

**CHIEF DIREKO LESAPO v NORTH WEST AGRICULTURAL BANK & ANOTHER**  
**CCT 23/99**

Explanatory Note

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

The case concerns the validity of section 38(2) of the North West Agricultural Bank Act 14 of 1981, which permits the North West Agricultural Bank to seize the property of defaulting debtors with whom it has concluded loan agreements, and to sell such property to recover its debt, without recourse to a court of law. The Bophuthatswana High Court declared this provision to be inconsistent with section 34 of the Constitution, which provides for the right of access to court. This order was referred to the Constitutional Court, which had to decide whether or not to confirm the High Court's finding that section 38(2) was unconstitutional and invalid. The Constitutional Court confirmed the Bophuthatswana High Court's order of unconstitutionality.

In a unanimous judgment by Justice Mokgoro, the Court dismissed the Bank's argument that section 38(2) is not unconstitutional because it operates only where there is no dispute, whereas a person is entitled to the section 34 right of access to court where there exists a dispute to be adjudicated upon by a court. The Court noted that section 38(2) entitled the Bank to sell the debtor's property in execution, whether the debt alleged to be due is disputed or not.

The Court pointed out that section 34 guarantees everyone who has a dispute that can be resolved by law, the protection and safeguards of the court process. An important aim of a court hearing is that it provides parties with an opportunity for the institutionalised resolution of disputes, and thus prevents them from resorting to self help. The Court stated that section 38(2) authorises the Bank to bypass the courts, allowing it to resort to self help and become a judge in its own cause.

The Court held that the right of access to courts guaranteed in section 34 of the Constitution is a manifestation of the principle against self help, which is an aspect of the rule of law and foundational to our democratic order. Implicit in the right of access to courts, understood in the light of the rule of law, is that nobody may take the law into her or his own hands by resorting to self help. The provision in question entitles the Bank to resort to self help to secure execution in settlement of debts due, by seizing secured property against the will of the debtor without an order of court. After the Bank has seized her or his property, the debtor has been deprived of possession without intervention of a court of law. This is so notwithstanding the fact that section 38(2) does not deny a debtor the right to subsequently challenge seizure and sale in court.

The Court held that section 38(2) was not a reasonable and justifiable limitation of section 34 of the Constitution. Because of the importance of ensuring a stable and orderly society by having legal disputes settled by a court of law, very powerful considerations would be required for section 34's limitation to be reasonable and justifiable. Although the provision in question was aimed at providing the Bank with a quick, efficient and inexpensive means of

realising its securities by avoiding normal legal procedures, it achieved this purpose only minimally, while making serious inroads into the constitutional rights of the Bank's debtors. In addition, there were less invasive remedies available to the Bank to protect its resources.

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