. Furthermore, when developing the common law they must promote the spirit, purport and objects of the Bill of Rights.

Once these steps have been conducted and the legislation or common law principle in question still cannot be developed to be consistent with the Constitution then it

⁹⁶ Van der Walt *supra* note 2 at 27.

⁹⁷ D Bhana "The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution" South African Journal of Human Rights Vol. 29 No. 2 (2013) 351- 375 at 361.

⁹⁸ s172(1): "*When deciding a constitutional matter within its power, a court— (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including— (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*"

must be declared invalid. This reading of the sections exemplifies subsidiarity. The first approach is to look at legislation, then to read or develop the common law in so far as the legislation is insufficient. And where no constitutionally inspired reading can be reached the legislation is declared invalid. Further, the subsidiarity methodology shows that the offending piece of legislation is declared invalid because it does not properly give effect to the right that it was designed to protect.

2 4 Criticisms against Subsidiarity

In this section the two major criticisms against subsidiarity are discussed. Firstly, the danger of constitutional avoidance and; secondly, the lack of substantive answers provided by the subsidiarity methodology.

2 4 1 What is Constitutional Avoidance?

Constitutional avoidance manifests itself as a usurpation of the resort to the Constitution. It entails that exercise of the constitution is avoided, in resort to settled ways of applying the law.⁹⁹ These other avenues may be based on common law tradition, practice rules or customary tradition. The *Pharmaceutical* case specifically tackled this issue. The CC communicated that a matter cannot escape constitutional review by merely being couched as a common law decision (requiring common law review).¹⁰⁰

The danger in avoiding the constitution is the possibility that its basic tenets, to which every person within the Republic is in entitled, may be eroded. Erosion could mean that (1) pre- constitutional practice rules may perpetuate disenfranchisement or unduly benefit an elect minority; (2) Legitimacy of the constitution is called into question with accusations of preferring form over substance (i.e. having the constitution written on paper but with no practical outworking or effect on the life of the ordinary person).

With regard to subsidiarity this concern is largely misplaced. Subsidiarity does not avoid the Constitution. On the contrary the primary concern of the analysis is the Constitution. The premise is to look at legislation giving effect to a right in the Bill of Rights, which invariably means we are actually beginning by ensuring the application

⁹⁹ Van Der Walt *supra* note 47 at 93.

¹⁰⁰ *Ibid.*

of the Constitution. Thereafter we are testing the legislation against the Constitution to ensure that it properly gives effect to the right it was enacted to protect. The development of the Subsidiarity methodology from the *Mhlungu* principle to the *Pharmaceutical* case is also a clear sign that the methodology isn't geared to avoid the Constitution at all, but rather to give proper effect to the Constitution and to respect the work of the legislature in applying the Constitution.¹⁰¹

2 4 2 Fundamentality without Fundamentalism¹⁰²

Klare's first critique concerns the phrase "effect giving statute".¹⁰³ Klare asserts that in this regard there may be two polar interpretations: on the one hand it could mean that the right is free standing with its own content and that parliament is invited to give it concrete or practical application; on the other it could mean that the right has the meaning that Parliament gives to it.¹⁰⁴ Subsidiarity is generally modelled after the second approach.¹⁰⁵ However, a better reading could be that the right is modelled to mean what Parliament describes it to mean, subject to review by the CC if the constitutionality of the statute is called into question.

Klare's critique of subsidiarity is that it lacks the ability to answer substantive questions; it brings the adjudicator to the threshold without answering the questions it was designed to.¹⁰⁶ In this regard he points to the SANDU principle:

In all cases seeking constitutional relief beyond that provided in an effect-giving statute, the courts must make a pre-threshold determination as to whether the plaintiff has a legitimate claim of constitutional inadequacy before it can make the supposedly threshold, subsidiarity-prescribed determination whether the cases should be decided on the statute alone. This renders the SANDU principle a nullity, unless courts are able to make the pre-threshold determination on the face of the pleadings. But how is a court to know whether it is in the presence of a bona fide constitutional question, short of airing and taking a view in the matter?"¹⁰⁷

¹⁰¹ Van Der Walt *supra* note 47 at 95-96.

¹⁰² Van Der Walt *supra* note 2 at 97.

¹⁰³ Klare *supra* note 33 at 138.

¹⁰⁴ *Ibid* at 140.

¹⁰⁵ *Ibid*.

¹⁰⁶ Klare *supra* note 33 at 138.

¹⁰⁷ *Ibid* at 139.

Klare's criticism is two-fold. Klare attacks the validity of the *SANDU* principle in that the court will not know if there is a bona fide constitutional question without taking a view on the matter on the face of the pleadings.¹⁰⁸ This criticism is misplaced seeing as the CC considers the merits of the matter when deciding on whether the appeal may be heard by it. The *Gundwana*¹⁰⁹ case confirmed that the substantial merits of the constitutional challenge will of necessity play a role in deciding whether it is in the interest of justice to grant leave to appeal.¹¹⁰

Therefore, on numerous occasions the Court draws the proverbial cart before the horse by looking at the depth and substance of the matter to answer a threshold question. Therefore, applying the subsidiarity methodology applies the same type of analysis involved in deciding whether the interests of justice allow granting leave to appeal.

Klare also questions whether the subsidiarity principles can answer substantive questions.¹¹¹ In response to this, the subsidiarity principles may not answer the substantive questions directly but they do provide an approach as to which of the substantive options should be chosen. As seen in the *Joseph* case,¹¹² when the Court approached the matter from contractual perspective it denied the Applicants relief but when the analysis was couched in terms of the Promotion of Administrative Justice Act (PAJA)¹¹³ - administrative and constitutional law - it granted the Applicants relief.¹¹⁴

An exposition of CC case law from 2007 to 2015 displays how the methodology has developed and how it alleviates the concerns that were raised above.

To recap this chapter, the basic premise of subsidiarity is that the courts first look at legislation promulgated to give effect to a right in the Bill of Rights which is what has already been discussed.¹¹⁵ Therefore, dealing with legislation enacted to give effect to a right; non-property legislation and partial legislation enacted to do same is

¹⁰⁸ Klare *supra* note 33 at 139.

¹⁰⁹ *Gundwana v Steko Development CC and Others* [2011] ZACC 14.

¹¹⁰ *Gundwana* at 3.

¹¹¹ Klare *supra* note 33 at 138.

¹¹² *Leon Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) at 21 – 24.

¹¹³ Promotion of Administrative Justice Act 3 of 2000.

¹¹⁴ *Joseph* at 21 – 24.

¹¹⁵ Van Der Walt *supra* note 2 at 67.

relatively straight forward under subsidiarity.¹¹⁶ The position is slightly skewed when dealing with legislation not enacted to give effect to a right. Van der Walt argues that the application of the rules would be slightly relaxed: in instances where there is democratic legislation the courts must apply the subsidiarity methodology and in instances where there isn't, the courts may apply subsidiarity.¹¹⁷ The courts would then apply the rules less strictly and apply the provisos more prominently.¹¹⁸ In most instances the first rule of subsidiarity would find no application, as the legislation was not enacted to give effect to a right in the Bill of Rights; thereafter the constitutionality of the pre-1994 legislation may be tested against a direct provision in the Constitution or against the spirit, purport and objects of the Bill of Rights as a whole.¹¹⁹ The purpose of the subsidiarity principles in each instance is to prevent recourse to the common law,¹²⁰ and to encourage application of applicable legislation but more importantly to ensure that the legislation and common law are tested for constitutional compliance and legitimacy.¹²¹

Van der Walt makes the distinction between other scenarios, in which the subsidiarity methodology would be applicable: (1) legislation giving effect to a right; (2) non-property legislation giving effect to a right; (3) partial property legislation giving effect to a right; (4) partial technical legislation not enacted to give effect to a right (under this sub-category he makes the distinction between partial technical legislation that protects a right indirectly, pre-1994 partial or technical legislation; purely technical or purely partial legislation); and (5) where there is no applicable legislation on the matter.¹²² However, I will only discuss cases where legislation was enacted to give effect to a right in the Bill of Rights or has the effect of giving effect to a right; where more than one act gives effect to the same right; where there is non-property legislation gives effect to a property right; where there is pre-constitutional legislation; where there is no legislation that gives effect to a right in the Bill of

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid* at 68.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* (Especially with the application of the second subsidiarity principle).

¹²¹ Van Der Walt *supra* note 2 at 69.

¹²² *Ibid* at 35 -91.

Rights; In each of those instances the subsidiarity method would find different application as is discussed in chapter 3.¹²³

¹²³ The issue is discussed in great detail in Van Der Walt *supra* note 2 at 35 - 91.

Chapter 3: Subsidiarity Methodology in Eviction Cases 2007 to 2015

3 1 Introduction

How does the CC decide cases where there are competing interests and competing legislation or various sources of law that are applicable, specifically in eviction cases? I will consider eviction cases from 2007 to 2015 in an attempt to draw a pattern or inference from the manner in which the CC (and to a limited extent the SCA) has consistently (or inconsistently) applied the subsidiarity principles. The cases discussed in some way or other deal with s25 and s26 of the Constitution; PIE; ESTA; Restitution of Land Rights Act (the Restitution Act),¹²⁴ the Expropriation Act,¹²⁵ or the National Building Regulations and Building Standards Act (NBRB).¹²⁶

3 2 Application of Subsidiarity to Different Types of Legislation

Van der Walt explains that the subsidiarity principles can be adapted depending on the type of legislation in question.¹²⁷ He makes the distinction between instances where there is: Legislation enacted to give effect to a right in the Bill of Rights or has the effect of giving effect to a right; where more than one act gives effect to the same right; where there is non-property legislation gives effect to a property right; where there is pre-constitutional legislation; where there is no legislation that gives effect to a right in the Bill of Rights; these will be discussed in turn.¹²⁸

3 2 1 Legislation Enacted To Give Effect

The broad meaning of the phrase to “*give effect to*” includes not only legislation specifically enacted with the legislative intent of giving effect to a right in the Bill of Rights,¹²⁹ but it also includes statutes that have the effect of giving effect to a right in the Bill of Rights.¹³⁰ It should also be noted that legislation enacted to give effect to a right in the Bill of Rights triggers the application of the subsidiarity methodology as the starting point but does not limit the analysis to the subsidiarity methodology.¹³¹

¹²⁴ Restitution of Land Rights Act 22 of 1994.

¹²⁵ The Expropriation Act 63 of 1975.

¹²⁶ National Building Regulations and Building Standards Act 103 of 1977.

¹²⁷ Van der Walt *supra* note 2 at 41.

¹²⁸ *Ibid* at 42.

¹²⁹ *Ibid* at 40.

¹³⁰ *Ibid* at 42.

¹³¹ *Ibid*.

The meaning of the phrase “to give effect to” was fleshed out in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*,¹³² wherein the CC dealt with the issue of land restitution in terms of the Restitution Act. It should be stated that an in depth analysis on the precarious nature of land rights will not form part of the scope of this study and will only be referred to in so far as the case lends itself to exposing how the Court applies the subsidiarity methodology in land related matters. This is due to the fact that land claim rights are only adjudicated long after the principal act of eviction has taken place.¹³³

In so far as *Goedgelegen* assists with understanding the CC’s application of the subsidiarity methodology, it was reiterated by the Court that the Restitution Act was promulgated to give effect to section 25(7) of the Constitution. The Court articulated that where a statute has been enacted: “to give content to a constitutional right or to the Constitutional obligation of the legislature, the proper construction of that statute is itself a Constitutional matter.”¹³⁴

This statement supports two assumptions: 1) that there is legislation that gives effect to a right in the Bill of Rights; and 2) That the proper construction of the statutes begins and ends with the Constitution, therefore leaving no room for constitutional avoidance. It is important to have statutes that give effect to rights in the Bill of Rights because they actualise the rights and make them accessible to the ordinary citizen. Statutes that give effect to a right display a partnership between the legislature, in promulgating statutes, and the judiciary, in applying legislation, within the broader framework of the separation of powers. It also clarifies or fleshes out the practical working out of the rights in the Bill of rights; and lastly the whole process promotes the spirit, purport and objects of the Bill of Rights, which are aimed at transformative constitutionalism in the South African context.

According to Moseneke DCJ, remedial legislation enacted to give effect to the right must also be interpreted purposively, because the two (enactment and purpose) are

¹³² *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 1999 (CC).

¹³³ In fact, land claim rights seek to adjudicate or right a wrong that occurred at a time when eviction without a court order was not unlawful. Land claims therefore are a matter of enforcing a positive right to land restitution as opposed to enforcing a negative right not to be evicted.

¹³⁴ *Goedgelegen* at 31.

umbilically linked.¹³⁵ Meaning, the right being enacted into legislation gives the Act direction and purpose.

*Webtrade Inv o 45 (Pty) Ltd and Another v Andres Van Der Schyff en Seuns (Pty) Ltd t/a Complete Construction*¹³⁶ dealt with understanding the purpose of PIE. The Appellants had occupied the property built by the Respondent (a contractor) even after the Respondent had attempted to restrain them from doing so pending payment for the work done.¹³⁷ When the Respondent raised the *mandament van spolie* in the *court a quo*, the Appellants then retorted that the provisions of PIE rendered the *mandament van spolie* inapplicable.¹³⁸ The *court a quo* pointed out that the purpose of PIE was not intended to shield affluent property owners who deliberately placed themselves in unlawful occupation of their property;¹³⁹ nor does it apply where the owner of land takes possession from a builder exercising a builder's lien. This case is important because of the following reasons: 1) Appellants sought to render a common law remedy inapplicable by raising PIE; but 2) the purpose of the Act precluded it from being a defence against the *mandament van spolie*. It practically meant that the Act was vindicated but also that the common law remedy *mandament van spolie* was 1) protected by following a subsidiarity principle; and 2) protected in a manner which in effect promotes the Constitution.

Joe Slovo,¹⁴⁰ consisted of five judgments.¹⁴¹ Yacoob J's judgment began with a solid exposition on the meaning of "consent",¹⁴² and "unlawful occupier,"¹⁴³ in terms of PIE seeing as it had been promulgated to give effect to s26(3).

Moseneke DCJ took a similar approach by expounding on the purpose of the words "unlawful occupier" and "consent" within the context of and the purpose of the legislation in which it appears; and further in a manner that is consistent with the spirit, purport and objects of the Bill of Rights in terms of s39(2).¹⁴⁴

¹³⁵ *Ibid* at 53.

¹³⁶ *Webtrade v Van der Schyff* (2007) SCA 104 (RSA).

¹³⁷ *Ibid* at 8.

¹³⁸ *Ibid* at 9.

¹³⁹ *Ibid* at 10.

¹⁴⁰ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 (9) BCLR 847 (CC).

¹⁴¹ *Ibid* at 1.

¹⁴² *Ibid* at 36-39; 54 – 85.

¹⁴³ *Ibid* at 40 – 53.

¹⁴⁴ *Ibid* at 146.

*“Section 39(2) of the Constitution requires a court to craft a just outcome that is in harmony with the guarantees of the Constitution rather than a mechanistic application of legal rules of private law in a terrain which is clearly intended to give fulsome protection derived from the Bill of Rights”.*¹⁴⁵

Moseneke J, in reference to the *PE Municipality* case added that the concept underpinning PIE is the requirement of justice and equity.¹⁴⁶

Sachs J described that certain fundamental principles must govern how the court approaches PIE cases where the state seeks to evict unlawful occupiers.¹⁴⁷ The first principle Sachs J described was the over-arching principle of reasonableness; secondly the duty to engage by the parties.¹⁴⁸ Further, Sachs J held that framing the question of unlawful occupation within the framework of common law rights of landowners would be inappropriate where the state is party to the proceedings; instead the question should be framed in the context of the special legal relationship between the state and the unlawful occupants.¹⁴⁹ He conceded that the position would be different if the matter involved private land owners seeking eviction, in which instance it would be necessary to consider unlawful occupation in the context of traditional private law criteria.¹⁵⁰ O'Regan J disagreed with this proposition and rather opined that regardless of the parties there should be some co-instantaneity in the development of the obligations of reasonable notice in private law and the obligations of procedural fairness in public law.¹⁵¹

*“Both will be based on similar equitable considerations. I do not agree with Sachs J, therefore, when he states the common law rules relating to ownership are not at the ‘core’ of the arguments in this case. In my view, they are important and need to be considered.”*¹⁵²

O'Regan J, therefore expounded on the common law requirements of *precarium* or precarious tenancy which may only be terminated on good cause and with

¹⁴⁵ *Ibid* at 146.

¹⁴⁶ *Ibid* at 161.

¹⁴⁷ *Ibid* at 339.

¹⁴⁸ *Ibid* at 339.

¹⁴⁹ *Ibid* at 343.

¹⁵⁰ *Ibid* at 343 (Footnote 24 therein).

¹⁵¹ *Ibid* at 288.

¹⁵² *Ibid* at 289.

reasonable notice.¹⁵³ Recognising that even in Roman Dutch law the requirement of reasonable notice was inserted to alleviate the possible injustice of land owners unilaterally terminating tenancy without more adieu,¹⁵⁴ she continued that:

*“PIE fundamentally reorders the ordinary common-law rules relating to eviction... The constitutional imperative of procedural fairness, therefore, is protected in PIE by making clear that the eviction will only occur in circumstances where it is just and equitable to make an eviction order.”*¹⁵⁵

As seen in *Joe Slovo* applying the subsidiarity method is by no means an easy task but it is a necessary task. It ensures that the angle of approach is correct in that the first analysis had to be into the meaning of words in terms of PIE. It is also clear that the fact that PIE re-ordered the common law, would make it amiss to ignore it as a starting point. It is only when the legislation enacted to give effect is insufficient cover the field that one considers the common law and further one would question the constitutionality of the legislation before direct reliance on a right in the constitution.

3 2 2 Competing and Complementary Legislation

When more than one statute gives effect to the same right there is a danger of competition between the Acts as well as misinterpretation of how these statutes fit together in the grander legislative scheme.

In *Rand Property*,¹⁵⁶ the Respondents challenged the constitutionality of s12(4) of the NBRB and the failure of the Applicants to comply with PIE, which would render the granting of an eviction order unjustifiable.¹⁵⁷ The *court a quo* in this case unfortunately read into s12(4) of the NBRB the discretion granted in terms of PIE to decide on the circumstances whether the eviction would be justifiable.¹⁵⁸ This hints at that the court may have got the angle of approach correct by first looking to the legislation that gives effect to a right but the court a quo erred in its reconciliation of different statutes that give effect to the same right by applying the discretion in PIE to NBRB as though they were one.¹⁵⁹ Although two statutes may give effect to the

¹⁵³ *Ibid* at 281.

¹⁵⁴ *Ibid* at 287.

¹⁵⁵ *Ibid* at 288.

¹⁵⁶ *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 SCA 25 (RSA).

¹⁵⁷ *Ibid* at 13.

¹⁵⁸ *Ibid* at 49.

¹⁵⁹ *Ibid*.

same right in the Constitution they might not have the same legislative framework or intent. To override the legislative intent of the statutes would result in a usurpation of the separation of powers and subsidiarity principles.¹⁶⁰ In this case the SCA therefore had to conduct an exposition on s26 of the Constitution in order to arrive at an appropriate balancing and understanding of the statutes.¹⁶¹

Van der Walt suggests that where there is competing legislation, the subsidiarity principle should be that the competing or complementary be applied in such a way that it gives optimal effect to the Bill of Rights as a whole and the promotion of the spirit, object and purport of the Bill of Rights.¹⁶²

The concept seems to harmonise with the section 36 limitation's clause of the Constitution,¹⁶³ which highlights that rights do not exist in isolation and the optimal functioning of the spirit, purport and objects of the Bill of Rights as a whole is better served possibly by the limitation of one right within a particular context.

This applies not only among rights (for our purposes the right to housing and the right to property) but also to their agents - the statutes that give them effect. At any point when these statutes that give them effect compete for application, the interpretation that optimises the Bill of Rights is preferred.

3 2 3 Proviso 2: Challenging Constitutionality of Legislation

The *Olivia Road* case¹⁶⁴ also dealt with a challenge to the constitutionality of sections in NBRB Act. The CC considered five main questions: 1) the constitutionality of s12 of the NBRB Act; 2) the constitutional validity of the decision by the City to evict the occupiers; 3) the reasonableness of the administrative action

¹⁶⁰ *Rand Property* at 45.

¹⁶¹ *Ibid* at 34 – 41.

¹⁶² Van der Walt *supra* note 47 at 111.

¹⁶³ 36(1) *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -*

(a) *the nature of the right;*

(b) *the importance of the purpose of the limitation;*

(c) *the nature and extent of the limitation*

(d) *the relation between the limitation and its purpose; and*

(e) *less restrictive means to achieve the purpose.*

¹⁶⁴ *Occupiers of 51 Olivia Road Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

to evict; 4) whether s26(3) of the Constitution precluded the eviction and 5) whether PIE was applicable to these proceedings.¹⁶⁵

The most notable section of this judgment is the Court's discussion on the constitutionality of s12(4)(b) which made provision for individuals to be ejected from unsafe or dilapidated buildings without the need of a court order (and thus without the consideration of all the relevant circumstances).¹⁶⁶ Further in s12(6) of the same Act, a criminal sanction was imposed on those who failed to comply with the notice to vacate.¹⁶⁷ In this instance the court held that there was an inter-relationship between section 26(2) of the Constitution and s12(4)(b) which meant that a s12(4)(b) could not be granted without consideration of the possibility of homelessness of the residents.¹⁶⁸ And further that s26(3) should be given a generous construction in its relation to section 12(6),¹⁶⁹ and that any provision that forces people to leave their homes without a court order on threat of a criminal section is contrary to the provisions of s26(3) of the Constitution.¹⁷⁰ To remedy the situation the Court read in a provision for court ordered eviction before the enforcement of a criminal sanction in order to save s12(6).¹⁷¹

This case is an instance where *Proviso 1* would find application by testing the constitutionality of the legislation against the right it is supposed to enact. Its important to note that the Court at this stage also used the interpretive tool of reading in to save the legislation.

In *Sarrahwitz v Maritz N.O. and Another*,¹⁷² the court was tasked with a particularly difficult situation. Ms Sarrahwitz, a member of a vulnerable group of indigent persons, had borrowed money from her then employer and purchased a house from Mr Posthumus on 17 September 2002.¹⁷³ However, the property was not subsequently transferred into her name despite numerous attempts at contacting Mr Posthumus.¹⁷⁴ In 2005 the Applicant made further attempts to find out why the

¹⁶⁵ *Olivia Road* at 7.

¹⁶⁶ *Ibid* at 41.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid* at 46.

¹⁶⁹ *Ibid* at 49.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid* at 50.

¹⁷² *Sarrahwitz v Maritz N.O. and Another* [2015] ZACC 14.

¹⁷³ *Ibid* at 5.

¹⁷⁴ *Ibid*.

property had not been transferred and it transpired that although all the papers had been signed to effect transfer, the rates on the property had not been paid to the municipality which meant that a Municipality clearance certificate could not be issued as part of the transfer requirements.¹⁷⁵ Despite not being liable for these charges the Applicant made payments to pay off the debt. However, the municipality erroneously debited the wrong account due to the fact that Mr Posthumus was in arrears on other properties he owned and the property was subsequently not transferred.¹⁷⁶ The Applicant remained in occupation of the property as the owner although she never received the title deed. In April 2006 Mr Posthumus was sequestrated and the trustee of his estate then sought to wind up all the assets (which included the Applicant's home) in the estate to pay off the debt.¹⁷⁷ After failed attempts at negotiating with the trustee to have the property transferred into her name, the Applicant instituted litigation in 2012.¹⁷⁸

At common law, property in an insolvent estate became part of the insolvent estate and did not protect people like the Applicant who had paid the purchase price to an insolvent seller.¹⁷⁹ The Alienation of Land Act (Land Act),¹⁸⁰ sought to remedy the mischief created by the common law provision.¹⁸¹ The Act however only remedied the situation for a select group of people who had made two instalment payments and did not extend to the Applicant who was vulnerable but had made full payment in one instalment. Therefore, the Applicant's contention was that the common law should be extended to accommodate her.¹⁸² She further argued that the common law was inconsistent with her constitutional rights to access to adequate housing, right to dignity and the right to equality. In the High Court it was held that it was the common law and not the Land Act that regulated the transfer of property:¹⁸³

¹⁷⁵ *Ibid* at 6.

¹⁷⁶ *Ibid* at 7.

¹⁷⁷ *Ibid* at 8.

¹⁷⁸ *Ibid* at 9.

¹⁷⁹ *Ibid*.

¹⁸⁰ Alienation of Land Act 68 of 1981.

¹⁸¹ *Sarrahwitz* at 39.

¹⁸² *Ibid* at 19.

¹⁸³ *Ibid* at 9.

The case deserves discussion for a variety of reasons that fall outside the scope of this study.¹⁸⁴ For our purposes it is sufficient to note that the majority refuted the High Court's contention that the matter should only be dealt with in terms of the common law.¹⁸⁵ The CC further recognised the subsidiarity principles, although not explicitly, by first couching the legal question correctly in terms of the applicable legislation before the common law.¹⁸⁶ The CC further emphasised that the spirit, purport and objects of the Bill of Rights must be promoted whether legislation is being interpreted or common law is being developed.

The majority in this case eventually decided that the impugned provisions were unconstitutional and the CC read in certain provisions into the legislation to cure its constitutional deficiency.¹⁸⁷

3 2 4 Interpretive Tools of the CC

As displayed in *Olivia Road* and *Sarrahwitz*, the subsidiarity principles do not operate in isolation but actually incorporate and rely on other interpretive tools of the Court in order to arrive at an appropriate solution. *Goedgelegen* is also a good example of how subsidiarity works with the other interpretive tools of the court. The Court in *Goedgelegen* demonstrated the interplay between the interpretive tools and the subsidiarity method in this manner: 1) The analysis began with the statute 2) by scrutinising the purpose of the statute which included consideration of the context of the statute and the remedy it was intended to provide; 3) during that process the court sought to promote the spirit, purport and object of the Bill of Rights as a whole 4) and preferred a generous construction over a textual or legalistic interpretation.¹⁸⁸ The Court also referred to understanding the context of the provision within the context of a grid consisting of the statute itself as a whole and its underlying values, and any other related provisions.¹⁸⁹ Therefore, the purposive, contextual, textual approaches were all incorporated as well as the tool of reading in. This is useful because it shows that the subsidiarity does not necessarily disturb the analysis that

¹⁸⁴ The treatment of the separation of powers doctrine in the majority and concurring judgment warrants some discourse with regard to the application of the doctrine on the one hand and institutional subsidiarity on the other.

¹⁸⁵ *Ibid* at 26.

¹⁸⁶ *Ibid* at 29.

¹⁸⁷ *Ibid* at 78. Whether this reading in process encroached on the separation of powers is a discussion for another paper.

¹⁸⁸ *Goedgelegen* at 53.

¹⁸⁹ *Ibid*.

Court already conducts but it rather gives the collective activity a name, an analytical starting point and legal certainty through systemization.

3 2 5 Non- Property Legislation that Gives Effect

There are also instances where non-property legislation, meaning legislation not specifically enacted to give effect to s25 is applicable to eviction cases. The *Joseph* case,¹⁹⁰ dealt with aspects of procedural fairness in terms of PAJA as well as s26 of the Constitution's right to access to adequate housing.¹⁹¹ The Applicants did not refer to PIE because the applicants were never formally evicted from the property but the building was without electricity for 12 months which caused all but six of the residents who brought the application to move out.¹⁹² The High Court had denied the applicants relief because the application couched the question in terms of the contractual law and not administrative & constitutional law.¹⁹³ Therefore, it was held by the CC that the starting point of analysis should have been rooted in PAJA - and whether any rights sought were consistent with PAJA and not the common law.¹⁹⁴ This case raises a difficult question in that the very premise of subsidiarity is based on preferring the legislation specifically enacted to give effect to a right and only when that fails considering the common law. This case tells us that there may be instances where it is more appropriate to look at legislation not specifically enacted before the common law. How do we identify those cases?

Firstly, by identifying whether the case involves another aspect of law: an administrative decision which would require the application of PAJA;¹⁹⁵ issues of discrimination which would warrant the application of the Promotion of Equality and

¹⁹⁰ *Joseph* at 22 – 24.

¹⁹¹ *Ibid* at 12.

¹⁹² *Ibid* at 9, 10, 19.

¹⁹³ *Ibid* at 18.

¹⁹⁴ *Ibid* at 24.

¹⁹⁵ Van der Walt *supra* note 2 at 43.

Prevention of Unfair Discrimination Act (PEPUDA).¹⁹⁶ Secondly, the driving principle would be promotion of the spirit, purport and objects of the Bill of Rights.¹⁹⁷

It was clear from the *Joseph* case that when the analysis began with PAJA, a non-property related piece of legislation, the interests of justice were better served than direct resort to the contractual obligation.¹⁹⁸

3 2 6 Pre-Constitutional Legislation

When dealing with pre-constitutional legislation (i.e. legislation where the legislative intent may have been tainted by Apartheid values) Van der Walt follows the “may” versus “must” approach; meaning that the subsidiarity methodology should not be abandoned in its entirety but *may* be followed.¹⁹⁹ He further proposed looking at pre-constitutional legislation in light of s39(2) of the Constitution and interpreting it to promote the spirit purport and objects of the Bill of Rights.²⁰⁰

The *Haffejee* case²⁰¹ mainly dealt with when compensation for the expropriation of property in terms of s25(2) of the Constitution is to be determined;²⁰² and thus questioned the constitutionality of the Expropriation Act on that basis.²⁰³ However, the court began its analysis with section 25 and not the Expropriation Act.²⁰⁴

“The starting point for constitutional analysis, when considering any challenge under section 25 for the infringement of property rights, must be section 25(1). The interpretation of the section must promote the values that underlie an open and democratic society based on human dignity, equality and freedom [referring to s39(1)(a)]. International law must be considered and foreign law

¹⁹⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; Van der Walt *supra* note 2 at 43 described a possible scenario between PEPUDA and a common law right. On the one hand PEPUDA eliminates all forms of discrimination but an absolute common law right may allow for the land owner to select whom he rents or sells his property to based on discriminatory grounds. In that instance the common law right would not succeed against the anti-discrimination clauses of PEPUDA.

¹⁹⁷ Van der Walt *supra* note 2 at 44.

¹⁹⁸ *Joseph* at 21 – 24.

¹⁹⁹ Van der Walt *supra* note 2 at 70.

²⁰⁰ *Ibid* at 71.

²⁰¹ *Haffejee N.O. and Others v eThekweni Municipality and Others* [2011] ZACC 28.

²⁰² *Ibid* at 1.

²⁰³ *Ibid* at 44.

²⁰⁴ *Ibid* at 29.

may be considered. Pre-constitutional expropriation law must be approached circumspectly".²⁰⁵

The court followed this approach possibly due to the fact that the Expropriation Act is what the Court described as of a "pre-constitutional vintage".²⁰⁶ Therefore, it in a way side-stepped the statute in order to consider the constitutional provision directly.

However, the subsidiarity principles would indicate that there is a distinction between pre-constitutional legislation and no legislation. Pre-constitutional legislation follows the *may* approach but nonetheless begins its analysis with the statute and aims to align the statute's pre-constitutional intent with the spirit, objects and purpose of the Bill of rights in terms of s39(2);²⁰⁷ and further even where there is no applicable legislation, the analysis begins with the common law before direct resort to a right in the Bill of rights.

3 2 7 No Applicable Legislation

In the *Mostwagae*²⁰⁸ case the Application was brought on the grounds that the Municipality had authorised the excavation of land right next to the outer wall of the first Applicant's home and thus exposing the foundations of the building.²⁰⁹ The question before the Court was whether the Municipality acted unlawfully by authorising the excavation before obtaining a court order for eviction.²¹⁰

Seeing as PIE would not apply (the applicants were not unlawful occupiers) nor would ESTA (the tenants owned their homes),²¹¹ this was an instance where there was no legislation covering the matter and the Court resorted to the common law before direct reliance on a right in the Bill of Rights. The Respondent argued that the State had a servitudal right to enter property to perform work related to the provision of public services. The court found this argument to be untenable in that even at common law servitude had to be exercised in a civil manner, respectfully and with caution. Thereafter, it conducted an exposition of the common law in a constitutional light. In this matter the CC's analysis was correct.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid* at 14.

²⁰⁷ Van der Walt *supra* note 2 at 71.

²⁰⁸ *Motswagae and Others v Rustenburg Municipality and Others* [2013] ZACC 1.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid* at 12.

Unfortunately, the *Tswelopele*²¹² judgment flies in the face of the subsidiarity methodology. In this matter the Applicants had unlawfully erected shacks on land in the Garsfontein area of Pretoria, where after a joint task force, which included the police demolished and destroyed these homes.²¹³ The Applicants raised the *mandament van spolie* and asked to have possession of their destroyed property restored.²¹⁴ The SCA had to either extend the application of the *mandament van spolie* to allow for restitution of damaged property or create a constitutional remedy in terms of s38 of the Constitution.²¹⁵ The court took the latter approach.²¹⁶ This had the effect of creating a parallel system of law in two different ways: 1) if parties have property that was partially confiscated and partially destroyed, then they would need to seek restitution of possession in terms of the *mandament van spolie* and restitution for the destroyed property in terms of s38; and 2) It becomes unclear when one would rely on the s38 constitutional remedy for restoration instead of a normal civil claim for damages.²¹⁷ This is exactly the position that subsidiarity seeks to avoid.

In this chapter I have shown that the subsidiarity methodology is and should be used in multifaceted balancing of the sources of law. It offers the best angle of approach and works in tandem with the other interpretive tools of the court. In spite of Klare's criticism as discussed in chapter 2, subsidiarity would guarantee more legal certainty in how the CC arrives at its decision. That being said in the next section I will discuss my critique against the CC in its application of the subsidiarity methodology and recommend ways in which it could be used more effectively.

²¹² *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* [2007] SCA 70 (RSA).

²¹³ *Ibid* at 2 -3.

²¹⁴ *Ibid* at 4.

²¹⁵ *Ibid* at 25 – 27.

²¹⁶ *Ibid*.

²¹⁷ Van der Walt *supra* note 2 at 82.

Chapter 4: Conclusion

4 1 Critique & Recommendations

4 1 1 Inconsistency in Application

A massive impediment to the subsidiarity methodology is the lack of consistent application of the principles as well as the lack of clarity on how the court views the subsidiarity methodology.

In their concurrent judgment in *Sarrahwitz*, Cameron J and Froneman J raised a different angle of approach to the matter. It was explained by the duo that a better framing of the application should have been through PIE based on s26(3) as a “*sharper and narrower remedy to safeguard her [the Applicants] possession.*”²¹⁸ The concurrent judgment further proposed that the Applicant would have qualified as an unlawful occupier because she had not received title to the property and the trustee had disavowed the contract.²¹⁹

I must respectfully disagree with this interpretation of the meaning of unlawful occupier as it calls upon PIE to perform a task it was not enacted to perform. Firstly, the definition of unlawful occupier is as follows:

“A person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land...”

In this case it cannot be said that the Applicant was without any other right in law to occupy the land, seeing as Mr Posthumus (the seller) had given the Applicant reliance on the fact that the property was to be transferred to her, the Applicant had paid the purchase price, the seller had indicated transfer would be effected and she was prejudiced as a result of the sellers failure to effect the transfer.²²⁰ The doctrine of estoppel would therefore apply to the Applicants predicament.²²¹ In South African law the doctrine of estoppel is more familiar in the law of contract but in English law and American law the concept of proprietary estoppel is regularly applied to instances as mentioned above.²²² The common law of estoppel could have been

²¹⁸ *Sarrahwitz* at 91.

²¹⁹ *Ibid* at 96.

²²⁰ Martin Dixon *Modern Land Law* 8th ed (2012) 369.

²²¹ *Ibid*.

²²² *Ibid*.

developed to allow for proprietary estoppel in favour of the Applicant. On that basis the Applicant could have registered the house into her name. This would have been more in line with the subsidiarity principle of developing the common law.

Secondly, the Alienation of Land Act was specifically enacted to remedy a common law situation but the Applicant merely fell outside of the scope of that protection. The correct approach, as shown by the majority judgement, was therefore to start the analysis (*lex specialis*) as opposed to PIE which ultimately could not provide a remedy for the Applicant.²²³

My two concerns about this judgment are that 1) the majority judgment may have over extended the tool of reading in and missed an opportunity to develop the common law doctrine of estoppel 2) the concurring judgment has now proposed PIE as competing legislation in a case that is very clearly governed by another statute, when it is the court's responsibility to ensure that the correct piece of legislation is correctly applied.

4 1 2 Form matters

One of the issues plaguing the courts is the form in which the applications are brought. The courts not only have the duty to apply the law but the applicants need to appropriately bring the application. It is important that applicants themselves bring their applications in a manner that reflects the subsidiarity method if we want to see the language of subsidiarity in the courts. This issue applies at all levels and not just at the CC level.

An example of the manner in which not bringing the application in the necessary format can affect an outcome was seen in the SCA *Agrico* case²²⁴ wherein the Respondents argued that the demolition of the Respondents shacks which were on the Appellants farm without a court order was unlawful by reason of: "s26(3), the common law and subordinate legislation". On the one hand it could be understood that the respondents merely listed the sources of law indiscriminately as opposed to as a method of interpretation. Subsequently the SCA decided the questions at hand in the manner it was framed by the appellants. Further framing the questions in this

²²³ The remedy constructed by Cameron J and Froneman J in *Sarrahwitz* at 97 is at best providing a court order that the Applicant could not be evicted and hoping that as a result the depreciation in the value of the property would compel the trustee to eventually relinquish the title deed to the Applicant.

²²⁴ *Agrico Masjinerie v Swiers* [2007] SCA 84 (RSA).

manner may lead to absurd consequences, as seen in the *Machele and 67 others* case,²²⁵ where the High Court in that instance granted an eviction order for the eviction of 62 families, but failed to have any consideration for provisions of the PIE or the Constitution.²²⁶

Furthermore, in the *Sarrahwitz* case the Applicant had only raised specific constitutional grounds in challenging the constitutional validity of certain common law provisions only when she took the matter on appeal.²²⁷ The problem with this approach was that the CC then had to act as the court of first and last instance without the benefit of seeing the High Court and SCA develop the common law.²²⁸ This is a particularly disappointing state of events seeing as we were deprived of fruitful legal discourse that could have occurred at all levels and could have been beneficial to the development of the common law.

4 1 3 Developing the Language of Subsidiarity

All the cases discussed in chapter 3 and 4 do not explicitly state that the subsidiarity methodology is being applied; at best it is inferred that the pattern being followed has the semblance of subsidiarity. It is vital for the methodology or the principles to be named when being used in order to understand how the court articulates adjudicative subsidiarity and also to have a clear picture on whether the CC has decided to develop the methodology in a way that is somewhat different from the conceptual framework described above. More academic commentary also needs to shed light in this area so as to ensure rich discourse on the methodology.

4 2 Conclusion

In chapter 1 I introduced the research problem and considered the historical narrative of South Africa to show the tension between s25 and s26. Pre-constitutional property rights were exercised in a discriminatory manner, a situation which plagues the courts today through common law practices that are not in line with spirit, object and purport of the Bill of Rights. The situation is complicated by the s26 right to access to adequate housing which was designed to combat arbitrary

²²⁵ *Machele and Others v Mailula and Others* 2009 (8) BCLR 767 (CC).

²²⁶ *Ibid* at 13.

²²⁷ *Sarrahwitz* at 10.

²²⁸ *Ibid* at 11.

evictions and land deprivation, which was used as a weapon in the arsenal of the previous regime.

In chapter 2 I introduced the subsidiarity methodology as described through albeit limited academic commentary and case law. I also discussed the major criticisms laid against the subsidiarity methodology, which are the possibility of constitutional avoidance and its inability to give substantive answers in eviction cases. I refuted the argument of constitutional avoidance, seeing as the subsidiarity methodology begins by questioning which right the legislation is enacted to give effect to and interprets the legislation and common law in line with the spirit, object and purport of the Bill of Rights; thus leaving no room for constitutional avoidance. I further argued that the subsidiarity methodology may not provide substantive answers but it does provide an angle of approach on how to choose the correct remedy to the problem, which in itself as a useful tool.

In chapter 3 I discussed CC case law from 2007 to 2015 in order to glean how the CC has applied the subsidiarity principles in eviction cases. The exposition showed that the court in some instances correctly applied the principles and in other instances missed the heart of the subsidiarity principles. It was also noted that the subsidiarity principles work in tandem with the other interpretive tools of the court.

In this chapter I levelled my critique against the manner in which the CC has applied the subsidiarity methodology. The manner of application is inconsistent and subsidiarity is never explicitly named. I recommend that the court expressly define and apply the subsidiarity methodology and that applications brought before the court should reflect the form of the methodology.

In conclusion this dissertation was never intended to provide a “be all and end all” solution but rather to highlight that there is a very real tension between the implications of s25 and s26 and that the subsidiarity methodology could help in balancing the sources of law in deciding eviction cases. Further it was intended that this would invite academic discourse on burgeoning method of interpretation.

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