CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 21/96

THE TRANSVAAL AGRICULTURAL UNION

versus

THE MINISTER OF LAND AFFAIRS
THE COMMISSION ON RESTITUTION OF LAND RIGHTS

Heard on: 19 September 1996

Decided on: 18 November 1996

JUDGMENT

CHASKALSON P:

Introduction

[1] The Transvaal Agricultural Union is a body established to represent the interests of its members who are farmers. It has applied directly to this Court for an order declaring that sections 6(1)(c), 9(1)(b), 11(1), 11(6)(b), 11(7), 11(8), and 13(2)(b) of the Restitution of Land Rights Act 22 of 1994, and rules 13 and 14 of the rules regarding the procedure of the Commission on Restitution of Land Rights, promulgated in terms of section 16(1) of that Act,[1] are inconsistent with the Constitution, and accordingly invalid. The provisions are material to the interests of members of the applicant, and it

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[1] Government No R 703 promulgated in Government Gazette No 16407 of 12 May 1995.

was not disputed that it has standing in terms of section 7(4)(b) of the Constitution to bring this application.

[2] Constitutional Court rule 17 deals with applications for direct access to the Court in terms of section 100(2) of the Constitution.[2] It stipulates that such applications are permissible

> "in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government."

[3] On receipt of the application in the present matter it was set down for hearing and directions were given in terms of rule 17(5) requiring the parties to submit written argument to the Court in regard to whether the matter was one in which direct access was appropriate. The parties were also required to address the merits of the issues raised in the application.

[4] The Commission on Restitution of Land Rights (the "Commission") informed the registrar that it would abide by the judgment of the Court and did not wish to participate

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[2] Section 100(2) of the Constitution provides:

> "The rules of the Constitutional Court may make provision for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction."

in the proceedings. The Minister, however, opposed the application both on the merits of the dispute and on the grounds that the matter is not a proper one for the exercise by the Court of the special jurisdiction vested in it under rule 17.

The Restitution of Land Rights Act

[5] The Restitution of Land Rights Act was enacted pursuant to the provisions of sections 121 to 123 of the Constitution. The provisions of these sections that are relevant to the present dispute are as follows:

> "**121. Claims**. - (1) An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section and in sections 122 and 123.
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> (2) A person or a community shall be entitled to claim restitution of a right in land from the state if -
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> (a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and
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> (b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.
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> (3) ....
>
> (4) ....
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> (5) No claim under this section shall be lodged before the passing of the Act contemplated in subsection (1).

(6) Any claims under subsection (2) shall be subject to such conditions, limitations and exclusions as may be prescribed by such Act, and shall not be justiciable by a court of law unless the claim has been dealt with in terms of section 122 by the Commission established by that section.

122. Commission. - (1) The Act contemplated in section 121(1) shall establish a Commission on Restitution of Land Rights, which shall be competent to -

(a) investigate the merits of any claims;

(b) mediate and settle disputes arising from such claims;

(c) draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court; and

(d) exercise and perform any such other powers and functions as may be provided for in the said Act.

(2) The procedures to be followed for dealing with claims in terms of this section shall be as prescribed by or under the said Act."

[6] The Restitution of Land Rights Act established the Commission to deal with matters referred to in section 122 of the Constitution, and a special court, the Land Claims Court, with the powers contemplated by section 123 of the Constitution. It is not necessary for the purposes of this judgment to set out the details of these powers.

[7] The principal function of the Commission is to process claims for restitution, by investigating the claims lodged with it, and where possible, securing settlement of claims through negotiations or mediation. Where this does not prove to be possible, the Commission is required to refer the claim to the Land Claims Court which is empowered to resolve it.

[8] The applicant does not dispute the validity of the legislation as such, or the need to make provision for the restitution of land rights. Its objection is confined to certain provisions of the legislation dealing with the Commission, which it contends are inconsistent with the object, spirit and provisions of the Constitution.

The Challenge to Sections 11(1), 11(6)(b), 11(7), 11(8) and Rules 13 and 14

[9] The applicant objects in the first instance to certain provisions of section 11 of the Act. It contends that these provisions are inconsistent with the administrative justice provisions of section 24 of the Constitution, and in particular, with section 24(b) which vests in every person the right to

> "procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened."

[10] Section 11 deals with procedures which have to be followed in processing claims for restitution. Persons or communities claiming restitution of land are required to complete a prescribed form in which a description of the land and the nature of the right being claimed must be given, and to lodge the form at a regional office of the Commission.[3] The regional land claims commissioner, if satisfied that the claim has

[3] S10 read with s16 of the Act, and s2 of the rules regarding the procedure of the Commission.

been lodged in the prescribed manner,[4] is not frivolous or vexatious,[5] and that no order has been made by the Land Claims Court in respect of that piece of land,[6] must cause notice of the claim to be published in the gazette.

[11] Immediately after publishing the notice in the gazette the Commissioner is required by section 11(6) to

> "(a) advise any other party which, in his or her opinion, might have an interest in the claim; and
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> (b) direct the relevant Registrar [of Deeds] ... to note in his or her records the fact that a claim for restitution of a right in the land has been instituted in terms of this Act."

[12] A decision to publish a notice of the claim in the gazette has certain consequences. Sections 11(7)(b) and (c) provide that no claimant who was resident on the land in question at the date of commencement of the Act may be evicted from the land, and no improvement on the land may be removed or destroyed, without the written authority of the Chief Land Claims Commissioner. Section 11(8) empowers a regional land claims commissioner who "has reason to believe that any improvement on the land is likely to be removed, damaged or destroyed or that any person resident on such land

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4 S2(1) of the Act provides that claims can be brought by a personal community contemplated in s121(2) of the Constitution, or a direct descendant of such person, but must be lodged within 3 years of the date prescribed by the Minister of Land Affairs for the lodging of such claims.

5 S11(1)(c).

6 S11(1)(d).

may be adversely affected as a result of the publication of such notice" to authorise officials or delegates of the Commission to enter upon the land to draw up an inventory of assets on the land, a list of persons employed or resident thereon, and to report on the "agricultural condition of the land and of any excavations, mining or prospecting thereon." Rules 13 and 14 deal with the terms of the section 11(1) notice and the compilation of the inventory.

[13] The applicant's complaint is that these provisions impair the rights of the owner of the land, who should therefore be given the opportunity of being heard by the regional land claims commissioner before any decision is taken in regard to the publication of the notice. The applicant also contends that this impairment of landowners' rights, particularly without a prior hearing, infringe their right to property and to engage in economic activity entrenched in sections 28 and 26 respectively of the Constitution.

The Challenge to Sections 9(1)(b) and 13(2)(b)

[14] Sections 9(1)(b) and 13(2)(b) of the Act empower the Chief Land Claims Commissioner to direct that attempts be made to settle a disputed claim for restitution of land rights through mediation. The Commissioner may appoint a mediator for such purposes, or the parties may do so themselves. The applicant contends that this procedure is inconsistent with section 122(1)(b) of the Constitution, which, so the

contention goes, requires the Commission to undertake the mediation itself.

The Challenge to Section 6(1)(c)

[15] The validity of section 6(1)(c) of the Act which requires the Chief Land Claims Commissioner to advise claimants of the progress of their claims, was also challenged in the application. It was contended that this provision is inconsistent with the equality clause,[7] because there is no corresponding requirement that landowners be advised of the progress of claims affecting them. Counsel for the applicant correctly did not persist in this contention at the hearing of the matter.

Direct Access

[16] Rule 17(1) states that direct access will be allowed only in exceptional circumstances. We have made it clear in previous decisions that this rule applies to all matters, including those concerned with issues alleged to be within the exclusive jurisdiction of the Constitutional Court. In the absence of exceptional circumstances applicants in such matters are required to follow the procedure laid down by section 102(1) of the Constitution, and apply to the Supreme Court for the referral of the disputed issues to this Court. The Supreme Court will determine whether the issue is

[7] Section 8(1) of the Constitution provides:

"Every person shall have the right to equality before the law and to equal protection of the law."

in fact within the exclusive jurisdiction of the Constitutional Court, and if it is, whether a decision thereon may be decisive of the case, and whether there is sufficient merit in the contention to justify a referral.[8]

[17] The applicant sought to justify its application for direct access on the following grounds:

(a) The Constitutional Court is the only Court with jurisdiction to grant the relief claimed by it.

(b) The application is urgent and raises matters of public interest. In this regard it is contended that a ruling on the validity of the impugned provisions will affect the rights of land owners and claimants for restitution and could have a material impact on the functioning of the Commission and the Land Claims Court.

(c) The issues can be resolved on the papers without hearing oral evidence.

(d) There are reasonable prospects of success.

[18] The Act deals with issues of considerable public importance. But so do many Acts of Parliament and, in itself, this is no justification for seeking relief by way of direct access to this Court. Section 102 of the Constitution prescribes, and jurisprudential policy dictates, that this Court should ordinarily not deal with matters as

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[8] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996(6) BCLR 752(CC) at paras 4 and 6 - 10.

both a court of first instance and as one of last resort. What rule 17 requires is, therefore, that in addition to the importance of the matter, there be proof "that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government". Clearly those are stringent requirements.

[19] The applicant avers in its founding affidavit that the matter is one of considerable urgency, affecting not only the past actions of regional land claims commissioners, but how they will deal with matters in the future. Urgency may afford grounds for engaging this Court directly. But it must be clear that the urgency is such that the delay in securing a definitive ruling would prejudice the public interest or the ends of justice and good government. An applicant who contends that such urgency exists assumes an obligation of establishing such averment to the satisfaction of the Court.

[20] *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others*[9] was such a case. The facts there were exceptional. The dispute concerned the validity of presidential proclamations which provided the framework for local government elections which were due to be held shortly in most parts of the country. The Court, in granting direct access, considered the possibility that invalidation of the proclamations could jeopardise the whole electoral

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9 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at paras 15-7.

process. In the event it did conclude that the proclamations were invalid and as a result Parliament had to be convened as a matter of urgency to address the problem and provide a legal framework for the elections.

[21] The present case is not comparable with the *Western Cape* case. The Restitution of Land Rights Act was promulgated on 2 December 1994. Prior to and during the passage of the bill through Parliament the public was given an opportunity to object to the principle of the bill or to particular provisions in it. Although the South African Agricultural Union, of which the applicant is a member, made submissions to the parliamentary committee dealing with the bill, neither it nor the applicant raised any objection at that stage to the provisions of the bill to which the applicant now objects, nor did the applicant do so for more than a year after the passing of the Act. The objection was raised for the first time some seventeen months after the Act had been passed, and more than nine months after the appearance of notices in terms of section 11(1) in the gazette.

[22] The applicant attached to its founding affidavit 68 extracts from press publications and 30 notices issued in terms of section 11(1) of the Act to support its contention that the issues raised by it are of public importance. The press publications cover the period May 1994 to February 1996. All but six of these appeared in 1994 and 1995, and more than half were published prior to October 1995. All of the section 11(1)

notices referred to were published between July and October 1995.[10] The notice of motion commencing the present proceedings is dated 26 April 1996, and was lodged with the registrar of this Court on 29 April 1996.

[23] The delay in launching these proceedings does not evidence any pressing urgency in connection with the matter; nor does the founding affidavit point to any particular instance of prejudice having been suffered by any of the applicant's members or other landowners as a result of the publication of section 11(1) notices, or as a result of the application of any of the provisions of the Act to which objection is now taken. On the contrary, the undisputed evidence of the Minister is that although 648 notices have already been promulgated, no requests have yet been made in terms of section 11(7) for permission to evict claimants or interfere with improvements. The only urgency to which counsel for the applicant could point was the importance of securing a ruling on a matter of public importance as soon as possible. That, however, is a consideration that is likely to be present in all cases concerned with the validity of provisions of Acts of Parliament, and cannot be said to be exceptional.

Audi Alteram Partem

[24] The main objection, and the one primarily relied upon by the applicant as the

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[10] One of these notices was corrected by Notice 23 of 1996 promulgated in Government Gazette No 16919 12 January 1996.

basis for its contention that landowners have been prejudiced by the legislation, is that no provision is made in the statute for regional land claims commissioners to hear owners before issuing a section 11(1) notice.

[25] The mere fact that the legislation does not specifically make provision for such a hearing does not mean that there is indeed no such right. It is well established that

> "... when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter - see [*Cabinet for the Territory of South West Africa v Chikane and Another* 1989(1) SA 349 (A)] at 379G), unless the statute expressly or by implication indicates the contrary."[11]

[26] The question whether such right has been excluded by the Act in the present case depends, therefore, upon the proper interpretation of the statute. That, in the first instance, is a task for and within the jurisdiction of the Supreme Court.[12] Counsel for the applicant contended, however, that the Act clearly excludes a right to a hearing, and that it was not necessary in the circumstances to approach the Supreme Court for such a ruling. He pointed out that rule 13(2) requires the section 11(1) notice to be given to "all possible interested parties, including the registered landowner" and contended that this implies that notice will not have been given to the owner earlier. The question whether a right to a hearing has been excluded depends, however, on an interpretation

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11 *Administrator, Transvaal, and Others v Traub and Others* 1989(4) SA 731 (A) at 748G-H.

12 *Brink v Kitshoff NO* supra at para 14.

of the Act; if required by the Act, it cannot be excluded by the rules.

[27] The Act contemplates that regional land claims commissioners will scrutinise claims lodged with them to satisfy themselves that claims comply with the formal requirements of the Act, and are not frivolous or vexatious.[13] If a claim is considered to be frivolous or vexatious, it can be dismissed summarily.[14] If a claim meets the formal requirements of the Act, and is not considered by the regional land claims commissioner to be frivolous or vexatious, it will be accepted and the process laid down by the Act must then be followed.

[28] The registration of the claim in the deeds registry, which is required by section 11(6)(b) of the Act, does not in itself detract from the rights of the landowner or other persons interested in the property. The owner remains free to alienate or deal with the property and other interested parties are free to assert their rights. Registration is no more than notice to the world at large that the land in question is subject to a claim under the Act, information which the landowner would in any event have been obliged to disclose to any potential buyer or mortgagor.

[29] Section 11(7) of the Act which precludes evictions of claimants who are residing on the land, or interference with improvements upon the land, and section 11(8) which

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13 S11.

14 S11(3).

authorises entry upon land for the purposes of drawing up an inventory do detract from the rights of a landowner, and possibly of other interested parties as well. The Chief Land Claims Commissioner is, however, vested with the power to allow evictions and interference with improvements, and decisions of the Commissioner in that regard are subject to review by the Land Claims Court.[15] Such decisions will have to be taken with due regard to rights which the landowner may have under the Constitution, and any justifiable limitation imposed upon such rights by the Act.

[30] In deciding whether the constitutional requirement that there be procedurally fair administrative action requires notice to be given by regional land claims commissioners to the landowners before issuing a section 11(1) notice, or whether their interests are sufficiently protected by notice given to them after such claims have been accepted, various matters would have to be considered by the Court. Without attempting to lay down what will be involved in such an enquiry, it seems clear that a Court would have to weigh up the interests of the claimants against those of the landowners, and consideration would have to be given to issues such as the temporary nature of the impediment; the purpose served by the status quo provision of section 11(7); whether there is a need for expedition in securing that purpose once a claim has been lodged; the harm done to landowners by the impediments placed upon them by sections 11(7) and (8); the vulnerability of the claimants and the harm that might be suffered by them if the

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15 S36.

status quo is not preserved; and the fact that there is an unrestricted right to approach a different official, the Chief Land Claims Commissioner, for authority to evict a claimant or interfere with improvements on the land. It might also be necessary to consider whether the Act reasonably requires claims to be processed expeditiously.

[31] These are all matters on which the Supreme Court can and should give a decision, and which ought to be canvassed in the Supreme Court in the light of any evidence placed before it, before any approach is made to this Court for relief. A constitutional issue will arise only if the Supreme Court were to hold that on a proper construction of the Act, it requires claims to be dealt with in a manner inconsistent with procedurally fair administrative action. It is premature to approach this Court for a decision, before that issue has been determined.

Sections 28 and 26 of the Constitution

[32] The applicant also contended that the provisions of section 11(7) and (8) of the Act are inconsistent with sections 28 and 26 of the Constitution which respectively protect the right of every person to acquire, hold and dispose of rights in property, and to engage freely in economic activity.

[33] The Restitution of Land Rights Act recognises that certain persons and

communities have a legitimate claim to the restitution of land rights which were lost as a result of past discriminatory laws. Legislation to provide for this is specifically sanctioned, and indeed required, by the provisions of sections 121 to 123 of the Constitution. It is clear from these provisions that existing rights of ownership do not have precedence over claims for restitution. The conflicting interests of claimants and current registered owners are to be resolved on a basis that is just and equitable,

> "taking into account all relevant factors, including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interests of the owner and others affected by any expropriation, and the interests of the dispossessed."[16]

If, after consideration of these factors, the Court (in terms of the Act, this will be the Land Claims Court) decides that the claim for restitution should be granted, the state must either purchase or expropriate the land to implement the order.

[34] The purpose of sections 11(7) and (8) of the Act is to maintain the status quo pending the determination of the claim for restitution, and to protect claimants against possible eviction or damage to improvements to the property while the claim is being processed. These could include residential accommodation and other improvements necessary for the claimants to continue living on the property.

[35] It is not clear that these status quo provisions infringe sections 28 or 26 of the

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16 S123(2) of the Constitution.

Constitution. It is, however, not desirable to say more in regard to the argument based on the alleged infringement of sections 28 and 26 of the Constitution, than is necessary for the purposes of the decision of the application for direct access. I will accordingly not deal in any detail with the arguments addressed to us on these two sections.

[36] The restitution of land rights is a complex process in which the rights of registered owners and other persons with an interest in the land must be balanced against the constitutional injunctions to ensure that restitution be made where this is just and equitable. Parliament is given a discretion by the Constitution to decide how this process is to be carried out. Provisions in such legislation that are designed to protect claimants and maintain the status quo pending determination of a claim serve a legitimate purpose. The first respondent has alleged in his affidavit that the interference with rights of ownership caused by the status quo provisions is slight, that in practice they have resulted in no real prejudice, and that there is no other means of effectively preserving the status quo which would be less invasive of the rights of landowners. These averments were not disputed by the applicant on affidavit. Counsel for the applicant was pressed in argument to suggest an alternative but less invasive procedure. All that he could suggest was the possibility that the eviction of a claimant or interference with improvements should be made a criminal offence. This, however, would not necessarily preserve the status quo, nor would it necessarily be less invasive.

[37] Even if it is assumed in favour of the applicant (and it is not clear that such an assumption should be made) that sections 11(7) and (8) infringe rights protected under sections 28 and 26 of the Constitution, on the evidence before us there is prima facie justification in terms of section 33 of the Constitution for such infringement.

[38] The applicant suggested in argument that section 33 of the Constitution does not apply to the present case because the Act is legislation specifically required by the Constitution itself. If the requirements of sections 121 to 123 of the Constitution lead to the conclusion that the legislation required will not be subject in any respect to Chapter 3 of the Constitution, this would destroy the applicant's case; if, however, the legislation has to be enacted with due regard to the provisions of Chapter 3, then it is clear from the language of section 33, that its provisions would be applicable to the Act.

[39] The applicant also contended that the provisions of sections 11(7) and 11(8) of the Act impaired the dignity of any landowner affected thereby, but this contention was wisely abandoned during argument, and there is no need to deal with it.

The Power to Delegate

[40] The other issues raised by the applicant deal with the mediation provisions of the Act. The contention here is that section 122(1)(b) of the Constitution requires the

Commission to undertake all mediations itself, that the Commissioners must act jointly in doing so, and that Parliament has no power to enact legislation providing for mediators to be appointed by the Chief Land Claims Commissioner.

[41] The Supreme Court does not have jurisdiction to declare that the provisions of the Act are unconstitutional on these grounds. It does, however, have jurisdiction under section 102 of the Constitution to consider the question, and to refrain from referring it to this Court, if it is of the opinion that there is no reasonable prospect that the contention will be upheld.[17]

[42] The Constitution contemplates that the Commission will deal with claims for restitution of land rights in respect of dispossessions effected during a period which could be from 19 June 1913 until 27 April 1994.[18] There is one Commission for the whole country. The first respondent in his answering affidavit says that more than 2 million people may be affected by the provisions of the Act. Over 10 000 claims (some from communities) have already been lodged, and the first respondent anticipates that more than double this number of claims are likely to be lodged in the future. The applicant is not in a position to dispute these statistics, but does not suggest that they are

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17 *S v Mhlungu and Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59; *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 2; *Brink v Kitshoff NO* supra n 8 at paras 5 and 15.

18 S121(3). 27 April 1994 is the date on which the Constitution came into force.

incorrect, or surprising.

[43] The Constitution contemplates that the Commission will play a crucial role in sifting claims for restitution and in the process of mediation and negotiation. This is apparent from the provisions of section 121(6) which provides that a claim for restitution

> "shall not be justiciable by a court of law unless the claim has been dealt with in terms of section 122 by the Commission established by that section."

The applicant contends that the competences referred to in section 122 have to be performed by all the members of the Commission jointly. If this is so there would be inordinate delays in processing claims. All members of the Commission would have to deal with each of the thousands of claims that are anticipated, and the functioning of the Commission would be cumbersome and impractical. Even if the Commission were to discharge its functions through its own employees, in order to perform all the tasks referred to in section 122 itself, namely, to investigate the merits of the claims, mediate and settle disputes arising from such claims, draw up reports on unsettled claims for submission as evidence to the Land Claims Court, and carry out any other functions which may be assigned to it by the contemplated legislation, without having the power to assign or delegate such functions to other functionaries, a large bureaucracy would have to be established to enable the Commission to function effectively and fulfill its mandate, and proceedings would be protracted to the potential prejudice of both the

claimants, and the owners and other persons interested in the land.

[44] Parliament has full plenary power to enact legislation within the competences vested in it by the Constitution. It is not to be equated with a subordinate functionary whose powers of delegation must be restricted, nor is the Constitution to be construed with "the austerity of tabulated legalism".[19] Section 122(1) of the Constitution does not specifically require the Commission to carry out the functions referred to in that section itself. It vests in the Commission a competence to do so. There is, prima facie, nothing in the Constitution which deprives Parliament of the power to enact legislation which authorises the Chief Land Claims Commissioner, who is the senior functionary of the Commission, to appoint mediators to assist in the settlement of disputed claims, or to delegate that power to some other person.[20]

[45] In these circumstances the Supreme Court may well hold that there is not sufficient substance in the contentions raised by the applicant in this regard to warrant the issue being referred to this Court for its consideration.

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19 *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319(PC) at 328H.

20 S13(1) specifically empowers the Chief Land Claims Commissioner to require the parties to attempt to settle their disputes through a process of mediation, and s13(2)(b) empowers him or the parties themselves, to appoint a mediator for that purpose. In terms of s7(2) the Chief Land Claims Commissioner may delegate any power conferred upon him under the Act to some other person.

The Decision

[46] The applicant has failed to establish that this is a case in which the ordinary procedures ought not to have been followed. There are important issues which are within the jurisdiction of the Supreme Court and which need to be resolved by it before this Court is approached for relief. As far as the other issues are concerned there is neither the urgency nor the prospects of success necessary to justify direct access to this Court. The application for direct access must therefore be dismissed.

[47] There may be good reasons why a losing litigant who raises a substantial constitutional issue in proceedings before this Court, ought not to be ordered to pay the costs of the successful party. In the present case, however, the applicant did not follow the ordinary procedures prescribed by the Constitution and rules of this Court. In doing so it took the risk that the proceedings would be dismissed if it failed to meet the requirements prescribed by rule 17. This has proved to be so. Although there may possibly be cases in which it would be inappropriate to make an order for costs against the losing party in a rule 17 application, there seems to me to be no reason why, in the circumstances of the present case, the applicant should not be required to pay the costs of the abortive proceedings. Both parties were represented by senior counsel, and the matter was one in which the services of two counsel were warranted.

[48] I accordingly make the following order:

1. The application for direct access in terms of rule 17 is dismissed.

2. The applicant is directed to pay the costs of the application, which are to include the costs of two counsel.

A Chaskalson
President of the Constitutional Court

Mahomed DP, Ackermann J, Didcott J, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J, and Sachs J concur in the judgment of Chaskalson P.

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