



CONSTITUTIONAL COURT OF SOUTH AFRICA

**Stephen Segopotso Tongoane and Others v Minister for Agriculture and Land Affairs
and Others**

**CCT 100/09
[2010] ZACC 10**

Judgment Date: 11 May 2010

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 11 May 2010 the Constitutional Court delivered judgment in a matter which arose out of a declaration of invalidity made by the North Gauteng High Court, Pretoria (the High Court) on 30 October 2009, in respect of various provisions of the Communal Land Rights Act 11 of 2004 (CLARA). In this Court the applicants sought confirmation of the declaration of invalidity. In addition, they sought leave to appeal against the High Court's refusal to declare CLARA invalid for failure to enact it in accordance with the correct procedure and applied for direct access to challenge the validity of CLARA on the basis that Parliament failed to comply with its constitutional obligations to facilitate public involvement in the legislative process.

Accordingly, there were three applications before this Court: (i) the application for confirmation; (ii) the application for leave to appeal concerning the "tagging" of CLARA; and (iii) the application for direct access concerning the public participation challenge.

The four applicants represent a community which occupies land to which CLARA applies. They act in their own interest, on behalf of the communities of which they are a part, and in the public interest. Only five of the fourteen respondents participated in these proceedings: the Minister for Agriculture and Land Affairs, now the Minister for Rural Development and Land Reform; the Minister for Provincial and Local Government, now the Minister for Cooperative Governance and Traditional Affairs; the Speaker of the National Assembly; the Chairperson of the National Council of Provinces (NCOP); and the National House of Traditional Leaders.

CLARA was enacted in accordance with section 75 of the Constitution; the procedure for “[B]ills not affecting the provinces”. The applicants argued that the enactment in accordance with this procedure was incorrect and invalid. They argued that CLARA was incorrectly classified or “tagged” as a section 75 Bill, rather than a section 76 Bill, as a result of Parliament adopting the incorrect “tagging” test.

The Speaker of the National Assembly and the Chairperson of the NCOP opposed the application for leave to appeal and sought to defend only the procedure in terms of which CLARA was enacted. They submitted that Parliament adopted the correct “tagging” test. In their view CLARA is essentially about land tenure and reform –an area of exclusive national competence. As a result, it was an “[o]rdinary Bill not affecting the provinces” and fell to be enacted in accordance with section 75 of the Constitution.

In a unanimous judgment, Ngcobo CJ held that there is a difference between determining whether the National Assembly or NCOP has the competence to legislate in a particular field, and determining how a Bill ought properly to be tagged and ultimately enacted. These are two different processes for which two different tests are to be applied.

Ngcobo CJ reaffirmed the decision of this Court in *Liquor Bill* that any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. While the main subject-matter of a Bill (a key factor in determining legislative competence) may not affect provinces, some of its provisions may nevertheless have a substantial impact on the interests of provinces. The test for the tagging of Bills must be informed by the need to ensure that the provinces exercise their appropriate role, fully and effectively, in the process of considering national legislation that substantially affects them.

After analysing the provisions of CLARA Ngcobo CJ held that the inescapable conclusion is that various provisions of CLARA affect, in substantial measure, indigenous law and traditional leadership – areas of concurrent national and provincial competence. He found that CLARA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land. It further replaces both the institutions that regulated these matters and their corresponding rules.

He accordingly concluded that Parliament followed an incorrect procedure in enacting CLARA.

In considering the appropriate remedy Ngcobo CJ held that where the Constitution prescribes a legislative procedure, that procedure must ordinarily be followed. Enacting legislation that affects the provinces in accordance with the procedure prescribed in section 76 is a material part of the law-making process relating to legislation that substantially affects the provinces. He held that failure to comply with the requirements of section 76 renders the resulting legislation invalid.

He accordingly held CLARA to be unconstitutional and invalid for want of compliance with the procedures set out in section 76 of the Constitution.

In the light of the finding that CLARA was unconstitutional in its entirety due to its improper enactment, no order was made on Parliament's alleged failure to facilitate public involvement in the legislative process. In addition, Ngcobo CJ held that the conclusion that CLARA was invalid in its entirety rendered it unnecessary to consider whether its provisions were consistent with the Constitution. He did, however, emphasise that Parliament should urgently and diligently enact the constitutionally envisaged legislation that will ensure that there is restitution of land to the people and communities that were dispossessed of their land during the apartheid era, and that they will be accorded secure land tenure or comparable redress.

The application for leave to appeal was granted and the appeal was upheld with costs.