CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 100/09
[2010] ZACC 10

In the matter between:

STEPHEN SEGOPOTSO TONGOANE	First Applicant
PHAHLELA JOAS MUGAKULA	Second Applicant
MORGAN MOGOELELWA	Third Applicant
RECKSON NTIMANE	Fourth Applicant
and	
MINISTER FOR AGRICULTURE AND LAND AFFAIRS	First Respondent
MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT	Second Respondent
PREMIER OF EASTERN CAPE	Third Respondent
PREMIER OF FREE STATE	Fourth Respondent
PREMIER OF GAUTENG	Fifth Respondent
PREMIER OF KWAZULU-NATAL	Sixth Respondent
PREMIER OF MPUMALANGA	Seventh Respondent
PREMIER OF NORTHERN CAPE	Eighth Respondent
PREMIER OF LIMPOPO	Ninth Respondent
PREMIER OF NORTH WEST	Tenth Respondent
PREMIER OF WESTERN CAPE	Eleventh Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Twelfth Respondent

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES — Thirteenth Respondent

NATIONAL HOUSE OF TRADITIONAL LEADERS — Fourteenth Respondent

Heard on : 2 March 2010

Decided on : 11 May 2010

JUDGMENT

NGCOBO CJ:

Introduction

[1] This case raises important constitutional questions concerning one of the most crucial pieces of legislation enacted in our country since the advent of our constitutional democracy: the Communal Land Rights Act, 2004[1] (CLARA). This legislation is intended to meet one of the longstanding constitutional obligations of Parliament to enact legislation to provide legally secure tenure or comparable redress to people or communities whose tenure of land is legally insecure as a result of the racist policies of apartheid that were imposed under the colour of the law. The people and communities who were primarily victimised by these laws were African people.

[1] 11 of 2004.

[2] Section 25(6) of the Constitution provides:

> "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."[2]

[3] This case concerns first, the procedure that must be followed in enacting this legislation; second, whether Parliament complied with its constitutional obligation to facilitate public involvement in the legislative process that culminated in the enactment of CLARA; and, third, whether the provisions of CLARA, instead of providing legally secure tenure, undermine it. But it also raises the question whether, if we should uphold any of the procedural challenges, it is still necessary for us to consider the substantive challenges to the provisions of CLARA.

[4] Four communities whose land rights are affected by CLARA mounted a two-pronged constitutional challenge to this legislation in the North Gauteng High Court, Pretoria (the High Court).[3] One was substantive, challenging CLARA on the ground that its provisions undermine security of tenure. The other was procedural, contending that the manner in which CLARA was enacted was incorrect. This latter challenge was premised on Parliament's decision to pass CLARA as a Bill which does not affect the

[2] Subsection (6) must be read with subsection (9) which provides that "Parliament must enact the legislation referred to in subsection (6)." Although CLARA was enacted on 14 July 2004 to fulfil this obligation, it has not yet been brought into operation.

[3] *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, Case No 11678/2006, North Gauteng High Court, Pretoria, 30 October 2009, unreported. The communities also challenged the constitutional validity of certain provisions of the Traditional Leadership and Governance Framework Act 41 of 2003. This challenge was dismissed by the High Court. The communities initially sought leave to appeal against the dismissal of this challenge. They no longer persist in seeking this relief.

provinces, under section 75 of the Constitution,[4] instead of as a Bill which affects the provinces, under section 76 of the Constitution.[5]

[5] The substantive challenge was partially successful. The High Court declared certain provisions of CLARA invalid. Although it found that Parliament should have

[4] Section 75 of the Constitution provides:

"Ordinary Bills not affecting provinces

(1) When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:

(a) The Council must—

(i) pass the Bill;

(ii) pass the Bill subject to amendments proposed by it; or

(iii) reject the Bill.

(b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.

(c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may—

(i) pass the Bill again, either with or without amendments; or

(ii) decide not to proceed with the Bill.

(d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.

(2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—

(a) each delegate in a provincial delegation has one vote;

(b) at least one third of the delegates must be present before a vote may be taken on the question; and

(c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote."

[5] Section 76 of the Constitution provides:

"Ordinary Bills affecting provinces

(1) When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:

(a) The Council must—

(i) pass the Bill;

followed the procedure for the passing of Bills affecting the provinces prescribed by section 76, it declined to grant relief on that account because Parliament had committed an error in good faith and did not intend to suppress the views of the provinces. It accordingly dismissed this part of the application. The High Court, as it was required to do, referred the order of invalidity to this Court for confirmation.

(ii) pass an amended Bill; or

(iii) reject the Bill.

(b) If the Council passes the Bill without amendment, the Bill must be submitted to the President for assent.

(c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.

(d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on—

(i) the Bill as passed by the Assembly;

(ii) the amended Bill as passed by the Council; or

(iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.

(f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if the Council passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent.

(i) If a Bill referred to the Council in terms of paragraph (f) or (h) is not passed by the Council, the Bill lapses unless the Assembly passes the Bill with a supporting vote of at least two thirds of its members.

(j) If a Bill referred to the Assembly in terms of paragraph (g) or (h) is not passed by the Assembly, that Bill lapses, but the Bill as originally passed by the Assembly may again be passed by the Assembly, but with a supporting vote of at least two thirds of its members.

(k) A Bill passed by the Assembly in terms of paragraph (e), (i) or (j) must be submitted to the President for assent.

[6] In this Court, the applicants seek confirmation of the order of invalidity. In addition, they seek leave to appeal against the dismissal of their application to have CLARA declared constitutionally invalid in its entirety for Parliament's failure to enact it in accordance with the procedure prescribed by section 76. The applicants also lodged an application for direct access to this Court in which they seek an order declaring CLARA

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(2) When the National Council of Provinces passes a Bill referred to in subsection (3), the Bill must be referred to the National Assembly and dealt with in accordance with the following procedure:

(a) The Assembly must—

(i) pass the Bill;

(ii) pass an amended Bill; or

(iii) reject the Bill.

(b) A Bill passed by the Assembly in terms of paragraph (a) (i) must be submitted to the President for assent.

(c) If the Assembly passes an amended Bill, the amended Bill must be referred to the Council, and if the Council passes the amended Bill, it must be submitted to the President for assent.

(d) If the Assembly rejects the Bill, or if the Council refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill must be referred to the Mediation Committee, which may agree on—

(i) the Bill as passed by the Council;

(ii) the amended Bill as passed by the Assembly; or

(iii) another version of the Bill.

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses.

(f) If the Mediation Committee agrees on the Bill as passed by the Council, the Bill must be referred to the Assembly, and if the Assembly passes the Bill, the Bill must be submitted to the President for assent.

(g) If the Mediation Committee agrees on the amended Bill as passed by the Assembly, the Bill must be referred to the Council, and if it is passed by the Council, it must be submitted to the President for assent.

(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Council and the Assembly, and if it is passed by the Council and the Assembly, it must be submitted to the President for assent.

(i) If a Bill referred to the Assembly in terms of paragraph (f) or (h) is not passed by the Assembly, the Bill lapses.

(3) A Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:

constitutionally invalid on the ground that Parliament failed to comply with its constitutional obligations to facilitate public involvement in the legislative process in terms of sections 59(1)(a)[6] and 72(1)(a)[7] of the Constitution.

[7] There are four applicants, each of whom represents a community that occupies land to which CLARA applies. They all act in their own interest, on behalf of the communities of which they are a part and in the public interest. Only five of the cited

(a) section 65(2);

(b) section 163;

(c) section 182;

(d) section 195(3) and (4);

(e) section 196; and

(f) section 197.

(4) A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation—

(a) envisaged in section 44(2) or 220(3); or

(b) envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government.

(5) A Bill envisaged in section 42(6) must be dealt with in accordance with the procedure established by subsection (1), except that—

(a) when the National Assembly votes on the Bill, the provisions of section 53(1) do not apply; instead, the Bill may be passed only if a majority of the members of the Assembly vote in favour of it; and

(b) if the Bill is referred to the Mediation Committee, the following rules apply:

(i) If the National Assembly considers a Bill envisaged in subsection (1)(g) or (h), that Bill may be passed only if a majority of the members of the Assembly vote in favour of it.

(ii) If the National Assembly considers or reconsiders a Bill envisaged in subsection (1)(e), (i) or (j), that Bill may be passed only if at least two thirds of the members of the Assembly vote in favour of it.

(6) This section does not apply to money Bills."

[6] Section 59(1)(a) of the Constitution provides: "The National Assembly must facilitate public involvement in the legislative and other processes of the Assembly and its committees".

[7] Section 72(1)(a) of the Constitution provides: "The National Council of Provinces must facilitate public involvement in the legislative and other processes of the Council and its committees".

respondents participated in these proceedings: the Minister for Agriculture and Land Affairs, now the Minister for Rural Development and Land Reform, who is the first respondent; the Minister for Provincial and Local Government, now the Minister for Co-operative Governance and Traditional Affairs, who is the second respondent; the Speaker of the National Assembly, the twelfth respondent; the Chairperson of the National Council of Provinces (NCOP), the thirteenth respondent; and the National House of Traditional Leaders, the fourteenth respondent.

[8] I use the terms applicants, communities, and applicant communities interchangeably. For convenience, the twelfth and thirteenth respondents will be referred to jointly as Parliament. Any reference to "the Minister" is a reference to the Minister for Rural Development and Land Reform.

[9] In order to put the issues presented into context, I consider it desirable to sketch briefly the legislative scheme which brought about our colonial and apartheid geography and which facilitated land dispossession of African people, the resultant insecure land tenure for the majority of our country, and the history of land occupation by the four applicant communities.

Colonial and apartheid laws

[10] Until 1905, the practice in the former Transvaal or Zuid-Afrikaansche Republic[8] was that ownership of land could not be registered in the name of a "native".[9] This was justified on the basis of two instruments, namely, the Volksraad Resolution of 14 August 1884 and article 13 of the Pretoria Convention, 1881. The latter provided that: "Natives will be allowed to acquire land, but the grant or transfer of such land will in every case be made to and registered in the name of the Native Location Commission hereinafter mentioned, in trust for such natives."[10]

[11] However, in 1905, and following the decision in *Tsewu v Registrar of Deeds*[11] which held that neither of these instruments had the force of law and that title could be registered in the names of "natives", African people were able to purchase land from white farmers. It is said that subsequent to 1905 and before June 1913, African people

[8] The Transvaal included the present provinces of Limpopo and Mpumalanga, as well as part of North West province, where the applicant communities reside.

[9] The word "native" refers to African people. Depending on what the government thought to be the acceptable term to refer to African people, the terms "Bantu" and "Blacks" were later used. The names of statutes referring to African people changed to coincide with the official term used to refer to African people from time to time. So, the Natives Land Act 27 of 1913 became the Bantu Land Act 27 of 1913 and later the Black Land Act 27 of 1913.

[10] Article 13 of the Pretoria Convention, as amended in 1910.

[11] 1905 TS 130 at 135. The judgment cites article 13 of the Pretoria Convention as follows: "Leave shall be given to natives to obtain ground, but the passing of transfer of such ground shall in every case be made to and registered in the name of the Commission for Kafir Locations hereinafter provided for, for the benefit of such natives." The citation refers to the Convention as it was at the time the matter was heard.

purchased some 399 farms.[12] All this changed in June 1913, when the Natives Land Act, 1913[13] (now the Black Land Act) was enacted.

[12] The Black Land Act and the Native Trust and Land Act, 1936[14] (now the Development Trust and Land Act) were the key statutes that determined where African people could live. The former contained a schedule which set out areas in which only African people could purchase, hire or occupy land. In terms of section 2(1), the sale of land between whites and African people in respect of land outside of the scheduled areas referred to in the Act was prohibited. The effect of this legislation was to preclude African people from purchasing land in most of South Africa.

[13] In exceptional circumstances, sales of land to African people could be approved by the Governor-General, later the State President, under the Native Administration Act, 1927[15] (now the Black Administration Act). African people purchasing land pursuant to such approval had to accept, however, that land would not be registered in their names but would be held in trust on their behalf by the Minister of Native Affairs who would

[12] Feinburg "Pre-apartheid African land ownership and the implications for the current restitution debate in South Africa" (1995) 40 *Historia* 48 at 50. It is not necessary for the purposes of this case to detail the history of land dispossession in the rest of the country. Suffice it to say that colonial settlement and expansion initiated a process whereby indigenous people were dispossessed of the land they occupied to a greater or lesser extent. The nomadic Khoi and San people in the Cape Colony were dispersed. After eight frontier wars all Xhosa people were finally colonised by the British by the end of the 19th century. So were the Zulu people in the colony of Natal. The Sotho people lost much of their land in the wars in the Orange Free State and eventually sought and found protection under the British in what is now Lesotho. Efforts at providing individual ownership to land, such as the Glen Grey Act in the Cape Colony and ownership of their land granted to the Griqua people, were generally not successful. See Davenport and Saunders *South Africa: A Modern History* 5ed (Macmillan Press, Great Britain 2000) 129-93.

[13] 27 of 1913.

[14] 18 of 1936.

[15] 38 of 1927. On the practical effect of the prohibition, see Feinburg and Horn "South African territorial segregation: new data on African farm purchases" (2009) 50 *Journal of African History* 41.

recognise their permanent rights of use and occupation of the land consistent with the position of an owner.

[14] The Development Trust and Land Act was enacted in 1936 to make provision for the establishment of the South African Native Trust (the Trust) and the release of more land for occupation by African people. In terms of section 6 of this Act, all land "which [was] reserved or set aside for the occupation of natives" and "land within the scheduled native areas, and . . . within the released areas" vested in the Trust. However, there was a limit on the amount of land that could be acquired by the Trust, and by implication, land that could be occupied by African people.[16] The affairs of the Trust were administered by the Governor-General in his capacity as the Trustee who, in turn, could delegate his powers and functions to the Minister of Native Affairs.[17]

[15] The land that vested in the Trust was "held for the exclusive use and benefit of natives".[18] The Trustee had the power to "grant, sell, lease or otherwise dispose of land . . . to natives" and "on such conditions as he [deemed] fit".[19] Further, the Governor-General had the power to make regulations, among other things, "prescribing the conditions upon which natives may purchase, hire or occupy land held by the Trust"[20]

[16] In terms of section 10(1) of the Development Trust and Land Act, land to be acquired for African people could not exceed seven and one-quarter million morgen in extent. The result was that the majority of people were confined to 13% of South African land while the minority occupied the remaining 87% of land.

[17] Section 4(3).

[18] Section 18(1).

[19] Section 18(2).

[20] Section 48(1)(g).

and "providing for the allocation of land held by the Trust for the purposes of residence, cultivation, pasturage and commonage".[21]

[16] The conditions under which African people could lawfully purchase, hire or occupy land held by the Trust were comprehensively dealt with in the Bantu Areas Land Regulations[22] and the Township Regulations.[23] The former dealt with rural areas while the latter dealt with townships in African areas.[24]

[21] Section 48(1)(i).

[22] Proclamation R188, GG 2486, 11 July 1969, made under section 25(1) of the Black Administration Act 38 of 1927 read with section 21(1) and 48(1) of the Development Trust and Land Act 18 of 1936.

[23] Regulations for the Administration and Control of Townships in Bantu Areas, Proclamation R293, GG 373, 16 November 1962, made pursuant to sections 6(2) and 25(1) of the Black Administration Act 38 of 1927 read with section 21 of the Development Trust and Land Act 18 of 1936.

[24] It must be recalled that there were African areas that were located near towns or cities which, by the stroke of a pen, were consigned to "native areas" and were thus made subject to provisions of the Development Trust and Land Act, 1936. Areas that come to mind are Umlazi and KwaMashu which are approximately 16 kilometres from the city of Durban. Occupation of land in these townships was governed by the Township Regulations. These townships must of course be distinguished from townships located in "white" urban areas which include Soweto in Johannesburg, Lamontville in Durban and Khayelitsha in Cape Town. These townships were governed by the Native (Urban Areas) Consolidation Act 25 of 1945. The proximity of all African townships to cities and towns was deliberate. These townships served as labour reservoirs to supply cheap labour to run the economy in urban areas and in "white" areas. Employment or possession of a work-seeker's permit was a condition for residence in the urban areas. See, for example, *Mabasa and Another v West Rand Bantu Affairs Administration Board* 1976 (4) SA 1002 (A) at 1009F-H; *In re Dube* 1979 (3) SA 820 (N); *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W); and *In re Duma* 1983 (4) SA 466 (N). Government officials and politicians of the time were candid about their motives. Thus Dr HF Verwoerd, then Minister of Native Affairs and later the Prime Minister, made this point in a parliamentary debate:

> "The only alternative [to African domination] is deliberately to see to it that the whole of South Africa does not become a country occupied by Natives and therefore run by Natives. . . . If we could succeed just to this extent in keeping the Native population in the reserve – and getting them to live there, even if they do work in the white area in industries which are scattered about near to their areas – if we could achieve that measure of separation, then even if the 2,000,000 or so who are now there remain behind in our towns, and the 3,000,000 approximately who are in the rural areas remain there, white South Africa will be saved." Senate, 1 May 1951, cols. 2896-8.

African people occupying houses in these areas had no right to own the houses they occupied. They occupied these houses under a permission to occupy or a 99-year lease. These titles were thoroughly insecure as they could be withdrawn if the holder ceased to qualify to remain in the city.

[17] The Bantu Areas Land Regulations recognised two forms of land tenure, namely, quitrent tenure of land[25] and occupation of land under permission to occupy.[26] Although quitrent title was defined to mean a "title deed relating to land", it did not confer full ownership on the holder. This title was subject to strict conditions prescribed in the regulations which included the right of the Bantu Affairs Commissioner, uNdabazabantu (People's Affairs)[27] or any person authorised by him to "enter upon and inspect the land" to ensure compliance with the regulations[28] and a prohibition against transferring title or disposing of land without the consent of the Bantu Affairs Commissioner.[29] In addition, the rights of the holder could be cancelled if the holder failed to comply with any condition upon which the right to occupy land was granted;[30] or upon conviction for certain offences such as theft, stock theft, cultivation or possession or dealing in drugs, or, if a person is on a second occasion sentenced to imprisonment for 12 months.[31]

[18] Substantially similar conditions applied to the permission to occupy. However, in the case of the permission to occupy, the regulations made it clear that "[p]ermission granted to occupy the allotment shall not convey ownership".[32]

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[25] Bantu Areas Land Regulations above n 22 at chapter 4.

[26] Id at chapter 5.

[27] The Bantu Affairs Commissioners served a dual purpose: they were judicial officers who adjudicated disputes between African people only, and administrators who administered the affairs of African people under apartheid laws.

[28] Bantu Areas Land Regulations above n 22 at annexure 4, item 1(2).

[29] Id at item 2(a).

[30] Id at annexure 5, item 10(c); for failure to "beneficially occupy" the land, see item 10(d).

[31] Id at item 10(g).

[32] Id at annexure 28, item 4.

[19] In addition, African people could not be absent from the land allotted to them without written permission issued by the Bantu Affairs Commissioner. Where a person absented himself from the land allotted to him for more than a year without permission, that person was presumed no longer to require the land and it reverted to what was called "commonage" and could be re-allocated to another person.[33]

[20] These regulations recognised the application of indigenous law in the areas reserved for African people. This is apparent from provisions of the regulations dealing with succession to land. Succession to land allotted under the regulations was governed by indigenous law.[34] In addition, tribal authorities or, where they did not exist, traditional leaders played a role in the allocation of arable and residential allotments.[35] To occupy land in these areas, African people required the permission of the Bantu Affairs Commissioner who would grant permission after consultation with the tribal authority having jurisdiction or a traditional leader, as the case may be.[36]

[21] What emerges from these regulations therefore is that (a) the tenure in land which was subject to the provisions of the Black Land Act and Development Trust and Land Act and which was held by African people was precarious and legally insecure; (b)

[33] Id at regulation 51(2) read with regulation 61.

[34] Id at regulations 35-40 (for quitrent land) and regulation 53 (for permission to occupy).

[35] Id at regulation 49.

[36] Id at regulations 19 and 49.

indigenous law governed succession to land in these areas, and the application of indigenous law in relation to land in these areas subject to regulations was recognised; and (c) tribal authorities and traditional leaders played a role in the allotment of land in these areas.

[22] The Black Land Act and the Development Trust and Land Act, together with the regulations made under these statutes, must be read together with the Black Administration Act and the Bantu Authorities Act, 1951[37] (now the Black Authorities Act). The latter statutes formed part of the colonial and apartheid legislative scheme for the control of African people. As indicated previously, the Bantu Areas Land Regulations were made under section 25(1) of the Black Administration Act read with section 21(1) and 48(1) of the Development Trust and Land Act.[38] The Township Regulations were made under the provisions of both the Development Trust and Land Act and the Black Administration Act.[39] As will appear below, the Black Authorities Act established a tribal structure for the administration of African people in African areas.

[23] The Black Administration Act made the Governor-General (later the State President) the "supreme chief of all Natives in the Provinces of Natal, Transvaal and Orange Free State" (later extended to the Cape Province),[40] and vested in him the

[37] 68 of 1951.

[38] Bantu Areas Land Regulations above n 22.

[39] Township Regulations above n 23.

[40] Black Administration Act above n 15 at section 1.

legislative, executive and judicial authority over African people. Specifically, it gave him the power to govern African people by proclamation,[41] to establish tribes,[42] and to "order the removal of any tribe or portion thereof or any Native from any place to any other place".[43] It dealt with, among other matters, the organisation and control of African people,[44] land administration and tenure,[45] and the establishment of separate courts for African people which had the authority to apply indigenous law.[46] It proclaimed the "Code of Zulu Law" to be the "Law for Blacks in Natal".[47]

[24] The Black Authorities Act gave the State President the authority to establish "with due regard to native law and custom" tribal authorities for African "tribes" as the basic unit of administration in the areas to which the provisions of CLARA apply.[48] These tribal authorities had the power to "advise and assist the Government and any territorial or regional authority . . . in connection with matters relating to . . . [among other things] the development and improvement of any land within [their areas of jurisdiction]".[49] And they were required to exercise their powers and perform their functions "with due regard

[41] Id at section 25.

[42] Id at section 5(1)(a).

[43] Id at section 5(1)(b).

[44] Id at chapter 2.

[45] Id at chapter 3.

[46] Id at chapter 4, in particular, section 11.

[47] Id at section 24, as amended.

[48] Black Authorities Act above n 37. Under section 4(1)(a), the powers of these tribal authorities was "generally [to] administer the affairs of the tribes and communities in respect of which [they have] . . . been established", and under section 4(1)(b) they were to assist traditional leaders in the performance of their "powers, functions or duties conferred or imposed upon [them] . . . under any law, as are in accordance with any applicable native law or custom". The definition of the areas to which CLARA applies is set out below n 102.

[49] Black Authorities Act above n 37 at section 4(1)(c).

to the rules, if any, applicable in the case of similar bodies in terms of the native laws or customs of the respective tribes or communities in respect of which [they have been] established".[50] It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act, 2003[51] (the Traditional Leadership Act). And in terms of section 21 of CLARA, these traditional councils may exercise powers and perform functions relating to the administration of communal land.

[25] Under apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands.[52] This commenced with the creation of "legislative assemblies" which would mature into "self-governing territories" and ultimately into "independent states".[53] According to this plan, there would be no African people in South Africa, as all would assume citizenship of one or other of the newly created homelands, where they could enjoy social, economic and political rights.[54] Section 5(1)(b) of the Black Administration Act became the most powerful tool to effect

[50] Id at section 4(2)(a).

[51] 41 of 2003.

[52] In *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) this Court stated, at para 42, as follows:

> "The Promotion of Bantu Self-Government Act 46 of 1959 divided Africans into ten 'national units' on the basis of their language and ethnicity. These were North Sotho, South Sotho, Tswana, Zulu, Swazi, Xhosa (arbitrarily divided into two groups), Tsonga, Venda, and Ndebele. On the basis of these 'national units' ten homelands were established, namely Lebowa, Qwaqwa, Bophuthatswana, KwaZulu, KaNgwane, Ciskei, Transkei, Gazankulu, Venda and KwaNdebele. The Black Homelands Citizenship Act 26 of 1970 sought to assign to each African citizenship of one or other of these homelands. It is in these homelands that Africans were required to exercise their political, economic and social rights." (Footnotes omitted.)

[53] See [26]-[27] below.

[54] See *Ex Parte Moseneke* 1979 (4) SA 884 (T) at 889D-G and 890A-C.

the removal of African people from "white" South Africa into areas reserved for them under this Act and the Development Trust and Land Act. And as we noted in *DVB Behuising*, "[t]hese removals resulted in untold suffering."[55] The forced removals of African people from the land which they occupied to the limited amount of land reserved for them by the apartheid state resulted in the majority of African people being dispossessed of their land. It also left a majority of them without legally secure tenure in land.

[26] The Bantu Homelands Citizenship Act, 1970[56] and the Bantu Homelands Constitution Act, 1971[57] further entrenched land dispossession as a key policy of the apartheid edifice. African people would, as a consequence, have no claim to any land in "white" South Africa. African people were tolerated in "white" South Africa only to the extent that they were needed to provide labour to run the economy. They had precarious title to the land they occupied to remind them of the impermanence of their residence in "white" South Africa.[58]

[27] Relentlessly, African people were dispossessed of their land and given legally insecure tenure over the land they occupied.

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[55] *DVB Behuising* above n 52 at para 41.

[56] 26 of 1970.

[57] 21 of 1971.

[58] See [16]-[21] above.

[28] One of the goals of our Constitution is to reverse all of this. It requires the restoration of land to people and communities that were dispossessed of land by colonial and apartheid laws after 19 June 1913. It also requires that people and communities whose tenure of land is legally insecure as a result of racially discriminatory colonial and apartheid laws be provided with legally secure tenure or comparable redress. CLARA was enacted with the declared purpose to "provide for legal security of tenure".

[29] It is against this background that the occupation of land to which CLARA applies by African people and, in particular, the four communities and the issues presented in this case, must be understood.

Factual background

[30] The four communities occupy land to which the provisions of CLARA apply. The Kalkfontein and Makuleke communities, which are represented by the first and second applicants respectively, own the land.[59] The Makgobistad community, which is

[59] The Kalkfontein B and C Community Trust owns two farms known as Kalkfontein B and Kalkfontein C. Members of Kalkfontein Community are descendants of the original purchasers of the land. Their forebears purchased the land in 1923 and 1924 from white farmers. However, in accordance with the Black Land Act, the land was transferred to the Minister of Native Affairs who held the land in trust for the purchasers and their successors in title. It was only in 2008 that the community's ownership was recognised and the two farms were transferred to the Trust. The co-owners of the farms exercised all rights associated with full ownership of the land. Over the years, and as a result of the Kalkfontein Community's belief that the Ndzundza Tribal Authority sought to mismanage the Community's affairs in respect of its land, it took various steps to secure its land rights via court action. The Community's efforts bore fruit when it was declared the beneficial owner of the land. The Community subsequently established a community trust in 1996 to receive and hold the registration of the transfer of the land on its behalf. It was only in 2008, and after further court action in the Land Claims Court, that the Community's ownership of the farms was recognised and the farms were transferred to the Trust.

The Makuleke community initially occupied approximately 26 500 hectares of land known as the Pafuri Triangle in what is now the Limpopo province. A portion of this land was designated as a scheduled area for Africans pursuant to the provisions of the Black Land Act. And the remainder was later designated as part of the released areas in terms of the Development Trust and Land Act. The community occupied this land from the early 19th century and remained there until it was forcibly removed in 1969. Subsequently, the community had the Pafuri Triangle restored to it under

represented by the third applicant, allegedly established rights in respect of land in the area known as Mayayane in the North West province. The Dixie community, which is represented by the fourth applicant, occupies the farm, Dixie 240 KU, in the Pilgrims Rest District in the Limpopo province. The Dixie Community exercises independent control over the farm. In the case of each community, the land that they occupy falls under the jurisdiction of a tribal authority.[60]

[31] The applicant communities all allege that the use and occupation of the land that they occupy is regulated by indigenous law. In the case of the Kalkfontein community, the farms were managed and administered according to indigenous law through a *Kgotla* – a customary decision-making body. It recognised the individual rights of co-owners and their families in respect of particular plots of land which they came to occupy for purposes of residence and cultivation. These functions are now performed on a similar basis through the institution of the Kalkfontein B and C Community Trust.[61]

[32] In the case of the Makuleke community, access to land held in common was determined by shared rules of indigenous law. The use of communal land and veld resources was regulated by traditional leaders. The allocation, use and occupation of

the Restitution of Land Rights Act 22 of 1994. A Communal Property Association (CPA) was formed by the community. Pursuant to a settlement, 22 733 hectares in the Kruger National Park were transferred to the Makuleke CPA in 1999. In terms of the settlement agreement, the community does not occupy Pafuri but co-manages it with the South African National Parks for eco-tourism projects through a Joint Management Board made up of equal representatives of the CPA and the South African National Parks.

[60] The Kalkfontein B and C community falls under the Ndzundza Tribal Authority; the Makuleke community falls under the Mhinga Tribal Authority; the Makgobistad community falls under the Motsewakhumo Tribal Authority; and the Dixie community falls under the Mnisi Tribal Authority.

[61] See above n 59.

other land was administered in accordance with indigenous land tenure. The same applies to the Makgobistad community. In the case of the Dixie community, land vests in the families who make up the community. Residential sites and fields for cultivation are recognised as being exclusive to a family. Grazing land is used on a communal basis with every member of the community having the right to make use of communal grazing land. Decisions pertaining to the community's land are taken by the community at village-level in meetings which are convened by the traditional leader.

[33] The communities are concerned that their indigenous-law-based system of land administration will be replaced by the new system that CLARA envisages. They are concerned that this will have an impact on the evolving indigenous law which has always regulated the use and occupation of land they occupy. They are further concerned that their land will now be subject to the control of traditional councils which, as is apparent from the record, they consider to be incapable of administering their land for the benefit of the community. All the communities claim that the provisions of CLARA will undermine the security of tenure they presently enjoy in their land, and those who own the land fear that they will be divested of their ownership of the land. While some of these claims are disputed by the government respondents, what is not disputed is that the land occupied by the communities is administered in accordance with indigenous law, and that traditional leaders, in particular the tribal authorities, play a role in the administration of communal land. There is some issue as to the extent to which the role of traditional leaders and tribal authorities accords with indigenous law.

High Court proceedings

[34] During 2006, these four communities launched a constitutional challenge to CLARA and to certain provisions of the Traditional Leadership Act. This application was resisted by the Minister, Parliament, the Minister for Co-operative Governance and Traditional Affairs (the second respondent) and the National House of Traditional Leaders (the fourteenth respondent). Parliament limited its opposition to the procedural challenge based on the failure to enact CLARA in accordance with the provisions of section 76 of the Constitution. The second and fourteenth respondents limited their opposition to the challenge to the provisions of the Traditional Leadership Act. The Minister, responsible for the administration of CLARA, opposed both the substantive challenge to the provisions of CLARA as well as the procedural challenge. The Premiers of the nine provinces, although cited, did not participate in the proceedings.

[35] The High Court held that in classifying CLARA for the purposes of "tagging", Parliament had applied the incorrect test, namely, the "pith and substance" test, instead of the "substantial measure" test foreshadowed in this Court's decision in *Liquor Bill*.[62] I refer to this question as the "tagging" question because this is the term used by Parliament in classifying Bills for the purposes of determining the procedure to be followed in enacting a Bill.

[62] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC); 2000 (1) BCLR 1 (CC).

[36] The High Court accordingly concluded that CLARA should have been classified as a section 76 Bill and that the procedure set out therein should have been followed in enacting CLARA. However, despite this conclusion, the High Court declined to declare CLARA unconstitutional, reasoning that Parliament did not act in bad faith when adopting the procedure prescribed in section 75 of the Constitution. In addition, it held that, in determining the validity of the procedure adopted in enacting legislation, a court should "consider if there is [a] substantial or material breach of the *audi alteram partem* rule."[63] It concluded that there was no breach of the audi rule because Parliament did not suppress the views of the provinces as they were duly represented, and that "there was a public hearing on the matter."[64]

[37] On the substantive challenge, the High Court held that the impugned provisions of CLARA were inconsistent with the Constitution and accordingly declared those provisions invalid.[65] It declined, however, to declare unconstitutional the impugned provisions of the Traditional Leadership Act. It thereafter referred the order of invalidity to this Court for confirmation.

[38] These proceedings are a sequel.

Proceedings in this Court

[63] *Tongoane* above n 3 at para 25.

[64] Id at para 24.

[65] The High Court declared section 2(1)(a), in so far as it concerns the land already owned or securely held by a community, and sections 2(1)(c) and (d), 2(2), 3, 4(2), 5, 6, 9, 18, 19(2), 20-24 and 39 of CLARA to be invalid.

[39] What lies at the heart of the confirmation proceedings is the question whether CLARA undermines the security of tenure of the applicant communities. The applicants submit that it does, and that for this reason CLARA is inconsistent with section 25(6) read with section 25(9) of the Constitution which requires Parliament to enact legislation to provide for legally secure tenure or comparable redress. At the centre of the application for leave to appeal is the question of the proper test for the tagging of Bills and the application of that test to CLARA. Parliament alone resists this aspect of the relief. Insofar as the application for direct access is concerned, the applicant communities allege that whatever public hearings may have taken place on the Bill, the adequacy of which they deny, the fundamental amendments that were effected to the Bill required Parliament to facilitate public involvement on the amended version of the Bill.[66] Parliament is also alone in resisting this procedural challenge.

[66] The public participation process in respect of the Communal Land Rights Bill, 2002, occurred at two levels. First, a process was initiated by the Department of Land Affairs that informed the drafting of the Bill between 1997 and 2002 which was followed by a further "comment" process initiated by the Department pursuant to the publication of the draft Bill in August 2002. Many organisations participated in this comprehensive consultative process. Second, a process of public involvement facilitated by the National Assembly Portfolio Committee on Agriculture and Land Affairs took place in the form of written submissions (received before 10 November 2003) and oral submissions (received between 11 and 14 November 2003). The dispute in these proceedings relates to the second level of the process. The draft Bill as gazetted by the Minister for public comment in August 2002 provided for a consultative role for traditional leadership in the administration of communal land. It did not give traditional leadership executive powers over land. More particularly, clause 33(1)(a) of the draft Bill provided for the appointment by a community of an "administrative structure". Clause 33(2) provided as follows:

> "Where applicable, the institution of traditional leadership which is recognised by a community as being its legitimate traditional authority may participate in an administrative structure in an ex-officio capacity; provided that the ex-officio membership in the administrative structure should not exceed 25 percent of the total composition of the structure".

The draft Bill provided that the ex officio component of the structure would have no veto powers in the decision-making structure. In other words, the 2002 version of the Bill provided a limited role for traditional authorities in the administration of communal land. When the 2003 version of the Bill was tabled in Parliament, clause 21(1) (which is identical to section 21(1) of CLARA) accorded a greater role to traditional leadership in administering communal land.

[40] On 18 February 2010, the Minister filed an affidavit in which he stated that CLARA needs to be reviewed. He went further to state that it would either be repealed *in toto* or drastically amended. He expressed the view that CLARA "does not accurately reflect current government policy regarding communal land". In the course of oral argument, we were informed by counsel for the Minister that CLARA would be repealed *in toto*.

[41] The affidavit by the Minister triggered further directions calling upon the parties to lodge written submissions on whether it was still necessary for this Court to consider the substantive challenges to CLARA, including the confirmation of the order of invalidity. In addition, the parties were required to make submissions as to why the hearing should not be limited to the tagging challenge and the failure to comply with the constitutional obligation to facilitate public involvement in the legislative process. The parties did not agree on the proper course to be followed in the light of the Minister's affidavit. The applicants urged us to hear the entire case as originally presented, while the respondents submitted that all the constitutional challenges had become moot given CLARA's imminent repeal.

[42] At the commencement of the hearing we heard argument on these issues. Having regard to the undesirability of pre-empting the outcome of the litigation, and the need to avoid hearing the case piecemeal, we considered it appropriate to hear argument on all the issues presented, and ruled accordingly.

The issues presented

[43] Four main questions arise:

(a) Did Parliament follow the correct procedure in enacting CLARA?

(b) Did Parliament comply with its constitutional obligation to facilitate public involvement in the legislative process in enacting CLARA?

(c) Should the order of invalidity be confirmed?

(d) What relief, if any, are the applicant communities entitled to?

[44] It is convenient to consider first whether Parliament followed the correct procedure in enacting CLARA, or the classification or tagging question.

Tagging

[45] The Constitution regulates the manner in which legislation may be enacted by the legislature. It prescribes different procedures for Bills amending the Constitution;[67] ordinary Bills not affecting provinces;[68] ordinary Bills affecting provinces;[69] and money Bills.[70] These provisions require Parliament first to classify a Bill submitted to it, in order to determine which procedure should be followed in enacting the Bill. Section 76(1) prescribes a more burdensome procedure than section 75. It provides that "[w]hen the

[67] Section 74 of the Constitution.

[68] Id at section 75.

[69] Id at section 76.

[70] Id at section 77.

National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with [the procedure set out in that provision]". Section 76(3) in turn provides that "[a] Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4". When a Bill is introduced in the National Assembly, the sponsor of the Bill will indicate the proposed classification of it. However, this classification is not conclusive as Parliament itself must still classify the Bill.

[46] Part 18 of the Joint Rules of Parliament[71] sets out the procedure to be followed in classifying Bills. The Joint Rules establish the Joint Tagging Mechanism (JTM) which consists of the Speaker and Deputy Speaker of the National Assembly and the Chairperson and Deputy Chairperson of the NCOP. The function of the JTM is, among other things, to make final rulings as to the classification of Bills in accordance with joint rule 160. Joint rule 160(3) provides:

> "When a Bill introduced as a section 75 Bill is referred to the JTM, [the JTM] must make a finding on whether the Bill— (a) is in fact a section 75 Bill; [and] (b) includes any provisions to which the procedure prescribed in section 76 of the Constitution applies".

[47] Similarly, where a Bill is introduced as a section 76 Bill, joint rule 160(4) requires the JTM to "make a finding on whether the Bill—(a) is in fact a section 76 Bill and if so,

[71] As approved by the Joint Rules Committee, April 2009 4ed (reprint).

which of subsections (3), (4) or (5) of that section applies to the Bill". The JTM must also establish whether the Bill "includes any provisions to which the procedure prescribed in section 75 applies".

[48] It is common cause that CLARA was introduced in the National Assembly, subsequently classified by the JTM and accordingly enacted as a section 75 Bill. In her answering affidavit before the High Court, the former Speaker of the National Assembly, Ms Baleka Mbete, gave the following explanation for tagging CLARA as a section 75 Bill:

> "[I]n order to determine whether CLARA falls within a functional area listed in Schedule 4 [in accordance with section 76(3)] it is necessary to determine the subject-matter or the substance thereof, its essence, or true purpose and effect. The latter is also referred to as its 'pith and substance'. It is furthermore necessary in this regard to have regard to the purpose for which CLARA was enacted. In this enquiry the preamble and the legislative history of CLARA are relevant considerations. They serve to illuminate its subject-matter and to place it in context, to provide an explanation for its provisions and to articulate the policy behind them.
>
> . . . .
>
> Having regard to all the relevant factors, including the provisions of CLARA, it is readily apparent that the substance of CLARA relates to the issue of security of land tenure or comparable redress which are constitutional imperatives and matters clearly falling within the legislative competence of Parliament only. The substance of CLARA accordingly does not fall within any of the areas listed in Schedule 4 to the Constitution and CLARA was therefore correctly tagged as a section 75 Bill."

Contentions of the parties

[49] The communities contended that CLARA should have been classified as a section 76 Bill because it affects the provinces. They relied upon the decision of this Court in *Liquor Bill*.[72] They submitted that in *Liquor Bill*, this Court formulated the test for the classification of Bills when it held that a "Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4" must be dealt with under section 76. They submitted that the provisions of CLARA in substantial measure deal with "indigenous and customary law" and "traditional leadership" which are functional areas listed in Schedule 4.

[50] In its written argument, Parliament contended that the test for tagging a Bill was the substance of the legislation which was referred to as the "pith and substance" test. The phrase "pith and substance" is borrowed from other jurisdictions and refers to what we term the "substance", the "purpose and effect" or the "subject-matter" of legislation. The "purpose and effect" test was developed by this Court to determine whether the National Assembly or a provincial legislature has the competence to legislate in a particular field.[73] Based on this test, which Parliament contended should also apply to the process of determining the manner in which a Bill should be tagged, Parliament submitted that the "pith and substance" of CLARA was land tenure. Any provision of CLARA that deals with indigenous law or traditional leadership, matters listed in

[72] Above n 62.

[73] *Liquor Bill* above n 62 at paras 63-4; *DVB Behuising* above n 52 at para 36; and *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* [1996] ZACC 15; 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC) at para 19.

Schedule 4, is incidental to land tenure. These provisions were irrelevant for the purposes of tagging CLARA.

[51] Parliament contended further that there should be no difference between the test for classifying legislation for the purposes of tagging on the one hand, and on the other hand, determining whether legislation falls within the competence of a legislature. This is so, the argument went, because both have the same end in mind, namely, to determine whether the legislation falls within one of the relevant schedules to the Constitution.

[52] However, in response to questions put to counsel for Parliament in the course of oral argument, there was a noticeable shift in Parliament's position. Counsel for Parliament accepted that there is a difference between the test for determining legislative competence and the test for determining how a Bill should be tagged. He also accepted that if a substantial part of a Bill is concerned with a functional area listed in Schedule 4 then the Bill falls to be classified as a section 76 Bill. However, he maintained that no substantial part of CLARA affected the provinces and that CLARA was correctly tagged as a section 75 Bill. This argument suggests that in tagging a Bill, Parliament looks not only at the substance, or purpose and effect, of the Bill but also at the provisions of the Bill in order to determine whether any of its provisions affect a functional area listed in Schedule 4.

[53] This modified argument was apparently based on the provisions of joint rule 160(3)(b) which requires the JTM, when classifying a Bill, to determine whether it "includes any provisions to which the procedure prescribed in section 76 of the Constitution applies". I did not, however, understand Parliament to abandon its reliance on the "pith and substance" test as the proper test for tagging. Nor did counsel for Parliament abandon the argument that the provisions of CLARA, which do not form part of its substance, are merely incidental to land tenure and therefore irrelevant to the question of tagging.

[54] The issue for determination, therefore, is whether Parliament properly classified CLARA as a section 75 Bill. There are two related issues which arise. The first relates to the proper test to be adopted in determining whether a Bill should be classified as a section 75 Bill or a section 76 Bill. The second relates to the application of the proper test to CLARA and the result this yields.

The proper test

[55] The *Liquor Bill* case involved a Bill which was introduced in Parliament, and dealt with as a Bill affecting provinces, in terms of section 76 read with section 44(1)(b)(ii)[74]

[74] Section 44(1)(b)(ii) provides:

> "The national legislative authority as vested in Parliament—
>
> (b) confers on the National Council of Provinces the power—
>
> (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76".

and section 44(2)[75] of the Constitution – the override provisions. The question which was submitted by the President to this Court for consideration was whether the invocation of the override provisions of the Constitution was justified. This was on the basis of a common understanding that the legislation concerned liquor licenses, an exclusive provincial area of competence. In his answering affidavit, the Minister for Trade and Industry contended that matters regulated by the Bill fell within national legislative competence. Against this background, the Western Cape Province then raised the question whether, if the legislation dealt with a matter within the national competence, the section 76 procedure had been rightly adopted. The Province contended that if the Bill was not legislation with regard to a matter within Part A of Schedule 5 of the Constitution then it should have been enacted in accordance with section 75.

[56] In resolving this issue, this Court held that the heading of section 76, namely, "Ordinary Bills affecting provinces" provides "a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4, be dealt with under section

[75] Section 44(2) provides:

> "Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary—
>
> (a) to maintain national security;
>
> (b) to maintain economic unity;
>
> (c) to maintain essential national standards;
>
> (d) to establish minimum standards required for the rendering of services; or
>
> (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole."

76."[76] It went on to hold that "[w]hatever the proper characterisation of the Bill . . . a large number of provisions must be characterised as falling 'within a functional area listed in Schedule 4', more particularly, the concurrent national and provincial legislative competence in regard to 'trade' and 'industrial promotion.'"[77] Accordingly, "[o]nce a Bill 'falls within a functional area listed in Schedule 4'"[78] it must be enacted in accordance with the procedure in section 76.

[57] The import of the submissions made on behalf of Parliament is that the statement in *Liquor Bill* that "any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4" was not intended to formulate the test for tagging. This is so, as I understand the argument, because this Court did not say it was formulating the test nor did it elaborate on this test. This view was bolstered by the submission that the test for tagging and for determining legislative competence is the same. In effect, therefore, the argument invites us to revisit what we said in *Liquor Bill*.

[58] The contention of the communities that the statement, "whose provisions in substantial measure" in *Liquor Bill*, formulates the test for determining the procedure to be followed in enacting a Bill must, in my view, be upheld. It is apparent from the passages in *Liquor Bill* to which I have referred, that the Court distinguished between the characterisation of a Bill and its tagging. What matters for the purposes of tagging is not

[76] *Liquor Bill* above n 62 at para 27.

[77] Id at para 28.

[78] Id at para 29.

the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill "in substantial measure fall within a functional area listed in Schedule 4". This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this Court to characterise a Bill in order to determine legislative competence. This "involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about".[79]

[59] There is an important difference between the "pith and substance" test and the "substantial measure" test. Under the former, provisions of the legislation that fall outside of its substance are treated as incidental. By contrast, the tagging test is distinct from the question of legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects

[79] *DVB Behuising* above n 52 at para 36 and the other sources cited in n 73 above.

the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.

[61] That this is so emerges from a consideration of the broader provisions of section 76. These provisions show that legislative competence is not determinative of when the Constitution requires the more burdensome processes prescribed by section 76 to be followed. Thus section 76(3) lists certain additional classes of legislation that must follow its process, over which provinces have no legislative competence at all. This legislation is concerned with section 65(2)[80] – the uniform procedure as to how provincial legislatures confer authority to vote on their NCOP delegations; section 163[81] – national legislation to recognise national and provincial organisations representing municipalities;

[80] Section 65(2) of the Constitution provides:

> "An Act of Parliament, enacted in accordance with the procedure established by either subsection (1) or subsection (2) of section 76, must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf."

[81] Section 163 of the Constitution provides:

> "An Act of Parliament enacted in accordance with the procedure established by section 76 must—
>
> (a) provide for the recognition of national and provincial organisations representing municipalities; and
>
> (b) determine procedures by which local government may—
>
> (i) consult with the national or a provincial government;
>
> (ii) designate representatives to participate in the National Council of Provinces; and
>
> (iii) participate in the process prescribed in the national legislation envisaged in section 221(1)(c)."

section 182[82] – functions of the Public Protector; section 195[83] – values and principles governing public administration; section 196[84] – Public Service Commission; and section 197[85] – Public Service.

[82] Section 182 of the Constitution provides:

"(1) The Public Protector has the power, as regulated by national legislation—

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential."

[83] Section 195 of the Constitution provides:

"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to—

[62] That the Constitution requires that a Bill providing for legislation envisaged in any of these provisions must follow the section 76 procedure shows that concurrent legislative competence is not the key to unlocking the applicability of processes prescribed in section 76. The key, instead, lies in those measures that substantially affect the provinces.

(a) administration in every sphere of government;

(b) organs of state; and

(c) public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration."

[84] Section 196 of the Constitution provides:

"(1) There is a single Public Service Commission for the Republic.

(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.

(3) Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission.

(4) The powers and functions of the Commission are—

(a) to promote the values and principles set out in section 195, throughout the public service;

(b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;

(c) to propose measures to ensure effective and efficient performance within the public service;

(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;

(e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to

[63] Indeed, as counsel for the communities pointed out, if the section 76 process were limited only to Bills involving subject-matter over which the provinces themselves had concurrent legislative competence, the need for a legislative process that took special account of their interests would hardly arise. This is because their concurrent legislative

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provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and

(f) either of its own accord or on receipt of any complaint—

(i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;

(ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;

(iii) to monitor and investigate adherence to applicable procedures in the public service; and

(iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service; and

(g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament.

(5) The Commission is accountable to the National Assembly.

(6) The Commission must report at least once a year in terms of subsection (4)(e)—

(a) to the National Assembly; and

(b) in respect of its activities in a province, to the legislature of that province.

(7) The Commission has the following 14 commissioners appointed by the President:

(a) Five commissioners approved by the National Assembly in accordance with subsection (8)(a); and

(b) one commissioner for each province nominated by the Premier of the province in accordance with subsection (8)(b).

(8) (a) A commissioner appointed in terms of subsection (7)(a) must be—

(i) recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and

(ii) approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members.

(b) A commissioner nominated by the Premier of a province must be—

(i) recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the

powers would enable them to enact their own preferred legislation in the same field, which would indeed enjoy some precedence, subject only to the national override provided for in section 146 of the Constitution. Yet it is where matters substantially affect them *outside* their concurrent legislative competence that it is important for their views to be properly heard during the legislative process. This too shows that concurrent

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legislature; and

(ii) approved by the legislature by a resolution adopted with a supporting vote of a majority of its members.

(9) An Act of Parliament must regulate the procedure for the appointment of commissioners.

(10) A commissioner is appointed for a term of five years, which is renewable for one additional term only, and must be a woman or a man who is—

(a) a South African citizen; and

(b) a fit and proper person with knowledge of, or experience in, administration, management or the provision of public services.

(11) A commissioner may be removed from office only on—

(a) the ground of misconduct, incapacity or incompetence;

(b) a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and

(c) the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office.

(12) The President must remove the relevant commissioner from office upon—

(a) the adoption by the Assembly of a resolution calling for that commissioner's removal; or

(b) written notification by the Premier that the provincial legislature has adopted a resolution calling for that commissioner's removal.

(13) Commissioners referred to in subsection (7)(b) may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation."

[85] Section 197 of the Constitution provides:

"(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

provincial legislative competence provides no conclusory guide to the rationale behind the section 76 process.

[64] The purpose of tagging is therefore to determine the nature and extent of the input of provinces on the contents of legislation affecting them. Indeed, all the legislation mentioned in section 76(3) is legislation that substantially affects the interests of provinces.

[65] The importance that the Constitution attaches to the voice of the provinces in legislation affecting them can be illustrated by referring to two parliamentary processes. The first is the voting procedure in the NCOP. When the NCOP votes on a section 76 Bill, each province has a single vote which is cast on behalf of the province by the head of its delegation.[86] The heads of provincial delegations vote in accordance with the instructions given by their respective provincial legislatures. The second is the mediation process mandated if there is a disagreement between the National Assembly and the NCOP. The Constitution establishes a Mediation Committee consisting of an equal number of representatives of members of the National Assembly and the NCOP to resolve differences between them on Bills.[87] Agreement on a Bill by the Committee must be supported by at least five representatives of the National Assembly and five

(4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service."

[86] Section 65 of the Constitution.

[87] In terms of section 78(1) of the Constitution, the Mediation Committee consists of nine members of the National Assembly and one delegate from each of the nine provincial delegations in the NCOP.

representatives of the NCOP.[88] If the Committee is unable to agree on a Bill passed by the National Assembly, it lapses. The National Assembly may only pass the same Bill with a supporting majority of at least two-thirds of its members.[89] None of these procedural safeguards applies to the enactment of a section 75 Bill.

[66] These procedural safeguards are designed to give more weight to the voices of the provinces in legislation substantially affecting them. But they are more than just procedural safeguards; they are fundamental to the role of the NCOP in ensuring "that provincial interests are taken into account in the national sphere of government", and for "providing a national forum for public consideration of issues affecting the provinces."[90] They also provide citizens within each province with the opportunity to express their views to their respective provincial legislatures on the legislation under consideration. They do this through the public involvement process that provincial legislatures, in terms of section 118(1)(a) of the Constitution, must facilitate.[91]

[67] There is another consideration that should inform the proper test for tagging Bills; it is the model of our government. Government under our Constitution "is constituted as

[88] Section 78(2) of the Constitution.

[89] Id at section 76(1)(e).

[90] Id at section 42(4).

[91] See generally, *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC); *Matatiele Municipality and Others v President of the RSA and Others (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC); *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC); and *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC).

national, provincial and local spheres of government which are distinctive, interdependent and interrelated."[92] One of its defining features is that legislative functions between the national and provincial spheres of government are not rigidly assigned to each sphere and many important functions are shared. In order to give effect to this model of government, the Constitution "introduces a new philosophy which obliges all organs of government to co-operate with each other and to discharge various functions."[93] And to this extent, it introduces principles of co-operative government and intergovernmental relations. These include the requirement that each sphere of government must "respect the constitutional status, institutions, powers and functions of government in the other spheres"[94] and "co-operate with one another in mutual trust and good faith by . . . co-ordinating their actions and legislation with one another".[95]

[68] The NCOP is an important institution which facilitates co-operative government in the law-making process. It has rightly been observed that the design of our constitutional democracy "integrates the national and provincial legislative institutions and builds the concept of multi-sphere government directly into the parliamentary process [and] [t]his principle carries over to the decision-making process in the NCOP."[96] Our model of government therefore anticipates that all powers will be exercised within the framework

[92] Section 40(1) of the Constitution.

[93] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 469.

[94] Section 41(1)(e) of the Constitution.

[95] Id at section 41(1)(h)(iv).

[96] Murray and Simeon "'Tagging' Bills in Parliament: Section 75 or Section 76?" (2006) 123 *SALJ* 232 at 237.

of co-operative government but recognises the integrity of each sphere of government and encourages co-operation among all spheres.

[69] The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.

[70] To apply the "pith and substance" test to the tagging question, therefore, undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) requires to be enacted in accordance with the section 76 procedure. It does this because it focuses on the substance of a Bill and treats provisions which fall outside its main substance as merely incidental to it and consequently irrelevant to tagging. In so doing, it ignores the impact of those provisions on the provinces. To ignore this impact is to ignore the role of the provinces in the enactment of legislation substantially affecting

them. Therefore the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence.

[71] On the other hand, the "substantial measure" test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.

[72] To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in section 76(3)(a)-(f), over which the provinces have no legislative competence, as well as Bills the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f), and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.

[73] The next question is whether the provisions of CLARA in substantial measure fall within functional areas listed in Schedule 4.

Do the provisions of CLARA affect, in substantial measure, indigenous and customary law and traditional leadership?

[74] There are two important considerations that must be borne in mind when determining whether the provisions of CLARA in substantial measure fall within the functional area of indigenous law. The first is to recognise that statutes do not ordinarily deal with indigenous law in the abstract. They do so in the context of specific subject-matter of indigenous law, such as matrimonial property,[97] intestate succession,[98] or the occupation and use of communal land, as CLARA does. Therefore any legislation with regard to indigenous law will ordinarily and indeed, almost invariably, also be legislation with regard to the underlying subject-matter of the indigenous law in question. The mere fact that a statute that repeals, replaces or amends indigenous law might have a different subject-matter of its own, does not detract from the fact that it also falls within the functional area of indigenous law.

[97] Recognition of Customary Marriages Act 120 of 1998. See *Gumede v President of the Republic of South Africa and Others* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC).

[98] Intestate Succession Act 81 of 1987 read with the Black Administration Act. See *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae)* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

[75] The second, which also applies to traditional leadership, is that the phrase "falls within" in section 76(3) must be construed purposively to ensure that ordinary Bills that affect provinces are enacted in accordance with the procedure prescribed in section 76(1). This is manifestly the purpose of section 76(3), as its heading plainly conveys. In the context of indigenous law or traditional leadership, a Bill deals with Schedule 4 matters if it repeals, replaces or amends indigenous law or the powers and functions of traditional councils. So too, does a Bill that requires indigenous law to be "recorded", codified or "registered" or, to use the words of CLARA, "converted, confirmed or cancelled".[99]

[76] This is the context within which the question whether the provisions of CLARA in substantial measure affect indigenous and customary law as well as traditional leadership, both functional areas listed in Schedule 4, must be understood.

[77] The convenient starting point in determining this question is CLARA's preamble. Its proclaimed purpose is:

> "To provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities, or by awarding comparable redress; to provide for the conduct of a land rights enquiry to determine the transition from old order rights to new order rights; to provide for the democratic administration of communal land by communities; to provide for Land Rights Boards; to provide for the co-operative performance of municipal functions on communal land; to amend or repeal certain laws; and to provide for matters incidental thereto."

[99] Section 18(3)(d) read with section 1(c) of CLARA.

[78] It is plain from the preamble that CLARA foreshadows a new system for the administration of communal land. To facilitate the transfer of communal land, land enquiries will be conducted to determine the transition from "old order rights", which include indigenous law. A new system of administering communal land is introduced, in terms of which communal land will be administered by land administration committees. Where traditional councils exist, these councils will perform the functions of land administration committees. To facilitate the administration of communal land under the new regime, communities are required to adopt rules that will regulate the use, occupation and administration of communal land.

[79] But, the field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend. The communities contended that the land which they presently occupy is administered by them in accordance with the rules of indigenous law that have evolved over time. This is true of all land to which the provisions of CLARA apply, they contended. Indeed all the parties approached the matter on the footing that the land which the four applicant communities occupy *is* regulated by indigenous law. However, the experts on both sides differed on the content of the indigenous law that applied in respect of the land which the communities occupy.

[80] It seems to me that once it is accepted, as it must be, that CLARA's purpose is to introduce a new regime that will regulate the use, occupation and administration of communal land, a field presently regulated to a large extent by indigenous law, it follows that CLARA, in substantial measure, deals with indigenous law, a functional area listed in Schedule 4. To the extent that traditional leaders, through traditional councils, will now have wide-ranging powers in relation to the administration of communal land, the Act deals, in substantial measure, with traditional leadership, another functional area listed in Schedule 4. The attempt by CLARA, as I will indicate later in this judgment, to reclassify the acts of traditional councils when performing the functions and powers of land administration committees as functions in respect of the "administration of land", simply emphasises the conclusion.

[81] An analysis of the provisions of CLARA amply demonstrates that they have a substantial impact on indigenous law and traditional leadership. I do not propose to go through all its provisions. It will be sufficient to refer to the main features of CLARA.

[82] There are three features of CLARA which are crucial to the assessment of its impact on indigenous law and traditional leadership. First, CLARA deals with land tenure not as it relates to any land, but as it relates to "communal land". Second, it deals with the transition from "old order rights", which include rights derived from indigenous law, to "new order rights", which include indigenous law rights which have been confirmed or converted by the Minister in terms of section 18. Third, it introduces a new

system of administration of communal land in which traditional councils are given wide-ranging powers and functions. These features can conveniently be considered under three broad topics: the scope of the application of CLARA; the system of administration of communal land that CLARA introduces; and the functions and powers of traditional councils.

The scope of the application of CLARA

[83] CLARA applies only to "communal land". This much is apparent from its preamble. And communal land is land "which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community".[100] A community is in turn defined as "a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group".[101]

[84] It is true that the definition of "community" makes no reference to indigenous law. There can be no doubt, however, that "shared rules determining access to land held in common" refers to the indigenous-law-based system of land tenure which typically includes communal land as a central feature. Indeed this is implicit, if not explicit, in the definition of communal land.

[100] Section 1 of CLARA.

[101] Id.

[85] Support for this conclusion can be found in section 2 of CLARA which specifies the land to which CLARA applies.[102] It applies to communal land formerly held by the South African Development Trust, which land later vested in the former "self-governing" territories and the "independent" homelands, including land to which the provisions of the KwaZulu-Natal Ingonyama Trust Act, 1994[103] applies. It is important to recall that the apartheid-era legislation to which section 2 refers, namely, the Black Land Act and the Development Trust and Land Act, demarcated the areas in which African people *could* live.[104] These statutes, read together with the Black Administration Act and the Black Authorities Act, regulated the lives of African people in the areas reserved for them.

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[102] Section 2 of CLARA provides:

"(1) This Act applies to—

(a) State land which is beneficially occupied and State land which—

(i) at any time vested in a government contemplated in the Self-governing Territories Constitution Act, 1971 (Act No. 21 of 1971), before its repeal or of the former Republics of Transkei, Bophuthatswana, Venda or Ciskei, or in the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936), but not land which vested in the former South African Development Trust and which has been disposed of in terns of the State Land Disposal Act, 1961 (Act No. 48 of 1961);

(ii) was listed in the schedules to the Black Land Act, 1913 (Act No. 27 of 1913), before its repeal or the schedule of released areas in terms of the Development Trust and Land Act, 1936 (Act No. 18 of 1936), before its repeal;

(b) land to which the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act No. 3 KZ of 1994), applies, to the extent provided for in Chapter 9 of this Act;

(c) land acquired by or for a community whether registered in its name or not; and

(d) any other land, including land which provides equitable access to land to a community as contemplated in section 25(5) of the Constitution.

(2) The Minister may, by notice in the *Gazette*, determine land contemplated in subsection (1)(d) and may in such notice specify which provisions of this Act apply to such land."

[103] 3 KZ of 1994.

[104] See the discussion at [14]-[22] above.

[86] From the provisions of these statutes, and the regulations made under them, it is apparent that African people who lived in the areas set aside for them under the 1913 and 1936 land statutes were governed by indigenous law. Indeed section 25 of the Black Administration Act made the provisions of the Natal Code of Zulu Law applicable to the province of Natal. The use, occupation and administration of communal land was regulated by indigenous law as it evolved over time. Colonial law and apartheid legislation may have determined, to a certain extent, "titles" to land that African people could hold through, for example, quitrent titles, certificates of occupation,[105] deeds of grant,[106] or permission to occupy.[107] These "titles", however, do not detract from the fact that indigenous law applied where it had not been supplanted by statute. Indeed the evidence on the record, provided by the communities and supported by some of the government respondents, bears testimony to this.

[87] I should note here that under the Traditional Leadership Act, the functions of the traditional council include the administration of the affairs of traditional communities in accordance with customs and traditions;[108] and performing any functions conferred by indigenous law, customs and statutory law consistently with the Constitution.[109]

[105] Township Regulations above n 23 at regulation 8(1).

[106] Id at regulation 1.

[107] Bantu Areas Land Regulations above n 22 at regulation 47.

[108] Traditional Leadership Act above n 51 at section 4(1)(a).

[109] Id at section 4(1)(l). Section 20(1)(b) contemplates that national legislation would be enacted to "provide a role for traditional councils or traditional leaders in respect of land administration."

[88] The land to which CLARA applies, therefore, is almost entirely land which was racially separated out for occupation by African people in terms of the Black Land Act and the Development Trust and Land Act. Originally, before colonisation and the advent of apartheid, this land was occupied and administered in accordance with living indigenous law as it evolved over time. Communal land and indigenous law are therefore so closely intertwined that it is almost impossible to deal with one without dealing with the other. When CLARA speaks of land rights, it speaks predominantly of rights in land which are defined by indigenous law in areas where traditional leaders have a significant role to play in land administration. This is more apparent when CLARA refers to "old order rights" which include rights derived from indigenous law. While the subject-matter of CLARA may well be land tenure, as it relates to communal land it is also legislation that necessarily affects indigenous law and traditional leadership. And substantially so.

Land administration system

[89] CLARA introduces a new system of land administration in relation to communal land. This system is to be based on community rules envisaged in section 19. These rules regulate "the administration and use of communal land by the community as land owner within the framework of law governing spatial planning local government".[110] Under this system, land is administered by the land administration committee whose duties and powers in relation to the administration of communal land will be contained in the community rules. It replaces the entire indigenous-law-based system that regulates

[110] Section 19(2)(a).

the administration and use of communal land. What matters for the purposes of tagging is not whether the system contemplated by CLARA is good or bad. What matters is that the new system contemplated by CLARA replaces the indigenous-law-based system currently managing the administration of communal land.

[90] The argument by Parliament that communities are entitled to incorporate the indigenous law rules of land tenure into the rules to be made under CLARA misses the point. Were this to happen, it would amount to the codification of indigenous law. Therefore, whether the community rules adopted under the provisions of CLARA replicate, record or codify indigenous law or represent an entirely new set of rules which replace the indigenous-law-based system of land administration, the result is the same: a substantial impact on the indigenous law that regulates communal land in a particular community. We are concerned merely with determining the impact that the adoption of community rules under CLARA will have on indigenous law. Evidently, this will have a substantial effect on indigenous law.

The powers and functions of traditional leadership

[91] Section 21[111] permits traditional councils to assume the powers and duties of land administration committees. It provides that traditional councils must comprise vulnerable community members including women, children and the youth.[112] This alters the composition of traditional councils.[113] Section 21(2) provides for the exercise of powers of land administration committees by traditional councils. All the various and wide-ranging provisions of CLARA which confer powers and functions and imposes duties on

[111] Section 21 of CLARA provides:

> "(1) A community must establish a land administration committee which may only be disestablished if its existence is no longer required in terms of this Act.
>
> (2) If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council.
>
> (3) In the exercise of the powers and the performance of the duties of a land administration committee as contemplated in subsection (2), a traditional council must ensure that the composition of its membership satisfies the requirements of section 22(4) and (5).
>
> (4) When a traditional council acts as a land administration committee as contemplated in this section, its functional area of competence is the administration of land affairs and not traditional leadership as contemplated in Schedule 4 to the Constitution.
>
> (5) Any provision in this Act which refers, or is applicable, to a traditional council is intended to establish norms and standards and a national policy with regard to communal land rights, to effect uniformity across the nation."

[112] Subsection 22(3) provides: "At least one third of the total membership of a land administration committee must be women." Subsection 22(4) provides: "One member of a land administration committee must represent the interests of vulnerable community members, including women, children and the youth, the elderly and the disabled."

[113] See section 3(2) of the Traditional Leadership Act which provides:

> "(a) A traditional council may have no more than 30 members, depending on the needs of the traditional community concerned.
>
> (b) At least a third of the members of a traditional council must be women.
>
> (c) The members of a traditional council must comprise–
>
> (i) traditional leaders and members of the traditional community selected by the senior traditional leader concerned in terms of that community's customs, taking into account the need for overall compliance with paragraph (b); and
>
> (ii) other members of the traditional community who are democratically elected for a term of five years, and who must constitute 40% of the members of the traditional council.
>
> (d) Where it has been proved that an insufficient number of women are available to participate in a traditional council, the Premier concerned may, in accordance with a procedure provided for in provincial legislation, determine a lower threshold for the particular traditional council than that required by paragraph (b)."

land administration committees, through the mechanism of section 21(2), become applicable to traditional councils. These powers and functions are set out in section 24 and they unquestionably pertain to the functional area of traditional leadership listed in Schedule 4 of the Constitution.[114]

[92] It is true that section 21(2) permits communities to decide whether or not existing traditional councils should assume the role of land administration committees. This means, Parliament argued, that traditional councils are not imposed on the community. They may or may not assume the role of land administration committees and if they do not, they would not feature at all in the context of CLARA.

[93] The issue is not whether traditional councils do in fact assume the role of land administration committees; what is significant for the purposes of tagging is that CLARA makes provision for traditional councils to assume that role and confers on them wide-

[114] Under section 24(1) of CLARA, the traditional council has the power to represent the community that owns the land; is entitled to exercise powers and duties conferred by CLARA on a land administration committee; and has all the powers conferred on the land administration committee by the rules of the community.

Under section 24(3) of CLARA, the traditional council has the power to: allocate "new order rights"; register communal land and "new order rights"; establish and maintain registers and records of all "new order rights" and transactions affecting such rights; promote and safeguard the interests of the community and its members in their land; promote co-operation among community members and as between community members and any other person in matters pertaining to the land; assist in the resolution of land disputes; liaise with the relevant municipality, the relevant land rights board and any other institution concerning the provision of services and the planning and development of the land; "perform any other duty prescribed by or under this Act or any other law"; and generally to deal with all matters necessary for or incidental to the exercise of its powers and the performance of its duties.

Under section 9 of CLARA, the traditional council has the power to grant or refuse conversion of "new order rights" to freehold ownership and to impose conditions upon a grant of freehold ownership.

Under section 19(2) of CLARA, read with the community rules, the traditional council has the power to regulate the administration and use of communal land by the community, as land owner, within the framework of law governing spatial planning and local government.

ranging powers and functions pertaining to traditional leadership. Whether they assume those powers is irrelevant for the purposes of tagging.

[94] The provisions of section 21(4) do not assist Parliament either. This section provides that when a traditional council performs the functions of the land administration committee "its functional area of competence is the administration of land affairs and not traditional leadership as contemplated in Schedule 4". But legislation is tagged under section 76(3) by the tag test prescribed by that section. Parliament cannot therefore alter CLARA's proper classification under section 76(3) by asserting that it falls within a functional area that is outside of Schedule 4. Section 21(4) cannot therefore affect the proper tagging of CLARA.

[95] Counsel for Parliament contended that any effect that the provisions have on indigenous law is indirect and incidental, and submitted that CLARA "could only conceivably have an impact on indigenous law and customary law to the extent that the latter do not secure land tenure". However, he made no attempt to analyse the extent to which indigenous law provided or did not provide secure communal land tenure. It seems to me that once it is accepted, as Parliament does, albeit in a faint tone, that the provisions of CLARA may have an impact on the indigenous law of communal land tenure, it must be accepted that the provisions of CLARA, in substantial measure, affect indigenous law and customary law.

[96] To sum up, therefore, CLARA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land. It replaces both the institutions that regulated these matters and their corresponding rules. CLARA also gives traditional councils new wide-ranging powers and functions. They include control over the occupation, use and administration of communal land.

[97] I conclude, therefore, that the provisions of CLARA in substantial measure affect "indigenous law and customary law" and "traditional leadership", functional areas listed in Schedule 4. It follows therefore that CLARA was incorrectly tagged as a section 75 Bill, that it should have been tagged as a section 76 Bill, and that the procedure set out in that section should have been followed. But what are the consequences of Parliament's failure to enact CLARA in accordance with the procedure prescribed in section 76(1)?

The consequences of a failure to follow the section 76 procedure

[98] Despite its conclusion that the provisions of CLARA in substantial measure fall within functional areas listed in Schedule 4 and, by implication, that CLARA should have been enacted in accordance with the procedure in section 76(1), the High Court declined to declare CLARA unconstitutional on this basis. It reasoned that a "court in determining the validity of the procedure adopted should . . . consider if there is substantial or material breach of the *audi alteram partem* rule".[115] As I understand its reasoning, there was no material breach of this rule because the NCOP "did not intend to stop the views of the

[115] *Tongoane* above n 3 at para 25.

provinces because the provinces were duly represented and there was a public hearing on the matter."[116]

[99] The High Court appears to have been influenced by an observation in *Liquor Bill* to the effect that it might be too formalistic to hold that a Bill is invalid because "Parliament erred in good faith" in enacting legislation before it under the section 76 procedure.[117] The High Court expressed the view that the NCOP did not act "in bad faith in adopting the section 75 procedure."[118]

[100] Counsel for Parliament supported the decision of the High Court in this regard. He submitted that adopting an incorrect procedure does not automatically result in invalidity. Relying on *Liquor Bill*, he submitted that the "issue is dependent upon the particular circumstances of the matter." He argued that because the "Bill was passed unanimously by both Houses of Parliament . . . [w]hatever procedure was followed would not have resulted in a different outcome." It is therefore "of no moment whether the NCOP voted corporately or individually . . . [because the] Bill would have been passed in any event", counsel argued. There was, therefore, substantial compliance with the Constitution, counsel for Parliament submitted.

[116] Id at para 24.

[117] *Liquor Bill* above n 62 at para 26.

[118] *Tongoane* above n 3 at para 24.

[101] The reliance on *Liquor Bill* is misplaced. It misconceives the nature of the enquiry involved in determining whether failure to comply with the manner and form requirements of the Constitution should result in the invalidity of legislation. More importantly, the approach of counsel for Parliament to the problem fails to appreciate the purpose of section 76(3), namely, to give more weight to the voice of the provinces in legislation affecting them.

[102] In addition, this approach ignores what was said in the last sentence of the paragraph in *Liquor Bill* on which they rely. There, we said "whether a provincial delegation votes corporately through its head of delegation, as prescribed by section 65, or individually by each member casting a vote, as prescribed by section 75(2), may in defined circumstances be determinative as to whether the NCOP passes a Bill."[119] To this, I should add that the procedure followed in enacting a Bill may also be determinative as to whether a Bill introduced in the National Assembly is enacted into law. This is so because to override the NCOP's objection to a section 76 Bill, the National Assembly would require a supporting vote of at least two-thirds of its members to pass the same Bill.

[103] Moreover, the reference to "good faith" in *Liquor Bill* was made in the context of a complaint that Parliament followed the more cumbersome section 76 procedure rather than the less exacting one prescribed by section 75. This is not the case here. It may well

[119] *Liquor Bill* above n 62 at para 26.

be that different considerations apply where the section 76 procedure is followed instead of the one prescribed by section 75. I need not express any opinion on this issue.

[104] Apart from this, this Court has held that—

> "[c]onstitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. . . . The Constitution itself allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution."[120]

[105] Both the High Court and counsel for Parliament, therefore, approached the matter incorrectly.

[106] In *Doctors for Life*, this Court considered the consequences of a failure to enact legislation in accordance with a procedure prescribed by the Constitution.[121] This was in the context of the obligation to facilitate public involvement in the law-making process. We held that the answer to this question depends, among other things, upon the importance that the Constitution attaches to the process in question.[122] And we said the

[120] *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 100.

[121] *Doctors for Life* above n 91 at para 202 (SA); 1463D-E (BCLR).

[122] Id.

following of the failure to comply with the manner and form requirements of the Constitution and the duty of courts in that regard:

> "It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid. And courts have the power to declare such legislation invalid."[123] (Footnote omitted.)

And we concluded:

> "[T]his Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid. Our Constitution manifestly contemplated public participation in the legislative and other processes of the NCOP, including those of its committees. A statute adopted in violation of section 72(1)(a) precludes the public from participating in the legislative processes of the NCOP and is therefore invalid." [124]

[107] The principles that we enunciated in *Doctors for Life* apply equally to this case. They are deeply rooted in the supremacy of our Constitution, a founding value of our constitutional democracy which is given expression in section 172(1)(a) of the Constitution.[125] In *Doctors for Life*, we said:

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[123] Id at para 208 (SA);1464F-G (BCLR).

[124] Id at para 211 (SA); 1466A-B (BCLR).

[125] Section 172(1)(a) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

> "The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court . . . must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic State. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme . . . ; law or conduct inconsistent with it is invalid'. It follows therefore that, if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid."[126] (Footnote omitted.)

[108] Under section 44(4) of the Constitution, when Parliament exercises its legislative authority it is "bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution." It is implicit, if not explicit, from this provision that, where the Constitution prescribes a procedure that must be followed in enacting a law, that procedure must ordinarily be followed. In *Executive Council of the Western Cape*,[127] this Court said the following concerning section 37 of the interim Constitution, the predecessor to section 44(4):

> "The new Constitution establishes a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication.
>
> . . .
>
> The supremacy of the Constitution is reaffirmed in section 37 in two respects. First, the legislative power is declared to be 'subject to' the Constitution, which emphasises the dominance of the provisions of the Constitution over Parliament's legislative power . . .

[126] *Doctors for Life* above n 91 at para 201 (SA); 1463B-C (BCLR).

[127] *Executive Council of the Western Cape* above n 120.

and, secondly, laws have to be made 'in accordance with this Constitution.'"[128] (Reference omitted.)

[109] I have already described in detail the purpose of the section 76 procedure and the importance of the constitutional role that the provinces must play in considering legislation which affects them.[129] Apart from this, the provisions of section 76(3) are couched in peremptory terms. Having regard to this, and the purpose of section 76(3), I consider that enacting legislation that affects the provinces in accordance with the procedure prescribed in section 76 is a material part of the law-making process relating to legislation that substantially affects the provinces. Failure to comply with the requirements of section 76(3) renders the resulting legislation invalid.

[110] For all these reasons, I conclude that CLARA is unconstitutional in its entirety.

[111] It follows, therefore, that the High Court erred in not striking down CLARA in its entirety on the ground that Parliament failed to enact it in accordance with the procedures set out in section 76. The High Court should have upheld the tagging challenge. The application for leave to appeal must therefore be granted and the appeal must be upheld.

[128] Id at para 62.

[129] See the discussion at [61]-[69] above.

[112] In the event, the order of invalidity made by the High Court should be set aside and in its place an order declaring CLARA invalid for want of compliance with section 76 should be made.

[113] The next question which arises is whether, in the light of the conclusion reached above, we should reach the remaining issues, namely, (i) whether Parliament complied with its obligation to facilitate public involvement in the legislative process; and (ii) the appropriateness of entertaining the substantive challenge to the provisions of CLARA declared to be unconstitutional by the High Court.

Should we reach the remaining issues?

[114] Counsel for the applicants properly conceded, in my view, that if tagging is decided in their favour it is not necessary to consider the argument based on the failure to facilitate public involvement in the legislative process. Nothing more need be said in this regard and, therefore, no order will be made in respect of the direct access application.

[115] Insofar as the substantive challenge to CLARA is concerned, however, counsel for the applicants urged us to consider the constitutionality of the impugned provisions of CLARA. In urging us to consider the substantive challenge, he referred to the delay in enacting this legislation and the amount of energy and expense invested by the applicants in litigating this matter. These efforts included compiling large amounts of evidence on which the substantive challenge was based and which informed the decision of the High

Court. Counsel submitted further, that it would be unfortunate to require the applicants, at some point in the future, to mount another challenge to the provisions of a new Act – provisions which may mirror those contained in CLARA.

[116] Once it is concluded that CLARA is unconstitutional in its entirety because it was not enacted in accordance with the provisions of section 76, it seems to me that that is the end of the matter. Although the anxiety of the applicants to finalise the matter in the light of the energy and time they invested in it is understandable, there is nothing left for this Court, as a court of final appeal, to consider.

[117] Counsel for the applicants sought to caution us against being influenced by the statement of the Minister to the effect that CLARA would be repealed *in toto*. I can see nothing wrong with the Minister informing this Court that CLARA, as it stands, is not consistent with government policy. If anything, the Minister performed his constitutional duty to draw to the attention of this Court any matter that should properly be brought to our attention. The Minister cannot be faulted. Indeed, it would have been unfortunate if the Minister, with full knowledge of the fact that the entire statute was going to be repealed, chose not to disclose this information to the Court.

[118] This Court has in the past required that a Minister responsible for the administration of any legislation under challenge must make representations to it on whether the legislation in issue limits any of the constitutional rights and, if so, whether

the limitation is justifiable in terms of section 36 of the Constitution. This is to assist the Court in the proper execution of its functions. This is not merely a question of form. It goes to the very heart of our constitutional democracy. It is a matter of comity between the branches of government. Other organs of state are required by the Constitution to "assist and protect the courts to ensure [their] independence, impartiality, dignity" and to enhance access to, and the effectiveness of, the courts.[130] These are not idle words randomly inserted into the Constitution. They must be given meaning.

[119] In *Mabaso v Law Society of the Northern Provinces and Another*,[131] we said the following concerning Rule 5 of the Constitutional Court Rules, which requires joinder:[132]

> "In a constitutional democracy, a Court should not declare the acts of another arm of government to be inconsistent with the Constitution without ensuring that that arm of government is given a proper opportunity to consider the constitutional challenge and to make such representations to the Court as it considers fit. There are at least two reasons for this. First, the Minister responsible for administering the legislation may well be able to place pertinent facts and submissions before the Court necessary for the proper

[130] Section 165(4) of the Constitution provides that "[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

[131] [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC).

[132] Rule 5 of the Constitutional Court Rules, 2003, provides:

> "1. In any matter, including any appeal, where there is a dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct, or in any inquiry into the constitutionality of any law, including any Act of Parliament or that of a provincial legislature, and the authority responsible for the executive or administrative act or conduct or the threatening thereof or for the administration of any such law is not cited as a party to the case, the party challenging the constitutionality of such act or conduct or law shall, within five days of lodging with the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, take steps to join the authority concerned as a party to the proceedings.
>
> 2.No order declaring such act, conduct or law to be unconstitutional shall be made by the Court in such matter unless the provisions of this rule have been complied with."

> determination of the constitutional issue. Secondly, a constitutional democracy such as ours requires that the different arms of government respect and acknowledge their different constitutional functions. Rule 5, therefore, is a manifestation of the respect which this Court must pay to the other arms of government. It cannot lightly be waived."[133]

[120] On a number of occasions this Court has emphasised that when the constitutional validity of an Act of Parliament is impugned, the Minister responsible for its administration must be a party to the proceedings inasmuch as his or her views and evidence tendered ought to be heard and considered.[134]

[121] When a Minister, upon reflection, considers that legislation is not supportable, he or she has a duty to convey this to the Court. This is what the Minister did in this case. That he did so was commendable. Indeed, this is what we expect of a cabinet minister in a constitutional democracy that is founded on the supremacy of the Constitution and the

[133] *Mabaso* above n 131 at para 13.

[134] *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at paras 7-8 and 10; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at paras 7-8; *Parbhoo and Others v Getz NO and Another* [1997] ZACC 9; 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at para 5. See also *JT Publishing (Pty) Ltd v Directorate of Publications and Another (Minister of Home Affairs Intervening)* 1995 (1) SA 735 (T) at 738C-F; 1995 (1) BCLR 70 (T) at 73D-F.

principles of accountability, openness and responsiveness.[135] What is regrettable is that the Minister communicated his intention regarding the legislation so late.

[122] Accordingly, while the applicants ardently wish to have finality regarding the constitutional propriety of the legislation that will be enacted, the invitation to us to express an opinion on provisions in a statute which we have declared invalid in its entirety, and which we have been told will, in any event, be repealed *in toto*, must be declined.

[123] I should note, however, that the substance of the submissions in respect of the Minister's intention to repeal CLARA lies in the real concern that further delay will be occasioned in the process of finalising new legislation. I understand these concerns. African people were deprived of their land by the apartheid legal order. They were confined to areas where they were not given any secure tenure. The Constitution recognises this – for it not only provides for restitution of land to people or communities that were dispossessed of their land as a result of past racially-discriminatory laws and practices, but it also recognises that African people were deprived of any secure tenure of land by reason of racially-discriminatory laws enacted by a white minority

[135] Section 1(c) and (d) of the Constitution provide as follows:

> "(1) The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

government. Against this background, the Constitution envisages that Parliament will enact legislation that will ensure that there is restitution of land to the people and communities that were dispossessed of their land, and that they will be accorded secure land tenure or comparable redress.

[124] This is a constitutional imperative which must be achieved. I accept the magnitude of the problem created by apartheid laws and practices, as well as the amount of time and effort necessary to undo these consequences. The core problem created by colonial and apartheid geography is that millions of African people were forced into labour reserves that were distant from employment opportunities, impoverished and overcrowded. The repressive machinery of apartheid, from the pass laws to forced removals, evolved in a way that restricted those affected to these impoverished zones. African communities were uprooted from their land and dumped onto foreign land. They were denied secure tenure in these areas. While the deep sense of humiliation and untold suffering cannot be fully compensated, at the very least, lost dignity can be partially restored by providing for security of tenure.

[125] Land restitution and security of tenure must be given priority. We are mindful that Parliament's legislative plate is overflowing. These matters have, however, now become pressing and should be treated with the urgency that they deserve.

[126] Section 237 of the Constitution provides that "[a]ll constitutional obligations must be performed diligently and without delay." Item 21(1) of Schedule 6 to the Constitution provides:

> "Where the new Constitution requires the enactment of national or provincial legislation, that legislation must be enacted by the relevant authority within a reasonable period of the date the new Constitution took effect."

[127] It is now some 13 years since the final Constitution came into effect. By any standard, a 13-year delay is unfortunate. Further delay as a consequence of this judgment and what we are now told is the inevitable repeal of the entire statute is unavoidable. This judgment will, however, provide Parliament with the opportunity to take a second look at the substantive objections raised by the applicants in respect of CLARA when it considers the proper way to give effect to section 25(6) of the Constitution. Suffice it to say that the legislation contemplated by section 25(9) read with section 25(6) must be enacted with a sense of urgency and diligence.

[128] Before concluding this judgment, there is one matter to which reference must be made. That is the delay of one year between argument before the High Court and the delivery of its judgment on 30 October 2009. This delay, coming on top of the other delays to which I have alluded, is most regrettable.

Costs

[129] That the applicants are entitled to costs is not in issue. In this Court, counsel for the applicants asked for the costs of three counsel. Usually, in a difficult case the costs of two counsel are warranted. But the unusual complexity of the legal issues in the case, and the depth and breadth of research that the procedural and substantive challenges to the validity of the statute necessitated, entitle the applicants to the costs of a third counsel. However, the High Court awarded the applicants the costs of five counsel. This is a most unusual, and it would seem unprecedented, award.[136] The High Court judgment is not expansive in justifying it. The judgment merely notes that seven counsel represented the applicants, and that "[a] lot of research had to be done in respect of each topic that was argued by each counsel representing the applicants", concluding that the costs of five counsel "would not be unreasonable".

[130] In this Court, the respondents, in resisting both the application to confirm and the appeal, made no moment of this unusual costs order. Nevertheless, it seems to me necessary to reconsider the basis on which it was granted. While the considerations mentioned by the High Court have weight, it does not seem to me that they justify the award of the costs of more than three counsel. This Court has had the benefit of perusing the full record, and of hearing full argument on all the issues in the case. A just costs award is for that of three counsel, and it is hard to conceive of any basis on which a more

[136] In *Commissioner, South African Revenue Service v Hawker Aviation Services Partnership and Others* 2005 (5) SA 283 (T), the High Court awarded the costs of four counsel, but the judgment was overturned on appeal: see *Commissioner, South African Revenue Service v Hawker Aviation Partnership* 2006 (4) SA 292 (SCA).

generous award could have been justified in the High Court. It seems to me that awarding the costs of five counsel was excessive and unjustified.

[131] The discretion to award costs is one with which an appellate court is loath to interfere. Interference will usually occur only where the discretion to award costs has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law.[137] In my view, the costs award in the High Court gave markedly over-generous weight to the complexity of the issues in the case, and to the research the case required. The award therefore failed to reflect fairly the position as between the parties, and consequently imposed an undue burden on the respondents.

[132] In these circumstances, it would seem that intervention in the costs award granted by the High Court is necessary. It seems to me that the order should be set aside, and replaced with one that grants the applicants the costs of the same number of counsel as in this Court, namely three. However, this question, as already indicated, was not canvassed before us. For this reason, the portion of the order below that sets aside the High Court costs award will be provisional. Any party wishing to draw any facts or circumstances relating to the High Court's costs award to our attention, or to make submissions on it, will be entitled to do so within ten days of the date of this judgment.

[137] See *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 29; and *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (2) BCLR 125 (CC); 2007 (5) SA 525 (CC) at para 19.

Order

[133] In the event, the following order is made:

(a) The application for leave to appeal is granted.

(b) The appeal is upheld.

(c) The order of the North Gauteng High Court, Pretoria, under Case No 11678/2006 is set aside and replaced with the following:

> "(i) It is declared that the Communal Land Rights Act 11 of 2004 is invalid in its entirety for want of compliance with the procedures set out in section 76 of the Constitution.
>
> (ii) The constitutional challenge to the provisions of the Traditional Leadership and Governance Framework Act 41 of 2003 is dismissed.
>
> (iii) The first, second, twelfth, thirteenth and fourteenth respondents are ordered to pay the costs of the applicants, jointly and severally, including those consequent upon the employment of three counsel."

(d) Any party wishing to draw to the attention of the Court any facts or circumstances, or to make submissions, on the costs order in (c)(iii) above, may do so within ten days of the date of this judgment.

(e) No order is made on the application for direct access.

(f) The first, second, twelfth, thirteenth and fourteenth respondents are ordered to pay the costs of the applicants in this Court, jointly and severally, including those consequent upon the employment of three counsel.

Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Ngcobo CJ.

[134] For the Applicants:	Advocate W Trengove SC, Advocate G Budlender SC, Advocate A Dodson, Advocate M Sikhakhane, Advocate N Mangcu-Lockwood and Advocate S Cowen instructed by the Legal Resources Centre and Webber Wentzel.
For the First Respondent:	Advocate N Cassim SC and Advocate MM Mokadikoa instructed by the State Attorney, Pretoria.
For the Second and Fourteenth Respondents:	Advocate MNS Sithole SC and Advocate MC Baloyi instructed by the State Attorney, Pretoria.
For the Twelfth and Thirteenth Respondents:	Advocate D Potgieter SC instructed by the State Attorney, Cape Town.