

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT51/05

AAA Investments (Proprietary) Limited

vs

The Micro Finance Regulatory Council and the Minister of Trade and Industry

Decided on 28 July 2006

MEDIA SUMMARY

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

The applicant, AAA Investments (Pty) Ltd is part of the micro-finance lending industry. It lends small sums of money to relatively poor people. At the time that the applicant brought its case in the High Court, it was exempted from the provisions of the Usury Act on conditions to be determined by the Minister of Trade and Industry (the Minister). The Minister had, in a Notice exempted small loans from the provisions of the Usury Act on the condition that each lender became a member of the Micro Finance Regulatory Council (the Council) and complied with the Rules of that Council. The applicant claimed in the High Court that the Rules were invalid because the Council exercised public legislative power in making them and because the Minister had no power to delegate any rule-making power to the Council. Objections were also taken to certain specific Rules on the basis that they offended the right to privacy. The High Court declared the Rules invalid on the basis that they constituted warrantless exercise of public legislative power.

The Supreme Court of Appeal reversed the High Court's decision on the basis that because the Council was incorporated as a private limited liability company it exercised private power.

The applicant challenged the correctness of this decision in an application for leave to appeal to the Constitutional Court. Yacoob J, supported by the majority held that the Council did exercise public legislative power. The Council was an organ of state to whom the Minister had properly delegated the power to make rules aimed at regulating the micro-finance industry. All the Rules were reasonably necessary for this purpose. Yacoob J also found that it was unnecessary to consider the privacy attacks on the specific Rules because the Usury Act was no longer in force and had been repealed by the National Credit Act which had taken its place. The ruling would therefore have no practical effect. The appeal was accordingly dismissed.

Chief Justice Langa dissented. While agreeing that the Council exercised a public power, he emphasised that the power ordinarily resided with the Minister and could only be exercised by the Council to the extent that it was properly delegated to it. He found that the only powers that could be constitutionally delegated to the Council were those that were reasonably necessary to implement the rules already put in place by the Minister. The Council was not entitled to set new conditions for exemption. While the majority of the rules were necessary to fulfil this function, those rules that created the national loans register, that allowed the Council to create additional conditions for exemption and that allowed it to cancel registration for a very broad array of offences were found to exceed the permissible scope of delegation.

In a separate concurring judgment, O'Regan J (Ngcobo J concurring), approaches the issues of the case in a different manner to Yacoob J. First, she considers whether the Rules constitute an unconstitutional usurpation of legislative power. She holds that they do not, because although the rules are legislative in character, delegated legislation is permissible under our constitutional order as long as the delegation is lawful. She then turns to the question of whether there was a delegation to the Council to make rules and if so whether it was a lawful delegation. She finds that section 15A of the Usury Act does confer a regulatory power on the Minister and that, in turn, the terms of the Exemption Notice delegate aspects of that regulatory power to the Council. She finds that as a regulatory institution, the Council needs the ability to make rules in order to perform its duties properly. She rejects the argument that the rules unlawfully usurp the Minister's power to determine conditions of exemption, on the grounds that they do not do so. She does hold that it would be impermissible for the Minister to delegate the power to determine the categories of exempted loans to the Council or anyone else. She also considers the argument that the establishment of a National Loans Register goes beyond the powers lawfully delegated to the Council by the Minister but holds that the establishment of such a register which does not affect the categories of exempted loans does not fall outside the powers of the Council. She notes that the purpose of the creation of the Register is to protect borrowers and lenders in the industry. She finds that to the extent that the Council performs a public function in terms of the Exemption Notice it is an "organ of state" and is bound by the provisions of the Bill of Rights. Finally, she agrees with Yacoob J, that the question whether or not the revised rules constitute an infringement of the Bill of Rights is an issue that is moot in this case. O'Regan J reasons that in our democracy there is no constitutional principle that renders it impermissible for the executive to delegate the performance of certain public functions to institutions that are outside government. She notes that such institutions will be bound by the Bill of Rights in terms of the definition of "organ of state" and therefore may not act in a manner that infringes the rights of individuals. Moreover, the terms of delegation will always have to be lawful.