TONGOANE V NATIONAL MINISTER FOR AGRICULTURE AND LAND AFFAIRS (SOUTH AFRICA)

Constitutional Court of South Africa (Ngcobo CJ, Moseneke DCJ, Cameron, Froneman, Jafta, Khampepe, Mogoeng, Nkabinde, Skweyiya, Van der Westhuizen and Yacoob JJ)
1 May 2010
[2010] ZACC 10

South Africa – constitutional law – *Constitution of the Republic of South Africa 1996* s 25(6) – achieving legally secure tenure for communities denied land rights under apartheid – protecting indigenous customary law systems of land administration – *Communal Land Rights Act 2004* ('CLARA') – application for confirmation of North Gauteng High Court's invalidation of CLARA provisions that threaten rather than enhance security of indigenous tenure – application for leave to appeal High Court's refusal to invalidate CLARA *in toto* given Parliament's failure to enact CLARA in accordance with s 76 of *Constitution* – application for direct access to Constitutional Court to seek further order invalidating CLARA for failure to facilitate public involvement in legislative process as required by ss 59(1)(a) and 72(1)(a) of *Constitution* – whether a finding of invalidity in toto due to improper enactment precludes Constitutional Court from reaching judgment on outstanding issues

Facts:

When the Parliament of South Africa enacted the *Communal Land Rights Act 2004* (South Africa) ('CLARA'), its purported intention was to fulfil its restitutionary obligation under s 25(6) of the Constitution, whereby communities or persons denied land rights under the racist policies of apartheid were entitled to secure legal tenure or comparable redress. However, on 30 October 2009 the North Gauteng High Court ('the High Court') declared certain provisions of CLARA constitutionally invalid as they threatened to displace existing Indigenous systems of land administration, thereby undermining rather than enhancing security of tenure.

The applicants in that case represented four communities – Kalkfontein, Makuleke, Makgobistad and Dixie – which occupied land to which CLARA would have applied. On 2 March 2010 they presented the Constitutional Court with three applications. Firstly, they duly sought confirmation of the High Court's invalidation of the various provisions of CLARA. Secondly, they asked for leave to appeal against the High Court's refusal to invalidate CLARA in its entirety given Parliament's failure to enact it in accordance with s 76 of the Constitution, which governs the legislative procedure for those Bills directly affecting the provinces; CLARA had been incorrectly 'tagged' as a s 75 Bill instead. Thirdly, the applicants sought direct access to the Constitutional Court in order to challenge the whole-scale validity of CLARA on another ground: that the Constitution requires a level of public involvement in the legislative process which Parliament had failed to provide.

Held, per curiam, granting leave to appeal and allowing the appeal against the High Court's refusal to invalidate the *Communal Land Rights Act 2004* in its entirety due to Parliament's failure to enact it in accordance with s 76 of the Constitution:

The test for determining whether the National Assembly or National Council of Provinces has legislative competence in a particular area is different from the test for determining how a Bill ought to be tagged and enacted: [58]–[61]; *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15, affirmed; *Western Cape Provincial Government and Others; In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2, cited.

The subject of a Bill may not appear to affect the provinces, yet certain provisions may nonetheless affect provincial interests. The test for the tagging of Bills must be informed by the need to ensure that the provinces exercise their constitutional role

of considering national legislation that substantially affects them: [69]–[71].

By making it possible to replace traditional councils with land administration committees, CLARA threatens existing customary law regimes governing the use, occupation and administration of communal land: [79], [95]–[97].

These are areas of both provincial and national competence; any piece of legislation which affects them substantially ought to be 'tagged' as a s 76 Bill: [79]–[82].

Where the Constitution prescribes a particular legislative procedure, it must be followed. Purported enactment according to a process other than that stipulated by s 76 of the Constitution renders CLARA invalid in its entirety: [106]–[111]; *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11, affirmed; *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8, cited.

Held, per curiam, finding it unnecessary to address the remaining applications in light of the invalidation of CLARA in its entirety:

Given that CLARA has been found to be invalid in its entirety, no further order is warranted regarding Parliament's alleged failure to provide for adequate public involvement in the legislative procedure: [116].

Likewise, given the invalidation of CLARA *in toto*, it is not appropriate to reach a decision regarding the application to confirm the High Court's invalidation of certain of its provisions: [122].

Parliament should follow up the invalidation of CLARA by urgently and diligently enacting legislation that gives lawful expression to the restitutionary objectives of the new Constitution of South Africa: [123]–[128].