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Explanatory Note

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*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.*

This is a direct application for leave to appeal against a decision of the Witwatersrand division of the High Court. The High Court had upheld allegations that the 242 applicants were in unlawful occupation of property registered in the name of Itsoseng Community Trust and that they were using the land in a manner that constituted a nuisance to the neighbouring landowners. According to the High Court order, the structures in which the applicants are living are to be broken down and they are to leave the property. They are to be ejected by the sheriff if they fail to do so. The respondents who oppose the application contend that there is an urgent need to bring the matter to an end and that the issues raised in this appeal are not constitutional issues.

In a unanimous decision by Chaskalson P, the Constitutional Court considered this application against the backdrop of section 167 of the Constitution as well as the rules of court which provide for when direct access to this court may be granted. It was held that leave to appeal directly to this court may be refused in cases which ought properly to be dealt with by the Supreme Court of Appeal before the Constitutional Court is called upon to consider the matter. The court held further that an order refusing direct access to this court does not preclude the applicant from approaching this court again for leave to appeal after the Supreme Court of appeal has disposed of the matter.

In dealing with the various issues before it the High Court had found that the provisions of the Extension of Security of Tenure Act 92 of 1997 [Tenure Act] were unconstitutional. This had not been raised as an issue in the application and no argument had been addressed thereto by the parties during hearing in the High Court. The High Court did not make a formal declaration of invalidity in terms of section 172 of the Constitution that would have been subject to confirmation by this court. The Constitutional Court held that the High Court ought not to have pronounced on the constitutionality of the Tenure Act if this were not relevant to the judgment. Further, if it was relevant, the Minister ought to have been joined as a party to the proceedings and argument ought to have been heard on the issue.

The Constitutional Court in refusing direct leave to appeal pointed out that appeals are brought against orders made by a court and not against comments made in the judgment. It was held that the finding by the High Court that the Tenure Act is inconsistent with the Constitution was of no force and effect and that it was in any event not the basis for the orders made by the High Court. Leave to appeal was refused because the nature, variety and complexity of the issues raised in the judgment were such that it was not appropriate for the appeal to be brought directly to the Constitutional Court.