

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 15/00

FIRST NATIONAL BANK OF SOUTH AFRICA LIMITED

Applicant

versus

LAND AND AGRICULTURAL BANK OF SOUTH AFRICA

First Respondent

LESLIE NEIL SACKSTEIN NO

Second Respondent

THE MASTER OF THE SUPREME COURT,
ORANGE FREE STATE

Third Respondent

THE MINISTER OF FINANCE

Fourth Respondent

THE MINISTER FOR AGRICULTURAL AND
LAND AFFAIRS

Fifth Respondent

and

Case CCT 07/00

HENRY NIEL SHEARD

Applicant

versus

LAND AND AGRICULTURAL BANK
OF SOUTH AFRICA

First Respondent

SAREL DAVID THERON NO

Second Respondent

Heard on : 16 May 2000

Decided on : 9 June 2000

JUDGMENT

MOKGORO J:

[1] These are two applications for confirmation of orders of invalidity made by the Orange Free State and Eastern Cape Divisions of the High Court respectively.¹ The Orange Free State High Court struck down sections 34(3)(b) to (7), (9) and (10) and 55(2)(b) to (d) of the Land Bank Act, 13 of 1944 (the Act) and the Eastern Cape High Court section 55(2), excepting 55(2)(a), of the same act. These provisions of the Act authorise the Land and Agricultural Bank of South Africa (the Land Bank) to attach and sell a debtor's property in execution without recourse to a court of law, section 34 dealing with movables and section 55 with immovable property. In addition, section 34(5) grants the Land Bank a preferent right to the proceeds of a sale in execution conducted in terms of section 34. The High Courts held that the process of execution sanctioned by sections 34 and 55 of the Act was essentially the same as that set forth in section 38(2) of the North West Agricultural Bank Act² which this Court struck down in *Chief Lesapo v North West Agricultural Bank and Another*³ as an impermissible infringement of the constitutional right to access the courts⁴ and a form of self-help inimical to the rule of law.

¹ *First National Bank v Land and Agricultural Bank of South Africa* (FS) 1995/98, 21 February 2000, as yet unreported; *HN Sheard v Land and Agricultural Bank of South Africa* (E) 1542/99, 3 February 2000, as yet unreported.

² 14 of 1981.

³ 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

⁴ The right to access the courts is protected by section 34 of the Constitution, which reads:
“Everyone has the right to have any dispute that can be resolved by the application of

[2] The President of this Court directed that the two matters be heard together. In the *Sheard* case none of the parties pursued the matter and no more need be said save that the order of invalidity of section 55(2), excepting 55(2)(a), of the Act made in that matter is confirmed. In what follows I deal only with the *First National Bank* case, in which the Land Bank on appeal conceded the constitutional invalidity of both impugned sections and opposed only the terms of the consequential order granted in the Orange Free State High Court.

[3] The order of the High Court was in the following terms:

- “1. Section 34(3)(b) to (7) of the Land Bank Act 13 of 1944, section 34(9) and (10) thereof and section 55(2)(b) to (d) thereof are declared inconsistent with the Constitution of South Africa Act 108 of 1996 and invalid.
2. Pending the confirmation by the Constitutional Court of the order made in 1 above the first respondent is prohibited from attaching or selling any assets by virtue of the aforesaid sections of the Land Bank Act.
3. The first respondent is ordered to pay the applicant’s costs, such costs to include those consequent upon the employment of two counsel.
4. The order in paragraph 1 above is referred to the Constitutional Court for confirmation in terms of section 172(2) of the Constitution.”

The Issues

law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[4] As mentioned above, the Land Bank conceded the unconstitutionality of the impugned provisions to the extent that they are inconsistent with the right to access the courts⁵ and merely sought a suspension of the order to allow the relevant authorities and Parliament time to correct the constitutional defects. In addition it sought an order limiting the retrospective effect of invalidity.

Constitutionality and Justification

⁵

In the High Court the applicant's founding affidavit alleged that its rights to equality (section 9 of the Constitution) and property (section 25) were infringed. After the *Lesapo* decision was handed down on 16 November 1999, the applicant based its challenge of the impugned provisions on section 34 of the Constitution.

[5] Nevertheless we have to consider the constitutionality of sections 34 and 55 of the Act. These provisions set out a substantially similar process of debt recovery to that invalidated in *Lesapo*. Sections 34 and 55 of the Act both allow the Land Bank to attach and sell property in execution on its own authority and without judicial supervision. The process of debt recovery common to sections 34 and 55, as was the case in section 38(2) of the North West Agricultural Bank Act, requires only that the executing bank give written notification to the debtor before seizing his or her property and selling it by public auction⁶ once certain specified preconditions have been met.⁷ It permits the Land Bank to bypass the courts and gives it sole discretion over the conditions of sale. This procedure, unlike the ordinary civil process of execution,⁸ allows the Land Bank to take the law into its own hands and serve as judge in its own cause. The Act also authorises it to usurp the inherent powers and functions of the courts by deciding its own claims and relief.⁹ This is the effect of sections 34 and 55 of the Act, and is a violation of section 34 of the Constitution.

[6] In deciding that this kind of limitation was unjustified in an open and democratic society based on human dignity, equality and freedom, this Court in *Lesapo* held that the right of access

⁶ Section 55(2)(b) contains an additional requirement that the Land Bank notify other creditors who hold a mortgage over the secured property being attached and sold. This distinction is immaterial to the question of whether or not the provision is inconsistent with the right to access the courts.

⁷ See sections 34(2) and 55(1) of the Land Bank Act and section 38(1) of the North West Agricultural Bank Act.

⁸ The ordinary process of execution is incidental to a judgment or order of court authorizing the execution of the debtor's obligation. Court intervention ensures that the affected parties have an avenue by which they can petition an independent tribunal to modify the conditions of sale. Circumvention of these procedural safeguards amounts to self help and an infringement of section 34, see *Lesapo* above n 3 at para 19.

⁹ Id at para 20.

to courts is fundamental to a democratic society that cherishes the rule of law. There the Court found that only very powerful considerations may justify the limitation of this right. In this matter, as in *Lesapo*, no such considerations were found to be present. The interest in reducing potential risks of loss by way of time-and cost-saving measures in favour of the Land Bank here, as there, does not detract from the need to protect the public's interest in having justiciable disputes settled by a court of law.¹⁰ In the result, the order of invalidity made by the High Court is to be confirmed.

The Order

[7] I now turn to the main question at hand: whether or not to suspend the order of invalidity and if so, for how long. The Land Bank accepted the immediate effect of the High Court order of invalidity as it pertains to section 55 but argued that in respect of section 34 the order should be suspended. Specifically, it urged this Court to suspend the order of invalidity as to sections 34(3)(b) and 34(5), so as to preserve the statutory security it enjoys over the proceeds of a sale in execution. For this submission, the Land Bank relied on the fact that, unlike section 55 advances and those that were at issue in *Lesapo*, section 34 loans are generally not secured by contract. As discussed above, both sections 34 and 55 provide for a process of debt recovery that allows the Land Bank to attach and sell a debtor's property without recourse to a court of law. Section 34 is exceptional in that it enables the Land Bank to make short and medium term advances to farmers without pledges or collateral security. The Land Bank affirmed that the bulk of its section 34

¹⁰ Id at para 24.

loans are unsecured by formal contract, and that these advances were made on the strength of its statutory security. It asserted that, should the order be confirmed with immediate effect, it would lose its only form of security and be placed at high risk. This would, in turn, likely impair its capacity to offer section 34 loans to the detriment of existing and potential clients.

[8] The distinction between section 34 and 55 advances implicates the national role of the Land Bank. It is a statutory body empowered to provide financial services to farmers and the agricultural sector. Although currently funded by commercial gain,¹¹ it functions on a non-profit basis. Its mission is inter alia to promote an effective and vibrant rural economy and a sustainable land reform program. In order to facilitate its developmental mission, the Land Bank was placed under the authority of the Minister for Land and Agricultural Affairs and integrated into the Department of Agricultural Affairs.¹²

¹¹ Nevertheless, the enabling Land Bank Act, at section 19(1)(d), entitles the Bank to government funding.

¹² Land Bank Amendment Act No. 21 of 1998. Prior to 1998 the Land Bank was under the administration of the Minister of Finance.

[9] Land reform and growth in the agricultural sector in South Africa require that new and emerging farmers have adequate access to financial services. Small-scale farmers and beneficiaries of land reform programmes often need credit at affordable interest rates and under low-capital conditions. It is these needs that the Land Bank aims to meet by way of section 34 advances.¹³ The Land Bank averred that its section 34 loans are commonly advanced to clients who are unable to proffer adequate collateral security normally required by other lending institutions, who view them as unworthy of credit under standard commercial lending criteria. Section 34 loans, therefore, aid small and emerging farmers, as well as beneficiaries of land reform programmes and put the Land Bank at an economic disadvantage.

[10] The Land Bank argued that sections 34(3)(b) and 34(5) serve to counter its economic risks. Section 34(3)(b) allows the Land Bank to attach and sell as much of the debtor's property as may be necessary to liquidate a debt owed to itself without recourse to a court of law. Section 34(5), in turn, grants the Land Bank a preferred claim to the proceeds stemming from attachments and sales executed according to section 34(3)(b). As stated earlier, the Land Bank conceded the impermissibility of recovering debts in this manner without ordinary judicial supervision. It also undertook to effect future attachments and sales in accordance with the rules of civil procedure.¹⁴ The Land Bank emphasised, however, that the two provisions in

¹³ Whether or not the Land Bank is actually meeting these needs cannot be answered here. First, the Land Bank submitted inadequate information as to its recent distributions. Second, the quasi-commercial nature of the Land Bank may conflict with its public goals. Nevertheless, the Bank submitted evidence that it substantially increased its short and medium terms loans under section 34 at least between the years 1994 and 1996. Conversely, its long-term loan distributions remained relatively stagnant, indicating a transformation in lending practices.

¹⁴ The Land Bank submitted that it would abide by the Rules of the Supreme Court, rule 46. See also Rules of the Supreme Court, rule 45. Counsel for the Land Bank also indicated that since notification of the decision in *Lesapo*, the Land Bank has not proceeded against defaulting debtors without court orders.

combination enable it to make otherwise unsecured advances. While its priority concern is its right of preference in section 34(5), the invocation of this right is dependent on the operation of section 34(3)(b). Should this form of statutory security be eliminated with immediate effect the Land Bank contended, it would be reduced to an unsecured creditor.

[11] I agree, and the applicant accepted, that sections 34(3)(b) and 34(5) of the Act comprise an important form of security in the absence of contractual security between the Land Bank and its debtor clients, and that the instant removal of such security would prejudice the Bank. It is reasonable to believe that if the statutory security were removed without any interim remedial measures, the Land Bank would incur monetary losses. The Bank may then be forced either to raise interest rates, as the applicant suggested in argument before this Court, or decline future section 34 advances. Even if it is only a perceived risk, the Land Bank may be compelled to protect itself from projected losses and transfer the burden onto its clients. This would undermine the intended role of the Land Bank to provide commercially unviable financial services. Because there exists a potential to impede the work of the Land Bank and the advantages it provides to struggling farmers and the national agricultural sector, it is not unreasonable in the interests of sound public policy to preserve its current form of security under section 34 by suspending the order of invalidity. While preservation of the security essentially depends on the suspension of invalidity as to sections 34(3)(b) and 34(5), section 34 as a whole constitutes an interdependent scheme. Moreover, to preserve the constitutionally repugnant provisions while striking down those that are incidentally impugned is illogical.

[12] The Constitution permits a court to decide the appropriate remedies in individual cases.

The relevant parts of section 172(1) of the Constitution read:

When deciding a constitutional matter within its power, a court -

. . .

(b) may make any order that is just and equitable, including -

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions,

to allow the competent authority to correct the defect.

[13] To suspend an order in terms of section 172(1)(b)(ii) it is required that the purpose served by the challenged statute outweighs the constitutional violation effected under its provisions.¹⁵ In *Lesapo*, this Court rejected counsel's request for a suspended order because no grounds for doing so were argued nor were they apparent on the record.¹⁶ This case is different. As already mentioned, the Land Bank did not request a suspended order as to section 55, but did so only in relation to section 34. To this end the Bank argued that both the prejudice it would suffer and the potentially adverse impact an order of immediate effect would have on the public good distinguishes this case from *Lesapo* and submitted that in the interest of justice and good government the order should be suspended.

¹⁵ See *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para 632; 1999 (6) BCLR 615 (CC) at para 42.

¹⁶ *Lesapo* above n 3 at para 33.

[14] In order not to jeopardise its commercial standing and transformative role, the Land Bank sought a suspension of the order of invalidity as to, at least, sections 34(3)(b) and 34(5) for a period of two years. It argued that two years was necessary to preserve its security in respect of section 34 advances while giving Parliament sufficient time to amend the Act. It also proposed a compromise interim interdict in the form of an ancillary order precluding it from attaching and selling any debtor's movable property in terms of section 34, without court intervention.¹⁷ Before discussing the propriety of a suspended order, it is appropriate to address the option of severance.

[15] During oral argument the Land Bank submitted that severance of the offending phrase in section 34(3)(b) -without recourse to a court of law"- would retain its statutory security and eliminate the constitutionally repugnant by-passing of judicial intervention. As was decided in *Lesapo* however, severance is not a viable solution.¹⁸ Section 34 provides for an integrated scheme, with clear legislative objective of placing the Land Bank in full control of its debt collecting process without any judicial supervision and with a view to a quick and effective debt recovery process. Severing the proposed part would alter the system of debt recovery set forth by the Legislature and would amount to

¹⁷ Rule 46 of the Supreme Court, see above n 14.

¹⁸ See *Lesapo* above n 3 at paras 31-2.

legislating, a function reserved for Parliament.¹⁹ In my view, suspending the order of invalidity of section 34 is, instead, the appropriate resolution here.

¹⁹ Id at para 32.

[16] The Land Bank is in an arguably precarious position because it must balance its high-risk lending practices with its commercial viability. Moreover, it must reconcile its developmental mandate with its constitutional obligations. This, in my view, is a complex matter that requires constructive and creative collaboration between the Minister, the Land Bank, Parliament and possibly the farming sector.²⁰ Suspending the invalidity of section 34 is therefore a more viable option here.

[17] The Land Bank was on notice of the unconstitutional nature of its debt recovery process since 1996 with the inception of the Constitution and undoubtedly from November 1999, when *Lesapo* was decided. It submitted that amended legislation was already being drafted, but the progress made in that regard could not be confirmed. Although it is important to avoid unnecessary delays in amending old, unconstitutional legislation to new constitutional standards,²¹ the Act includes several grants of power to attach and sell property without recourse to a court of law and the entire amending process will take time. A suspension of invalidity for a period of two years should be

²⁰ In *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC), this Court in a different context invoked its power to suspend its order where resolution of the matter demanded that the legislature consider various amendments and which affected the wider public. The situation is substantially similar here where the immediate striking down of section 34 would prejudice the Bank's ability to meet its public interest goals.

²¹ *South African National Defence Union* above n 15 at para 42.

reasonably sufficient to effect the necessary amendments to the Act in response to the order of this Court.

[18] Finally, I turn to the Land Bank's argument against any retrospective effect of the order of invalidity. It submitted that such an order should not invalidate sales in execution already completed, arguing that retrospective invalidity of past attachments and sales may result in the annulment of purchasers' title deeds and render the Bank susceptible to claims for proceeds of executed sales. Similar to the question of suspension, the standard to be applied in questions of retrospectivity is whether or not the interests of justice and good government outweigh the relief sought by individual litigants.²² Any retrospective effect of the order would undoubtedly risk disrupting the operations of the Land Bank. Consequently, the invalidity of the impugned provisions should not affect attachments and sales already completed. However, all current attachments not yet perfected by a sale effected in terms of section 34(3)(b) as it now reads, i.e without recourse to a court of law, should be invalidated²³ and all future attachments require that the Land Bank proceed only by court order.

Costs

[19] Effectively neither party was successful. Under these circumstances, no order as to

²² *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at paras 31-32.

²³ As pointed out above in 14, counsel indicated that since *Lesapo*, the Land Bank has not proceeded against clients without recourse to a court of law.

costs is appropriate.

[20] In the result the following order is made:

1. *The order of the Orange Free State High Court in case CCT 15/00*

- 1.1 The order declaring sections 34(3)(b) to (7), (9) and (10) and 55(2)(b) to (d) of the Land Bank Act 13 of 1944, as amended, unconstitutional in terms of section 34 of the Constitution of South Africa, is confirmed.
- 1.2 The invalidity of section 34(3)(b) to (7), (9) and (10) is suspended for a period of two years, provided that as from the date of this order no attachments and sales in execution in terms of section 34(3)(b) of the Land Bank Act 13 of 1944 not yet completed, shall take place without recourse to a court of law.
- 1.3 All attachments made in terms of section 34 of the Land Bank Act 13 of 1944 where no sales have yet been carried out shall be set aside without prejudice to the statutory security enjoyed by the Land Bank in terms of section 34(3)(b) of the Act as it currently reads.
- 1.4 There is no order as to costs.

2. *The order of the Eastern Cape High Court in case CCT 7/00*

The order declaring section 55(2)(b) of the Land Bank Act, 13 of 1944 invalid is confirmed.

Langa DP, Goldstone J, Kriegler J, Madala J, Ngcobo J, Sachs J, Yacoob J and Cameron AJ
concur in the judgment of Mokgoro J.

In First National Bank:

For the applicant: JJ Gauntlett SC, WH Olivier SC and AM Breitenbach instructed
by Symington&DeKok Attorneys, Bloemfontein..

For the respondent: AJ Freund instructed by Matlala Incorporated

In Sheard:

For the applicant: No appearance

For the respondent: No appearance