CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 22/99

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| WESTERN CAPE PROVINCIAL GOVERNMENT | First Intervening Party |
| FREE STATE PROVINCIAL GOVERNMENT | Second Intervening Party |
| NORTHERN PROVINCE PROVINCIAL GOVERNMENT | Third Intervening Party |

IN RE:

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| DVB BEHUISING (PTY) LIMITED | Applicant |
| versus | |
| NORTH WEST PROVINCIAL GOVERNMENT | First Respondent |
| THE REGISTRAR OF DEEDS | Second Respondent |

Heard on : 7 September 1999

Decided on : 2 March 2000

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JUDGMENT

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NGCOBO J:

*INTRODUCTION*

[1] This matter has some unusual features. First, it concerns the constitutionality of the repeal by a provincial legislature of parts of an egregious apartheid law which anachronistically

has survived our transition to a non-racial democracy. Second, the proceedings were initiated by a private commercial company which succeeded in the High Court and which has not appeared in this Court to support the order it was granted. Third, the government of the province which purported to repeal the law, and which opposed the relief in the High Court, has not appeared to oppose the confirmation of the order of the High Court, but two other provincial governments have done so. A third provincial government filed written submissions in which it also opposed the confirmation of the High Court order.

[2] The apartheid law with which these proceedings are concerned is Proclamation R293 of 1962[1] (the Proclamation) which was issued in terms of the Native Administration Act, 38 of 1927. It made provision for the establishment of a special kind of township by the Minister of Bantu Administration and Development for African citizens in areas of land held by the "South African Native Trust" which was established by the Native Trust and Land Act, 18 of 1936.[2] That Act was one of two infamous statutes[3] that effectively made it impossible for members of the African community, a racial majority by far in this country, to own land in some 87% of the country. Even a cursory reading of the Proclamation conveys the demeaning and racist nature of the system of which it was a part. Provision was made for the "Ethnic Character of [the] Population of Township[s]". Limited forms of tenure were created by way of "deeds of grant" and "certificate[s] of occupation of a letting unit for residential purposes". The tenure was a precarious one and could be cancelled by the township "manager", in the event, amongst others,

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1 *Government Gazette* 373, 16 November 1962.

2 Africans were initially referred to in statutes as "Natives". This term was later changed to "Bantu", and eventually to "Blacks". The short titles of the statutes reflect the name used to refer to Africans at the time the statute was promulgated. The original short titles given to the statutes will be used throughout this judgment.

3 The first was the Natives Land Act, 27 of 1913.

of the holder of the right "ceasing to be in the opinion of the manager a fit and proper person to reside in the township".[4] The Proclamation also made provision for the establishment of special deeds registries and for the registration of deeds of grant.[5] There were detailed provisions relating to trading and other activities in the townships and to their control. It is unnecessary to provide further detail to demonstrate the distasteful character of the Proclamation. There can be no doubt that its terms were in conflict with a number of provisions of the Bill of Rights in the interim Constitution and the 1996 Constitution (the Constitution) and on that account unconstitutional. Its terms are a timely reminder of where we have come from and the progress we have made in our transformation to democracy.

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4 Regulation 23(1)(a)(iv) of the Proclamation.

5 Chapter 9 of the Proclamation.

[3] The issues in this case arise pursuant to the enactment, by the legislature of the North West (the North West), of the North West Local Government Laws Amendment Act, 7 of 1998 (Act 7). Section 6 of Act 7 purports to repeal the Proclamation in its entirety. In the Bophuthatswana High Court (the High Court), the applicant, DVB Behuising (Pty) Limited (DVB), challenged the constitutional validity of section 6 of Act 7, contending that the purported repeal of Chapters 1, 2, 3 and 9[6] of the Proclamation was beyond the legislative competence of the North West. The matter was heard by Mogoeng J. It was claimed on behalf of DVB that the repeal of those chapters made it impossible for persons to whom it had sold houses in a township established under the Proclamation to have their deeds of grant registered by the second respondent, the Registrar of Deeds, Pretoria (the Registrar). This was alleged to prejudice its business seriously, in particular, because the purchasers of such houses were not able to secure loans which would normally be offered to them by banks.

[4] As indicated above,[7] the application was opposed by the North West, which was cited as the first respondent. However, the province did not file an answering affidavit in the High Court. The only facts before the High Court, therefore, were those set out in the founding affidavit on behalf of DVB. The application was not opposed by the Registrar who elected to abide by the decision of the court.

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6 To the extent relevant to this matter, Chapter 1 of the Proclamation makes provision for the establishment of the townships. Chapter 2 provides for the demarcation of sites in the townships for various categories of occupation and regulates their occupation, sale or lease. It makes provision also for the issue of deeds of grant and certificates of occupation, as well as for their assignment or transfer. Chapter 3 relates to trading sites and the control of trading in the townships. Chapter 9 establishes special deeds registries in the office of every "Chief Bantu Affairs Commissioner" and for the registration therein of rights granted under the Proclamation.

7 Para 1.

[5] On 27 May 1999 Mogoeng J made an order declaring that the purported repeal of the said chapters of the Proclamation by section 6 of Act 7 was unconstitutional.[8] There was no order for costs. Pursuant to the provisions of section 172(2)(a) of the Constitution,[9] Mogoeng J's declaration of invalidity was referred to this Court for confirmation.

[6] In response to notices given to other provincial governments pursuant to directions issued by the President of this Court, the governments of the Western Cape, the Free State and the Northern Province filed written submissions opposing the confirmation of the order of Mogoeng J. At the hearing of the confirmation proceedings, the Western Cape and Free State governments were represented by counsel. In the light of the non-appearance of DVB, Mr P Kennedy of the Johannesburg Bar, at the request of this Court, made submissions in support of the confirmation of the order of the High Court. We are indebted to him for his helpful heads of argument and submissions. Notice of these proceedings was also given to the national government, but it did not respond.

*THE APPLICABLE STATUTORY PROVISIONS*

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8 *DVB Behuising (Pty) Ltd v North West Provincial Government and Another*, Bophuthatswana High Court, Case No 308/99, 27 May 1999, as yet unreported.

9 Section 172(2)(a) provides as follows:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[7] Areas which had been declared "trust land" and reserved for occupation by Africans[10] were, by the Promotion of Bantu Self-government Act, 46 of 1959, set aside as areas which would in the future be declared "independent homelands". In 1977 Parliament granted "independence" to Bophuthatswana in terms of the Status of Bophuthatswana Act, 89 of 1977. During the period of the "independence" of Bophuthatswana the Proclamation became a law of the homeland,[11] and a number of amendments were made to it by the legislature of Bophuthatswana. None of these, as far as my research has revealed, has any relevance to the present matter. In terms of the provisions of the interim Constitution, and with effect from 27 April 1994, Act 89 of 1977 was repealed[12] and Bophuthatswana was reincorporated into South Africa. Parts of its former territory were incorporated into the North West.[13]

[8] In 1991 Parliament passed the Upgrading of Land Tenure Rights Act, 112 of 1991 (the Upgrading Act). Its terms were not of application in the TBVC states[14] until 28 September 1998, the date of promulgation of the Land Affairs General Amendment Act, 61 of 1998,[15] which made its provisions applicable in the whole country. As the name of the Upgrading Act suggests, its purpose was to provide for the conversion into full ownership of the more tenuous land rights

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10 Under the 1913 and 1936 Land Acts. See above para 2.

11 In terms of section 18 of the Bantu Homelands Constitution Act, 21 of 1971:

> ". . . all laws which immediately prior to the constitution of the first executive council for an area in terms of section 5 were in force in that area or any portion thereof, shall continue in force until repealed or amended by the competent authority."

In terms of section 2 of the Status of Bophuthatswana Act, any rule of law in force in Bophuthatswana prior to "independence", was to "continue in force as a rule of law of Bophuthatswana until repealed" or amended.

12 Schedule 7 to the interim Constitution.

13 See section 124 of the interim Constitution and schedule 1 thereto.

14 The former "independent homelands" of Transkei, Bophuthatswana, Venda and Ciskei.

15 Which inserted section 25A in the Upgrading Act.

which had been granted during the apartheid era to Africans.

[9] The provisions of the Upgrading Act indicate that since 1991 the policy of Parliament has been to ensure that any title that conferred a limited form of ownership was to be upgraded to full ownership. It is implicit in this policy that a title which conferred a limited form of ownership was to be phased out. Those who already had such titles were to retain them until they could be upgraded to full ownership.

[10] On 17 June 1994 the President, acting under the provisions of section 235(8) of the interim Constitution,[16] assigned the administration of a substantial number of national laws to the North West.[17] One of those was the Proclamation. This was prior to the extension of the provisions of the Upgrading Act to areas of the former Bophuthatswana which became part of the North West.[18] The President's assignment was stated to be subject to the functional areas specified in schedule 6 of the interim Constitution.[19]

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16 Section 235(8) is set out in full below at para 28.

17 Proclamation R110 dated 17 June 1994.

18 See above para 8.

19 Schedule 6 of the interim Constitution set out the functional areas of competence of the provinces. These are set out below at para 32.

[11] By Government Gazette No. 17753 of 31 January 1997, the President, acting under the provisions of section 237(3) of the interim Constitution,[20] promulgated Proclamation R9 of 1997 (Proclamation R9), which amended and repealed a host of national and provincial laws in order to rationalise the public administration with reference to land affairs. One of the laws amended was the "Regulations for the Administration and Control of Townships, Proclamation No. R.293 of 1962 of the former Republic of Bophuthatswana". The relevant amendments included the following:

(a) The definition of "deeds registry" was amended to mean a deeds registry contemplated in the Deeds Registries Act.[21]

(b) Regulation 3 of Chapter 1 was amended to provide that the provisions of the Deeds Registries Act would be applicable to the registration of the deeds of grant. The provisions of the Deeds Registries Act were made applicable "in so far as such provisions can be . . . applied".[22]

(c) Regulation 1 of Chapter 9 was amended to provide that "[a]ll documents relating to immovable property in any township referred to in [the] regulations [contained

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20 Section 237(3) of the interim Constitution provided that:

> "(a) The President may, subject to subsection (2)(a), by proclamation in the *Gazette* take such steps as he or she considers necessary in order to achieve the aim mentioned in subsection (1).
>
> (b) Without derogating from the generality of paragraph (a), the steps referred to in that paragraph may include -
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> (i) the amendment, repeal or replacement of any law regulating the establishment, functions and other matters relating to an institution referred to in section 236(1), or of any law referred to in section 236(2), or of any law which deals with any of the aforegoing matters in a consequential manner: Provided that if a law referred to in section 236(2) is repealed, provision shall be made for the application of any law of general application regulating the employment of persons or any class of persons in the employment of the state, to the persons or class of persons affected by such repeal;
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> . . ."

21 Proclamation R9, item 2(a), amendment 1(a).

22 Id, amendments 2(a) and 2(b).

in the Proclamation] shall be registered in a deeds registry".[23]

[23] Id, amendment 3(a)

(d) Regulations 1(2) and (3) of Chapter 9, dealing with the establishment of special deeds registries in the offices of the Chief Bantu Commissioners, were deleted from the Proclamation.[24]

[24] Id, amendment 3(b).

[12] The Deeds Registries Act was also amended to bring it in line with Proclamation R9. The effect of these amendments was to bring about uniformity in the registration of titles in respect of land, regardless of whether that title takes the form of a title deed, a lease, or a deed of grant. The result is that the Registrar of Deeds has the same obligations and duties in respect of the registration and transfer of deeds of grant as he or she has in respect of title deeds and other forms of land tenure.[25] These obligations include the registration of deeds of grants, which must now be done under the Deeds Registries Act.[26] Deeds of grant registered in the deeds registry may be transferred or mortgaged and the Registrar is, in terms of the Deeds Registries Act, obliged to register such transfers and mortgage bonds in respect of deeds of grant registered with that office.[27] The duties and obligations of the Registrar flow from the registration provisions of the Proclamation, and the provisions of the Deeds Registries Act.[28] Proclamation R9, read with the provisions of the Deeds Registries Act, envisaged that the special registries established under the Proclamation would continue to exist until a date to be determined by the national government, in terms of section 1A(3)(a) of the Deeds Registries Act.[29] On 14 April 1997, the special registries office established in Bophuthatswana was discontinued by Government Notice.[30] With effect from this date all records of the special registries office in Bophuthatswana

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25 Amendment 2(b) of item 2(a) inserted the following subregulation into the Deeds Registries Act:

> "(2A) Notwithstanding the provisions of subregulation (1), save as is otherwise provided in these regulations or the context otherwise indicates, the provisions of the Deeds Registries Act, 1937 (Act No. 47 of 1937), shall, in so far as such provisions can be so applied, apply *mutatis mutandis* in relation to all documents registered or filed or intended to be registered or filed in a deeds registry in terms of these regulations."

26 In terms of amendment 3(a) of item 2(a), which replaced subregulation (1) of the Deeds Registries Act with the following:

> "(1) All documents relating to immovable property in any township referred to in these regulations shall be registered in a deeds registry."

27 Proclamation R9, item 2(a), amendment 10(a).

28 Id, amendments 2(b) and 3(a).

29 Proclamation R9, item 1, amendment 1(3)(a).

30 *Government Gazette* 17809, GN 329, 28 February 1997.

were transferred to the offices of the Registrar of Deeds in Vryburg and Pretoria.[31]

[13] The next development was the promulgation by the North West of Act 7. It was section 6 of that Act which purported to repeal the whole of the Proclamation. As no date was specified in the Act for the coming into operation of section 6, the repeal, if constitutional, would have become effective from the date of its promulgation, namely 31 July 1998.[32] The long title of the Act is:

> "To provide for the rationalisation of laws pertaining to local government applicable in the Province of the North-West [sic]; to provide for the amendment of certain such laws; and for matters incidental thereto."

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[31] Section 1A, which deals with the discontinuance of special registries, reads, in relevant part, as follows:

> "(3) (a) A rationalised registry shall be discontinued with effect from a date determined in respect of that registry by the Minister by notice in the *Government Gazette*.
>
> (b) Different dates may be so determined in respect of the different deeds registries.
>
> (4) The Minister may with effect from the date of commencement of Proclamation No. R.9 of 1997, take the necessary steps to transfer the records, equipment and any other property of a rationalised registry to the respective receiving registry.
>
> (5) Any official in the employ of a rationalised registry shall with effect from the date contemplated in subsection (3) be transferred to the receiving registry and shall be suitably taken up in the establishment of the receiving deeds office: Provided that the appointment of a person as a registrar or officer in charge of a registry of a rationalised registry shall lapse on the date contemplated in subsection (3).
>
> (6) All records of a rationalised registry shall with effect from the date contemplated in subsection (3) be transferred to the receiving registry."

[32] Section 123 of the Constitution provides that:

> "A Bill assented to and signed by the Premier of a province becomes a provincial Act, must be published promptly and takes effect when published or on a date determined in terms of the Act."

[14] The next relevant event was the promulgation, on 28 September 1998, of the Land Affairs General Amendment Act, 61 of 1998.[33] The effect of section 1 of that Act was to make the provisions of the Upgrading Act apply throughout the Republic.[34]

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33 See above para 8.

34 With the exception of sections 3, 19 and 20, the provisions of which are not relevant to this matter.

[15] The final legislative act in this long history was the promulgation, on 29 December 1998, of the North West Local Government Laws Amendment Act, 9 of 1998 (Act 9). It inserted sections 5A(1) and (2) into Act 7.[35] These provisions were inserted in an apparent attempt to ensure that the deeds of grant that had been issued, and those applied for under the Proclamation were converted into ownership under the Upgrading Act. It appears that, at the time of the promulgation of Act 9, the North West was unaware that the provisions of the Upgrading Act had been made applicable throughout the Republic.

*THE JUDGMENT OF THE HIGH COURT*

[16] The central findings which led Mogoeng J to grant the order sought by the applicant were the following:

(a) Provincial legislatures have "a clearly defined and very limited legislative authority" and have to operate "within the strict parameters" of that authority.[36]

(b) In construing the powers of provincial legislatures the relevant provisions of the

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35 Those sections read, so far as they are now relevant, as follows:

> "(1) Any deed of grant in terms of the Regulations for the Administration and Control of Townships in Black Areas, 1962 (Proclamation No. R.293 of 1962), issued in respect of any erf or piece of land -
>
> (a) immediately prior to the commencement of this Act; or
>
> (b) after the commencement of this Act in pursuance of the provisions of subsection (2),
>
> shall, subject to any applicable national legislation, be converted into ownership in accordance with the relevant provisions of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991) and as from such conversion the ownership of such erf or piece of land shall vest exclusively in the person who, according to the register of deed of grant rights in which that tenure right was registered, was the holder of that land tenure right immediately before the conversion.
>
> (2) Any application for a deed of grant in terms of the Regulations for the Administration and Control of Townships in Black Areas, 1962 (Proclamation no. R.293 [of] 1962) signed by the applicant immediately prior to the commencement of this Act and not dealt with at the commencement of this Act, shall be proceeded and dealt with as if this Act had not been passed".

36 At 7 of the judgment.

Constitution must

> ". . . be given a strict interpretation. This is necessary to ensure that no provincial legislature is allowed to exercise the authority it does not have and thereby usurp the functions of Parliament."[37]

(c) The only functional areas of provincial legislative competence which could be relevant to the repeal of the Proclamation are those relating to "housing", "local government", "trade" and "industrial promotion".[38]

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37 Id

38 Id at 8.

(d) The "predominating features" of Chapters 1, 2, 3 and 9 of the Proclamation are "land, land tenure or ownership, the registration of deeds and the establishment and abolition of townships." Those are "matters which are not provincial but national competences." The provisions repealed do not fall within those functional areas.[39]

(e) The assignment of the administration of the Proclamation by the President to the North West did not include the provisions contained in Chapters 1, 2, 3 and 9 thereof, because the assignment expressly excluded any provisions of the Regulations falling outside the functional areas specified in schedule 6 to the interim Constitution.[40] If the President had intended to assign the powers contained in Chapters 1 and 9 of the Proclamation he would not have amended them by Proclamation R9 of 1997 after the date of such assignment.[41]

[17] I would point out immediately that I respectfully disagree with the view expressed by Mogoeng J to the effect that the functional areas of provincial legislative competence set out in the schedules should be "given a strict interpretation". In the interpretation of those schedules there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national Parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.

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39 Id at 9.

40 See below para 27.

41 Judgment at 9-10. See also above para 11.

*THE CONSTITUTIONAL CONTEXT*

[18] There were fourteen government structures, apart from the national government, when the interim Constitution came into effect. These were the four provincial governments,[42] six governments of the self-governing territories,[43] and the four "independent" states.[44] Each had its own laws. There were of course areas of overlap, in particular, with regard to the laws applicable in the former homeland areas, as these homelands had been part of the Republic of South Africa at one time or another.

[19] Section 229 of the interim Constitution provided that all laws in force in any area of South Africa would remain in force in that area, subject to the provisions of the Constitution, and subject to any repeal or amendment of such laws by a competent authority. As there were differences between the laws in force in each of the ten homelands and the laws in force in the remainder of South Africa, there was not a uniform legal order throughout the country, or throughout each of the provinces, when the new constitutional order came into force. The difficulties occasioned by this lack of consistency were recognised and addressed in the transitional provisions of the interim Constitution. These provisions contained a very complex scheme for the allocation of the power to exercise executive authority in respect of the laws that existed when the interim Constitution took effect.

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42 Natal, the Transvaal, the Cape of Good Hope and the Orange Free State. These are the names used in the 1983 Constitution (Act 110 of 1983).

43 Lebowa, Gazankulu, Qwaqwa, kwaZulu, KwaNdebele and KaNgwane. These are the names as given in the establishment proclamations (R225 of 1972, R15 of 1973, R203 of 1974, R11 of 1977, R60 of 1981 and 148 of 1984 respectively).

44 Transkei, Bophuthatswana, Venda and Ciskei. These are the names used in the establishment statutes (Act 100 of 1976; Act 89 of 1977; Act 107 of 1979; and Act 110 of 1981 respectively).

[20] The issues in this case can only be formulated and resolved by following a somewhat tortuous path dictated by the Constitution and consisting of a number of steps, which will be briefly stated here and elaborated later in the judgment. First, although the Constitution does not expressly empower a provincial legislature to repeal legislation, this is clearly implicit in its powers, provided the legislation which it purports to repeal is provincial legislation. Second, the Proclamation could only constitute provincial legislation if it was "legislation that was in force when the Constitution took effect and . . . [was] administered by a provincial government."[45] The third step is to determine which of the provisions of the Proclamation, if any, were administered by the North West. The only basis on which such administration could have been carried out by the North West in this case was under an assignment thereof made by the President to the North West under section 235(8)(a) of the Constitution. Such assignment of administrative power is limited by section 235(6)(b) to those provisions of the Proclamation which "fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126(3)". It is therefore necessary to determine whether all the provisions of the Proclamation fall within one or other of the functional areas specified in schedule 6. If any provision does not, this means that the administration of such provision was not assigned to the North West by the President, that the provision itself does accordingly not constitute provincial legislation and could not validly have been repealed by Act 7. Those provisions of the Proclamation that fall within the functional areas specified in schedule 6 must, however, satisfy a further negative condition before their administration could have been assigned under section 235(8)(a); they must not deal with matters referred to in paragraphs (a) to (e) of section 126(3). It is only when both these tests are satisfied that the administration of any

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45 Section 239 defines "provincial legislation" as follows:

> "'provincial legislation' includes -
>
> (a) subordinate legislation made in terms of a provincial Act; and
>
> (b) legislation that was in force when the Constitution took effect and that is administered by a provincial government."

provision of the proclamation could have been assigned to the North West by the President. Once assigned, such provision constituted provincial legislation and could validly have been repealed by Act 7. The remainder of the judgment will follow this line of enquiry.

[21] The Constitution does not expressly confer on the provinces the power to repeal their laws. This power is nevertheless implicit in section 43(b) read with section 104(1)(b)(iv) of the Constitution. Section 43(b) provides that the legislative authority "of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104". In terms of section 104(1)(b)(iv), the provinces have the power to legislate with regard to "any matter for which a provision of the Constitution envisages the enactment of provincial legislation". It seems to me that, read with section 104(1)(b)(iv), section 43(b) cannot be construed otherwise than as envisaging that the provinces will have the competence to repeal their own laws.

[22] In terms of section 239 of the Constitution, the laws that were administered by the province when the Constitution took effect became provincial laws.

[23] Section 235 of the interim Constitution dealt with the administration of existing laws.[46] It provided in subsection (6)(b)(ii) that all homeland laws which were in force when the interim Constitution came into operation, and which were laws "with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126(3)" should, subject to subsections (8) and (9),[47] be administered by a competent authority within the jurisdiction of the government of the province in which that law applied. As only part of a particular homeland law might meet the requirements for

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46 See below para 28.

47 Subsection 9 is set out in full at n 50 below.

"assignment" to a province, the interim Constitution contemplated that the administration of a particular law might be allocated partly to a province and partly to the national government. This seems to be implicit in the reference in subsection (6)(b)(ii) to the province administering the law "to the extent that it so applies", and is explicit in subsection (8)(b)(ii), where provision is made for a situation in which "the assignment does not relate to the whole of such law".

[24] The provisions of subsections (8) and (9) were designed to ensure that the administration of laws would not be vested in provinces until they had the administrative infrastructure needed to enable them to deal with such matters. If the administrative structure existed, a province was entitled to have the administration of the relevant laws assigned to it. If the province lacked the necessary administrative structure, the administration of such laws had to be assigned to a functionary in the national government until the administrative structure was established by the province. The entitlement of the province to administer the relevant laws was derived from the interim Constitution and not from an authority delegated to it by the President. The assignment provisions had the limited purpose of regulating the administration of laws while the new provinces were setting up their administrations. Once they had the capacity, the President was obliged to assign the administration of the laws to them.

[25] Section 235(8)(b) also made provision for existing laws which were to be administered by the provinces to be adapted to meet the new constitutional structure. For this purpose, the President was given the power to amend or adapt any law when the administration of that law was assigned to a province or at any time thereafter. Where the assignment did not relate to the whole of the law, it could be repealed and re-enacted by the President for the purpose of the assignment, in terms of section 235(8)(b)(ii).

[26] It follows, therefore, that if the whole Proclamation, including the impugned provisions, was administered by the North West when the Constitution took effect, it constituted provincial legislation and the North West was therefore competent to repeal the whole Proclamation. It is necessary, therefore, to determine first the extent to which the Proclamation was assigned to the North West.

*THE ASSIGNMENT OF THE PROCLAMATION*

[27] The Proclamation was assigned to the North West by Government Notice 110 of 1994.[48] That assignment, in its relevant part, provided as follows:

> "I hereby -
>
> > (a) assign the administration of the laws specified in the Schedule, excluding those provisions of the said laws which fall outside the functional areas specified in Schedule 6 to the Constitution or which relate to policing matters referred to in section 235(b) or to matters referred to in paragraphs (a) to (e) of section 126(3) of the Constitution, to a competent authority within the jurisdiction of the government of the Province of the North-West [sic] designated in respect of each such law by the Premier of that province . . ."

The schedule to the Proclamation indicates that the "whole" Proclamation was assigned. That, however, is not determinative of the question. It is necessary to determine which provisions of the Proclamation were assigned to the North West.

[28] The terms of the assignment must be understood in the light of the assignment provisions of the interim Constitution. The relevant provisions of the interim Constitution that dealt with

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48 *Government Gazette* 15813, 17 June 1994.

the assignment of the executive power to administer old order laws were contained in sections 235(6) and (8), and provided:

> "(6) The power to exercise executive authority in terms of laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of section 229 continue in force after such commencement, shall be allocated as follows:
>
> (a) All laws with regard to matters which -
>
> (i) do not fall within the functional areas specified in Schedule 6; or
>
> (ii) do fall within such functional areas but are matters referred to in paragraphs (a) to (e) of section 126(3) (which shall be deemed to include all policing matters until the laws in question have been assigned under subsection (8) and for the purposes of which subsection (8) shall apply *mutatis mutandis*),
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> shall be administered by a competent authority within the jurisdiction of the national government: Provided that any policing function which but for subparagraph (ii) would have been performed subject to the directions of a member of the Executive Council of a province in terms of section 219(1) shall be performed after consultation with the said member within that province.
>
> (b) All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126 (3) shall -
>
> (i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1)(a) or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (8) to a competent authority within the jurisdiction of the government of such province; or
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> (ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in subsection (1)(c), subject to subsections (8) and (9) be administered by a competent

authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies: Provided that this subparagraph shall not apply to policing matters, which shall be dealt with as contemplated in paragraph (a).

. . . .

(8) (a) The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the *Gazette* assign, within the framework of section 126, the administration of a law referred to in subsection (6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.

(b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary for the efficient carrying out of the assignment, he or she may-

(i) amend or adapt such law in order to regulate its application or interpretation;

(ii) where the assignment does not relate to the whole of such law, repeal and re-enact, whether with or without an amendment or adaptation contemplated in subparagraph (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and

(iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer or secondment of persons (subject to sections 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of state, administration, force or other institution."

[29] The purpose of section 235 was considered by this Court in *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others*,[49] where

[49] 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 84.

Chaskalson P said:

> "The overall purpose to be achieved through the application of s 235 is a systematic allocation of the 'power to exercise executive authority' in terms of each of the 'old laws', to an authority within the national government or authorities within the provincial governments. Subsection (8)(b)(ii) indicates that this authority may be allocated to provincial functionaries in respect of parts of a law and, in respect of other parts of the same law, to national functionaries. To achieve this purpose the President is given the power in ss (8)(b) to amend or adapt the laws to the extent that he considers it necessary 'for the efficient carrying out of the assignment'. The purpose of this power is clearly to provide a mechanism whereby a *fit* can be achieved between the old laws and the new order." (Emphasis in the original)

[30] Subsections (6), (8) and (9)[50] deal with the transfer of executive powers from the President, in whom the authority vested when he assumed office, to the Premiers in whom the executive authority was vested under the interim Constitution. Subsection (6) sets out the criteria for identifying the competent authority to whom the executive authority should be allocated. It also specifies the criteria for the allocation of the executive power. In terms of these criteria, a law was to be allocated to a competent authority within the province if:

(a) it was a law that dealt with a matter listed in schedule 6; and

(b) it did not deal with a matter referred to in paragraphs (a) to (e) of section 126(3).[51]

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50 "(9)(a) If for any reason a provincial government is unable to assume responsibility within 14 days after the election of its Premier, for the administration of a law referred to in subsection (6)(b), the President shall by proclamation in the *Gazette* assign the administration of such law to a special administrator or other appropriate authority within the jurisdiction of the national government, either generally or to the extent specified in the proclamation, until that provincial government is able to assume the said responsibility.
(b) Subsection [sic] (8)(b) and (d) shall *mutatis mutandis* apply in respect of an assignment under paragraph (a) of this subsection."

51 *Executive Council Western Cape*, above n 49, per Chaskalson P at para 79, and per Kriegler J at paras 162

[31] Section 126 of the interim Constitution conferred legislative authority on the provinces and, in relevant part, provided:

> "(1) A provincial legislature shall be competent, subject to subsections (3) and (4), to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6.
>
> (2) The legislative competence referred to in subsection (1), shall include the competence to make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence.
>
> (2A) Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).
>
> (3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as -
>
> (a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;
>
> (b) the Act of Parliament deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic;
>
> (c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;
>
> (d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or
>
> (e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.
>
> . . ."

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and 174-5.

[32] Schedule 6 of the interim Constitution listed the following functional areas as legislative competences of the provinces:

> "Agriculture
> Abattoirs
> Airports, other than international and national airports
> Animal control and diseases
> Casinos, racing, gambling and wagering
> Consumer protection
> Cultural affairs
> Education at all levels, excluding university and technikon education
> Environment
> Health services
> Housing
> Indigenous law and customary law
> Language policy and the regulation of the use of official languages within a province, subject to section 3
> Local government, subject to the provisions of Chapter 10
> Markets and pounds
> Nature conservation, excluding national parks, national botanical gardens and marine resources
> Police, subject to the provisions of Chapter 14
> Provincial public media
> Provincial sport and recreation
> Public transport
> Regional planning and development
> Road traffic regulation
> Roads
> Soil conservation
> Tourism
> Trade and industrial promotion
> Traditional authorities
> Urban and rural development
> Welfare services"

[33] The process of determining whether a law was administered by a province when the Constitution took effect involves a three-stage enquiry: first, was the law subject to assignment by the President? If the answer is in the affirmative, the second question is whether the law was "with regard to matters which fall within the functional areas specified in Schedule 6". If it did not, that is the end of the enquiry. If it did, the third question is whether the law deals with "matters referred to in paragraphs (a) to (e) of section 126(3)" of the interim Constitution. If the law deals with a matter referred to in paragraphs (a) to (e) of section 126(3), its administration is not subject to assignment.

[34] The application of the assignment criteria presents a difficulty, in particular in the present case. This difficulty arises from the fact that: first, the Proclamation is a pre-constitutional order law; second, what is being challenged is not the repeal of the whole Proclamation but the repeal of certain of its provisions; third, the section 235(6) criteria are concerned with executive powers at an administrative level,[52] yet for its purpose, the section uses schedule 6, which deals with legislative competences, and paragraphs (a) to (e) of section 126(3), which are concerned with how conflicts between provincial and national legislation in relation to schedule 6 functional areas are to be resolved. The first question to consider is whether the administration of the Proclamation fell within the purview of subsection (6) of section 235.

*DID THE PROCLAMATION FALL WITHIN THE PURVIEW OF SECTION 235(6)?*

[35] The Proclamation in the form in which it existed when the interim Constitution took effect was in force in "any area which forms part of the national territory". In terms of section 229 of the interim Constitution, therefore, it continued to exist, subject to the provisions of the

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[52] Id per Chaskalson P at paras 76-9, and per Kriegler J at para 162.

Constitution. It follows that it fell within the purview of subsection (6) and its administration was, therefore, assignable in terms of section 235(8) of the interim Constitution. The next question, to which I now turn, is whether the Proclamation as a whole dealt with a matter listed in schedule 6.

*DID THE PROCLAMATION AND THE IMPUGNED PROVISIONS DEAL WITH A MATTER LISTED IN SCHEDULE 6?*

[36] The inquiry into whether the Proclamation dealt with a matter listed in schedule 6 involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the Proclamation is about.[53] In determining the subject

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53 In certain jurisdictions the subject matter of a statute is referred to as its "pith and substance". Indian authors suggest that the doctrine of "pith and substance" is one of the interpretive tools which is invoked whenever "a law dealing with a subject in one list is also touching on a subject in another list" (Singh *V.N. Shukla's Constitution of India* 9 ed (Eastern Book Company, Lucknow 1994) at 656-9. See also Seervai *Constitutional Law of India* (vol 1) 4 ed (N.M. Tripathi Private Ltd, Bombay 1991) at 269-75). The authority for this view is to be found in *Subrahmanyan Chettiar v Muttuswami Goundan* AIR 1941 FC 47 at 51 (quoted with approval in *Prafulla Kumar Mukherjee and others v Bank of Commerce Ltd., Khulna* AIR 1947 PC 60 at 65) where the Federal Court said:

> "It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved . . . whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that".

In Australia, Latham CJ in *Bank of New South Wales and Others v The Commonwealth and Others* (1948) 76 CLR 1 at 185, held that the phrase "pith and substance" was not of particular use except insofar as it was used "as representing 'primary object and effect' and incidental application". He expressed the view that "there is no difference between asking: 'What is the pith and substance of a statute?' and asking: 'What is its true nature and character?'" In Canada, in characterizing the "matter" of a challenged law for the purpose of determining whether it is within its competence, the courts usually describe it as "the pith and substance" of the law. See Hogg *Constitutional Law of Canada* 3 ed (Carswell, Ontario 1992) p 377 para 15.5.

The doctrine of "pith and substance" as used in other jurisdictions is intended to refer to the content or subject matter of the legislation, that is, its true nature and character or its substance. It is usefully invoked to characterize legislation which, though purporting to deal with a matter falling within the competence of the legislature enacting the legislation, also deals with a matter which falls outside such competence, for the purposes of determining whether it falls within the competence of the legislature which has enacted the

matter of the Proclamation it is necessary to have regard to its purpose and effect. The inquiry should focus beyond the direct legal effect of the Proclamation and be directed at the purpose for which the Proclamation was enacted to achieve. In this inquiry the preamble to the Proclamation and its legislative history are relevant considerations, as they serve to illuminate its subject matter. They place the Proclamation in context, provide an explanation for its provisions and articulate the policy behind them.

[37] The relevance of the purpose and effect of legislation in an inquiry such as this was discussed by Chaskalson P, writing for this Court, in *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*.[54] He stated:

> "If the purpose of legislation is clearly within Schedule 6, it is irrelevant whether the Court approves or disapproves of its purpose. But purpose is not irrelevant to the Schedule 6 enquiry. It may be relevant to show that although the legislation purports to deal with a matter within Schedule 6 its true purpose and effect is to achieve a different goal which falls outside the functional areas listed in Schedule 6. In such a case a Court would hold that the province has exceeded its legislative competence. It is necessary, therefore, to consider whether the substance of the legislation, which depends not only on its form but also on its purpose and effect, is within the legislative competence of the KwaZulu-Natal provincial legislature." (footnotes omitted)

[38] The purpose and effect of the legislation may equally be relevant to show that although the legislation, in some of its provisions, purports to deal with a matter which falls outside the functional areas listed in schedule 6, its true purpose and effect is to achieve a different goal

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legislation in question.

54 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC) at para 19.

which falls within the functional areas listed in schedule 6. In such event, a court would have to hold that the province has acted within its competence and then consider whether those provisions which fall outside of the provincial competence are reasonably necessary for, or incidental to give effect to, the object of the legislation.

[39] The determination of the subject matter of the Proclamation, therefore, requires an understanding of its legislative scheme. Ordinarily, legislation is the embodiment of a single legislative scheme. A law may, however, have more than one subject matter.[55]

[40] Before embarking upon the analysis outlined above, it is necessary first to set out the historical context of the Proclamation. One is dealing here with legislation that is admittedly racist and sexist and that constituted a key element in the edifice of apartheid. In characterising the Proclamation we cannot ignore its history, what it was intended to achieve, and what it actually did achieve.

*Historical context of the Proclamation*

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55 See, for example, *Ex parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) at para 62.

[41] Residential segregation was the cornerstone of the apartheid policy. This policy was aimed at creating separate "countries" for Africans within South Africa. The Natives Land Act, 27 of 1913 and the Native Trust and Land Act, 18 of 1936 together set apart 13% of South Africa's land for occupation by the African majority. The other races were to occupy the remaining 87% of the land. Africans were precluded from owning and occupying land outside the areas reserved for them by these statutes. The Native Administration Act, 38 of 1927 appointed the Governor-General (later referred to as the State President) as "supreme chief" of all Africans.[56] It gave him power to govern Africans by proclamation.[57] The powers given to him were virtually absolute.[58] He could order the removal of an entire African community from one place to another.[59] The Native Administration Act became the most powerful tool in the implementation of forced removals of Africans from the so-called "white areas" into the areas reserved for them. These removals resulted in untold suffering.[60] This geographical plan of segregation was described as forming part of "a colossal social experiment and a long term policy."[61]

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56 Section 1.

57 Section 25.

58 *Ynuico Ltd v Minister of Trade and Industry and Others* 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC) at para 7.

59 Section 5.

60 See generally Platzky and Walker *The Surplus People: Forced Removals in South Africa* (Ravan Press, Johannesburg,1985) at 128-400; A. Higginbotham Jr, F. Higginbotham and Ngcobo "De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice" 1990 *University of Illinois Law Review* (4) 763 at n 66.

61 See the remarks on the provisions of the Group Areas Act, 77 of 1957 in *Minister of the Interior v Lockhat and Others* 1961 (2) SA 587 (A) at 602D-E.

[42] The areas reserved for Africans later formed the basis for the establishment of ethnically based homelands. 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.[62] 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.[63]

[43] Under this scheme cities and towns fell outside of the areas reserved for Africans. However, the policy had to yield to economic imperatives - the need for cheap labour to run the economy in urban areas and towns. This was openly acknowledged:

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62 Higginbotham Jr et al, above n 60, at 779 n 62.

63 This was the "full logical conclusion" of the policy of apartheid, as one Minister put it:

> "If [the] policy is taken to its full logical conclusion as far as the [African] people are concerned there will be not one [African] man with South African citizenship . . . Every [African] man in South Africa will eventually be accommodated in some independent new state in this honorable way and there will no longer be a moral obligation on . . . Parliament to accommodate [Africans] politically." Dr CP Mulder, quoted in Dugard "Denationalization: Apartheid's Ultimate Plan" *Africa Report*, July-August 1983, at 44.

"Assuming that the ideal to be arrived at is the territorial separation of the races there must and will remain many points at which race contact will be maintained, and it is in the towns and industrial centres, if the economic advantage of cheap labour is not to be foregone, that the contact will continue to present its important and most disquieting features. The . . . figures are eloquent of the number of natives in the towns in 1911; that number has increased and will increase to an ever greater extent as the industrial future of the country develops. It is in the towns that the native question of the future will in an ever-increasing complexity have to be faced."[64]

[44] The Natives (Urban Areas) Act, 21 of 1923 was the first statute to address "the native question". It was subsequently repealed by the Native (Urban Areas) Consolidation Act, 25 of 1945 which substantially re-enacted its provisions. The 1945 Act authorised the local authority, "[s]ubject to the approval of the Minister after reference to the Administrator", to "define, set apart and lay out one or more areas of land for the occupation, residence and other reasonable requirements of natives . . .".[65] Only Africans who were "necessary to supply the reasonable labour requirements of the urban area[s]" were allowed to remain in these areas and "redundant natives" were liable to be removed from urban areas.[66] Unemployed or "idle" Africans were

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64 Davenport and Hunt (eds) *The Right to the Land* (David Philip, Cape Town 1974) 70 at para 108, quoting from Union Government 7 - 1919, at 16-17.

65 Section 2(1)(a).

66 Section 26(1) required a local authority to:

"render to the Minister once in every alternate calender year . . . a return showing -

(a) the number and sexes of natives within the urban area and their places of origin;
(b) the number and sexes of natives employed therein;
(c) the occupations in which they are employed and the number and sexes employed in each such occupation;
(d) the number and sexes of natives which, in the opinion of the urban local authority, is necessary to supply the reasonable labour requirements of the urban area;
(e) the number and sexes of natives within the urban area which the urban local authority considers not necessary for the purpose mentioned in paragraph (d) and desires to have removed;

. . ."

Section 28 made provision for the removal of "redundant Natives" from the urban areas (See section 28 (1)).

liable to be sent to their "home[s]" or to

> "be sent to and detained for a period not exceeding two years in a farm colony, work colony, refuge, rescue home or similar institution . . . and perform thereat such labour as may be prescribed under [the Prisons and Reformatories Act, 13 of 1911] or the regulations made thereunder for the persons detained therein . . ."[67]

This statute only applied in the so called "white areas". The perniciousness of this section was eloquently captured by Didcott J in *in re Dube*,[68] when he describe its effect as follows:

> "You are then an 'idle person', once you are capable of being employed but have no lawful employment and have had none for a total of 122 days or more during the past year . . . It does not matter whether you actually need work and its rewards. Perhaps your family supports you adequately and is content to carry on doing so. That does not count. The section says so in as many words. Nor apparently do any other lawful means you may be fortunate enough to have.
>
> . . . .
>
> Once you are officially 'idle', all sorts of things can be done to you. Your removal to a host of places, and your detention in a variety of institutions, can be ordered. You can be banned forever from returning to the area where you were found, or from going anywhere else for that matter, although you may have lived there all your life. Whatever right to remain outside a special 'Bantu' area you gained by birth, lawful residence or erstwhile employment is automatically lost.
>
> Perhaps you have never broken the law in your life, or harmed anyone, or made a nuisance of yourself by your activities or the lack of them. To complete our example, let us take that to be so. It makes no difference."

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67 Section 29(2)(b).

68 1979 (3) SA 820 (N) at 820H-821E.

[45] Some of the "African areas" were close to "white areas." Townships could therefore be established in those "African areas" to provide housing for Africans working in the nearby cities and towns. As from December 1948, a series of proclamations were enacted that made provision for the establishment of townships in "African areas" and regulated "the administration and control of native townships on land owned by the South African Trust".[69] The persistent theme in these proclamations was the expressed intent of establishing townships in "African areas" and the "ultimate aim of the Government that suitable forms of local authority should be established for the control of the said townships by the native inhabitants thereof".[70] A number of the provisions of these proclamations were re-enacted in the Proclamation by the State President on 16 November 1962 in terms of sections 6(2)[71]and 25[72] of the Native Administration Act, read

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69 Proclamation 362 of 1948 was published in the *Government Gazette* in December 1948, to provide "Regulations for the administration and control of native townships on land owned by the South African Native Trust". It expressed the Government aim "that suitable forms of local authority should be established for the control of the said townships by the native inhabitants thereof" but noted that until such time the townships should be governed by these "interim regulations". It set up most of the regulations which are contained in Proclamation R293 (amongst other things, health, structures, occupation, inspection), but did not provide for deeds of grant. Proclamation 23 of 1953 duplicated the provisions of Proclamation 362 but was concerned only with the creation of the township of Umlazi. Proclamation 98 of 1953 (as amended by 258 of 1954 and 260 of 1955), gazetted in May 1953, created regulations for the control of rural villages on Trust land, on the basis that "it is expedient and in the interest of soil economy to establish villages for the closer settlement of Bantu persons residing in scattered kraals". The proclamation entrusted the management of these villages to the Native Commissioner, who was authorised to make the various necessary administrative regulations (concerning, amongst other things, sanitation, the keeping of animals, establishment, the allotment of plots, and control of burial places). It also created "Bantu village councils". Proclamation 227 of 1955 (as amended by 113 of 1958) introduced the title of "deed of grant" for both townships and rural villages, while Proclamation 261 of 1955 gave the Chief Native Commissioner all the powers and duties vested in Registrars of Deeds in relation to property in those townships and rural villages.

Proclamation 258 of 1956 set up regulations for the establishment and control of cemeteries in both townships and rural villages.

70 See the preamble of Proclamation 362 of 1948.

71 "6(1) All the powers and duties hitherto vested in or imposed upon registrars of deeds under the law relating to the registration of deeds, in so far as may relate to

with section 21[73] of the Native Trust and Land Act. This was before any of the homelands were established. It made provision for urban settlement and township development in accordance with the apartheid planning policies that were then applicable to such matters. These townships were to be established in the vicinity of cities and towns to provide housing for Africans and

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immovable property owned by Natives and situate within any such area included in the Schedule to the Natives Land Act, 1913 (Act No. 27 of 1913) or any amendment thereof, as may be defined by the Governor-General by proclamation in the *Gazette* shall, upon the issue of such proclamation, devolve upon the chief native commissioner of the area within which such immovable property is situate and all documents relating to any such immovable property shall thereupon be transferred from any existing deeds registry to the custody of the chief native commissioner concerned: Provided that any registrar of deeds may instead of so transferring any document filed in his registry furnish the chief native commissioner concerned with a copy thereof certified under his hand, which copy shall thereafter be as valid for all purposes as the original document.

(2) The Governor-General may make all such regulations as he may deem expedient for giving effect to the provisions of sub-section (1), and may in such regulations prescribe the fees to be charged by chief native commissioners in the exercise of any function under that sub-section."

This section was later amended to change the terms used to describe Africans and the chief native commissioner. See above n 2.

72 "25(1) From and after the commencement of this Act, any law then in force or subsequently coming into force within the areas included in the Schedule to the Natives Land Act, 1913 (Act No. 27 of 1913), or any amendment thereof, or such areas as may by resolution of both Houses of Parliament be designated as native areas for the purposes of this section, may be repealed or amended, and new laws applicable to the said areas may be made, amended and repealed by the Governor-General by proclamation in the *Gazette*.

(2) Save where delay would, in the opinion of the Governor-General, be prejudicial to the public interest, no such proclamation shall be issued unless a draft of its provisions or of its principal provisions shall have been published in the *Gazette* at least one month previously; but the omission of such publication shall not invalidate any such proclamation.

(3) Nothing in this Act contained shall affect the powers vested in the Governor-General under the Transkeian Annexation Act, 1877 (Act No. 38 of 1877), the Walfish Bay and St. John's River Territories Annexation Act, 1884 (Act No. 35 of 1884) so far as it relates to the St. John's River Territory; the Tembuland Annexation Act, 1885 (Act No. 3 of 1885), and the Transkeian Territories, Tembuland and Pondoland Laws Act, 1897 (Act No. 29 of 1897) of the Cape of Good Hope."

73 "21(1) All land of which the Trust is the registered owner or which has been transferred by the Trust to a native shall be deemed to be native areas for the purposes of sub-section (1) of section *twenty-five* of the Native Administration Act, 1927 (Act No. 38 of 1927), and of section *five* of the Native Affairs Act, 1920 (Act No. 23 of 1920), or any amendment thereof.

(2) The provisions of section *six* of the Native Administration Act, 1927 (Act No. 38 of 1927), and any amendment thereof shall apply to all land the title to which has been derived by any native from the Trust."

were referred to as "Native towns".[74] The Proclamation enforced segregation along racial and ethnic lines, and regulated how settlements in which African people would be entitled to live were to be established, and who could live there. It also specified strict conditions of residence and harsh controls to which residents and visitors would be subject.

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74 This much is apparent from the parliamentary statements made by the then Minister of Native Affairs, Dr HF Verwoerd on 13 June 1952 who, in opposition to the establishment of married quarters at the mines, said:

> "While we are already establishing Native towns in the vicinity of the big cities to provide housing for the Natives it will mean that in addition a large number of black spots will be spread out throughout that whole Free State mining area. Now we must bear in mind that when the mines stop working one day that large number of towns will remain there spread out over that area . . . The Department of Native Affairs has no jurisdiction over those Native towns on mining land. We do realize that the mines need a certain limited number of experienced married Natives such as boss boys but our view is that there should be married quarters only for those who are needed on the mines for night duties or for emergency duties. The others who are needed there but who need not live on the spot because of the nature of their work should find their accommodation in the neighbouring locations or in Native areas where locations may be established."
> (Hansard, Debates of the House of Assembly, vol 80, 1952)

It is thus no coincidence that Soweto is near Johannesburg, Katlehong near Germiston, Umlazi near Durban, Mdantsane near East London and Gugulethu near Cape Town, to name but a few.

[46] When the homelands were established they took over existing laws, including the Proclamation.[75] The Proclamation, insofar as it applied in these different areas, was amended on occasions by the relevant homeland legislatures,[76] and was also amended insofar as it applied in South Africa outside the homelands.[77] The Proclamation, therefore, though it retained its name, had different provisions operating in different parts of the country. Insofar as it was adopted and applied in Transkei, Bophuthatswana, Venda and Ciskei, it ceased to be South African law, and became part of the law of those "independent states".

[47] The most significant of the amendments made in respect of the different areas in which the Proclamation was in force was probably that made by section 4(3) of the Upgrading Act in 1991, which had the effect of removing from the Proclamation most of its more opprobrious provisions. The Upgrading Act was not, however, applicable in Bophuthatswana, and comparable amendments were not made by the Bophuthatswana legislature. When the interim Constitution came into force, therefore, the Proclamation insofar as it applied to areas of the North West that were formerly part of Bophuthatswana, contained provisions that were clearly inconsistent with the Constitution. When the President assigned the administration of the Proclamation to the North West he did not adapt or re-enact it, or make the assignment subject to the Upgrading Act. It is in this context that the Proclamation and its provisions must be considered.

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75 This was in terms of section 18 of the Bantu Homeland Act - see above n 11. It appears from Proclamation R9 that all the homelands inherited the Proclamation (see items 2(a) to (j) of schedule 1 to Proclamation R9).

76 See, for example, in Bophuthatswana, where it was amended by the Townships Regulations Amendment Act, 21 of 1981, and the Townships Regulations Amendment Act, 4 of 1982.

77 Proclamation No. R293 of 1962, as amended by Proclamations No. R211 of 1969, R161 of 1970, R264 of 1970, R222 of 1971, R150 of 1976, R34 of 1977, R178 of 1978, R200 of 1978, R197 of 1979, R153 of 1983 and R150 of 1986.

*The substance of the Proclamation*

[48] A review of the Proclamation discloses an orchestrated scheme for the establishment, management and regulation of informal townships and establishment of local government. It authorised the establishment of informal townships "for the occupation, residence and other reasonable requirements" of Africans.[78] It regulated who might lease or buy a house in the township. Occupation of houses in the township was based on ethnic affiliation and race, consistent with the Promotion of Bantu Self-government Act, 46 of 1959. It controlled every aspect of the lives of the residents of the townships, from birth to death. It regulated general sanitation (Chapter 4), the use of communal halls (Chapter 5), public meetings (Chapter 6), cemeteries (Chapter 7), and the establishment of township councils (Chapter 8). It created a range of criminal offences for those who failed to comply with its provisions. The purpose of this management and regulation of townships was to prepare ground for apartheid-based local governments in townships.

[49] The preamble to the Proclamation unfolded its objects thus:

> "Whereas the South African Native Trust constituted under section *four* of the Native Trust and Land Act, 1936 (Act No. 18 of 1936), has established and intends establishing further townships for the residence of Bantu on land situate in Bantu areas;
>
> And whereas it is the aim of the Government that a suitable form of local authority should be established for the control of the said townships by the Bantu inhabitants thereof;
>
> And whereas it is expedient that, until the State President is satisfied that the Bantu inhabitants have attained such degree of development as to warrant the introduction of such form of local government, interim regulations should be promulgated for the control

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78 Regulation 4(1) of Chapter 1. It is relevant to note that the language used in this regulation is similar to that used in section 2(1)(a) of the Native (Urban Areas) Consolidation Act of 1945.

of the said townships;

. . ."

and the entire Proclamation was geared to achieve the objects set out in its preamble.

[50] There can be no doubt that the establishment of a township necessarily involves planning where the township will be situated. While it would not always be appropriate to assign constitutional meaning to phrases on the basis of the prior meaning our legislation or case law assigned to them,[79] it is relevant for this case that in the pre-transition jurisprudence relating to provincial ordinances, the courts construed the power to establish a township to involve town planning. Thus in *Broadacres Investments Ltd v Hart*[80] the Appellate Division of the Supreme Court had to consider what was implied within the notion "The establishment and administration of townships". It said:

> "If the power is conferred to establish a township there is implicit a power to do at least elementary town planning, because without such planning there can be no township."

[51] The Proclamation made provision for the establishment and disestablishment of townships in "Bantu areas". As indicated above, "Bantu areas" fell largely outside of the urban areas and were in rural areas. It contained extensive regulations dealing with local government. On a view of the Proclamation as a whole, I am satisfied that its legislative scheme was in substance within the functional areas of regional planning and development, urban and rural development and local government. These are functional areas listed in schedule 6. It now remains to consider whether the impugned provisions of the Proclamation dealt with a matter

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79 *The Liquor Bill c*ase above n 55 at para 59.

80 1979 (2) SA 922 (A) at 931A-B.

listed in schedule 6.

*DID THE PROVISIONS OF CHAPTERS 1, 2, 3 AND 9 DEAL WITH ANY MATTER LISTED IN SCHEDULE 6?*

[52] Chapters 1, 2 and 3 clearly dealt with matters which relate to regional planning and development, urban and rural development, and local government. Chapter 1 dealt with the establishment and abolition of townships,[81] defined the ethnic character of the population of the township,[82] made provision for the publication of directions, notices and by-laws relating to the township,[83] and prescribed requirements for agreements of sale or lease in the township.[84]

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81 Chapter 1, regulations 4(1) and 12.

82 Id, regulation 5.

83 Id, regulation 6.

84 Id, regulation 9.

[53] Chapter 2 dealt with the appointment of officers who were to administer the townships,[85] the publication of the Proclamation,[86] the demarcation of sites,[87] the maintenance of beacons on sites,[88] sale or lease of sites,[89] conditions under which sites were to be allocated and occupied,[90] conditions under which houses owned by the Trust were occupied, including qualifications for leasing such houses,[91] conditions under which a site might be occupied, including qualifications for purchasing a site,[92] replacement of lost or destroyed certificates of occupation or deeds of grant,[93] sub-letting,[94] transfer of houses or sites,[95] prohibition on the sale, cession, assignment, pledge or donation of rights or interests in the house or a site in the township,[96] maintenance and repair of houses,[97] and the disposal of a certificate of occupation or a deed of grant upon the death of a holder or a grantee as the case might be.[98] In addition, it authorised township officials to require any person in the township to produce proof of his or her right to remain in the

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85 Chapter 2, regulation 1.

86 Id, regulation 2.

87 Id, regulation 3.

88 Id, regulation 4.

89 Id, regulation 6.

90 Id, regulation 7.

91 Id, regulation 8.

92 Id, regulation 9.

93 Id, regulation 10.

94 Id, regulation 11.

95 Id, regulation 13.

96 Id, regulation 12.

97 Id, regulation 14.

98 Id, regulation 15.

township,[99] made provision for the keeping of the register of the occupiers, and the issuing of lodgers permits.[100] It prohibited the building of any extensions to existing houses without a building permit issued by township authorities.[101] It made provision for housing loans by the Trust,[102] and prohibited gambling, entertainment, soliciting, indecent exposure, destruction of public property, damaging of fences and the making of fires.[103] It regulated slaughtering of stock, camping, cultivation, excavation and quarrying,[104] prohibited the obstruction of township officials, the disturbance of public peace, and the obstruction of traffic and persons,[105] regulated the keeping of animals in the township, the reporting of births, deaths and infectious diseases, the entering of premises by medical personnel and township officers, and the possession of dangerous weapons.[106] It made provision for the payment of rents and charges and prescribed actions that might be taken against defaulters,[107] and created offences for failure to comply with the provisions of the Proclamation.[108]

[54] Chapter 3 dealt with trade and prescribed conditions under which trade in the township might be carried out. In addition, it made provision for the allocation of trading sites, and the

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99 Id, regulation 16.

100 Id, regulations 18 and 19.

101 Id, regulation 20.

102 Id, regulation 21.

103 Id, regulations 26, 27, 28, 30, 31 and 32.

104 Id, regulations 29, 33, 34 and 35.

105 Id, regulation 36, 37 and 38.

106 Id, regulations 39, 40, 41, 42, 43 and 45.

107 Id, regulations 46, 47 and 48.

108 Id, regulation 50.

granting of deeds of grant in respect of the trading sites.[109] Chapter 9 made provision for the registration of deeds of grant. It established special deeds registries in the offices of the Chief Bantu Affairs Commissioners[110] and set out the duties of the officers in charge of these deeds registries.[111]

[55] The provisions of Chapter 2 and Chapter 3 that related to the granting of a limited form of "ownership" rights in land in the township and those that related to the registration of those rights in Chapter 9 dealt, on their face, with a form of land tenure, a matter not listed in schedule 6. However, as appears from what follows, they were essential to the scheme of the Proclamation.

[56] The purpose of establishing a township was to create and sell sites to Africans. In *Broadacres Investments Ltd v Hart* it was also said:

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109 Chapter 3, regulation 4.

110 Chapter 9, regulation 1.

111 Id, regulation 3.

> "To establish a township necessarily involves creating sites and selling them to the public or allowing that to be done."[112]

At 932E-F, it was further noted:

> "The establishment of a township necessarily involves both the creation of the township on paper, the lay-out of the land and the acquisition of sites by purchasers. In my view the provisions contained in s 36(2) of the Ordinance [27 of 1949] to expedite the process of changing a private township into an approved private township and the protection of purchasers who buy sites before such approval is given, are incidental to the establishment of a township and they are reasonable both in the interests of the Province and of prospective owners."

[57] The Proclamation made provision for the creation of sites and their acquisition by purchasers. It created a special form of "tenure" for those who acquired sites in the township in the form of deeds of grant. This title was only available to purchasers of sites in the townships. In addition, the Proclamation established special deeds registries in the offices of Chief Bantu Affairs Commissioners to register these special forms of tenure and created special procedures for the registration of the deeds of grant. These special provisions applied only to deeds of grant issued in respect of sites in the township. They were well integrated into the scheme of the Proclamation and they were important for the efficacy of the Proclamation.

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112 Above n 80 at 931H.

[58] I am satisfied that the "tenure" and deeds registration provisions of the Proclamation were inextricably linked to the other provisions of the Proclamation and were foundational to the planning, regulation and control of the settlements.[113] These provisions were an integral part of the legislative scheme of the Proclamation and accordingly fell within schedule 6.

[59] It now remains to consider whether the tenure and the registration provisions of the Proclamation dealt with matters referred to in paragraphs (a) to (e) of section 126(3) of the interim Constitution.

*DID THE TENURE OR REGISTRATION PROVISIONS OF THE PROCLAMATION DEAL WITH A MATTER REFERRED TO IN PARAGRAPHS (a) TO (e) OF SECTION 126(3)?*

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113 The Proclamation had a purpose that was fundamental to the apartheid plan. As its title openly declared, it contained "Regulations for the Administration and Control of Townships in Bantu Areas". Indeed an analysis of the regulations contained in the Proclamation indicates how complete and thorough this control was. It controlled who might enter, remain and acquire rights in the townships. Only a "fit and proper person" could purchase a home in the township, and that home had to be occupied "by the Applicant and his family". It was an offence to remain in the township unless one was an occupier of a house in a township or to allow someone who was not an occupier to remain in the township. Particulars of family members were to be furnished to the township authorities including any change in the marital status. Failure to do so was an offence. If you failed to occupy your house for more than two months, in the case of a rented house, or for more than twelve months, in the case of a purchased house, you could be evicted from your house. If you failed to pay rent, the superintendent, a junior officer, could evict you without a court order and dispose of your property to recover any sum due to the township authorities. You could not dispose of your rights in the house to anyone - it had to be someone approved by the authorities. If you wanted to carry out any extensions to your house you could not do so without permission and you had also to indicate why you needed more rooms.

[60] The only relevant provision is section 126(3)(b), which "deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic". A grant of land is the conventional form of transferring state land. The defining feature of a deed of grant under the Proclamation is the conditions attached to the grant. These conditions are part of a scheme designed to control and administer townships.[114] Harsh racist and sexist conditions are attached to a deed of grant.

[61] As indicated above,[115] town planning necessarily involves creating and selling sites to the public. The conditions to be applicable to a town planning scheme is a matter that must be determined by the province in the exercise of its town planning legislative competence. Such conditions may have to be informed by the local conditions, which differ from province to province. It is not a matter, in my view, that requires uniform norms or standards for it "to be performed effectively".

[62] The conditions are integral to the grant and the two cannot be administered independently of each other. I conclude, therefore, that the special tenure provisions of the Proclamation did not deal with any matter that is referred to in paragraphs (a) to (e) of section 126(3).

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114 See above n 113.

115 At paras 56 and 57.

[63] Different considerations, however, apply to the administration of the registration provisions. Proclamation R9,[116] read with the Deeds Registries Act, contemplates at least two things: first, the provisions of the Deeds Registries Act and the Proclamation would regulate the registration of the deeds of grant; and second, the special deeds registries established under the Proclamation were to continue to exist until discontinued in terms of section 1A(3) of the Deeds Registries Act. As pointed out above,[117] the special deeds registries established under Chapter 9 of the Proclamation were discontinued with effect from 14 April 1997. The provisions of Chapter 9 that dealt with their establishment have been repealed.

[64] Proclamation R9 brought about uniformity in the registration of all titles in respect of land, irrespective of the form of title and the statutory provision under which such title was granted. The need for the national system of deeds registration to be nationally administered cannot be questioned. To this extent, therefore, the administration of the registration provisions of the Proclamation, namely, regulations 1 and 3 of Chapter 1 and Chapter 9,[118] dealt with a matter in paragraph (b) of section 126(3). These provisions did not meet the criteria for assignment set out in section 235(6)(b) of the interim Constitution. It follows, therefore, that their administration was not assigned. Consequently, they did not constitute "provincial legislation" for the purposes of section 239 of the Constitution. In the event, the North West did not have the legislative competence to repeal those provisions.

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116 See above para 11.

117 Above para 12.

118 See above para 11.

[65] I am satisfied that the North West was constitutionally entitled to repeal the Proclamation, save regulations 1 and 3 of Chapter 1 and Chapter 9. Further, the repeal of the "tenure" provisions did not have the effect of taking away the rights of those who had already acquired deeds of grant. It is trite that the repeal of a law does not take away rights acquired under the repealed law.[119] In addition, sections 12(2)(b) and (c) of the Interpretation Act, 33 of 1957, provide that "the repeal [of a law] shall not . . . affect . . . anything duly done or suffered under the law so repealed" or "any right, privilege, obligation or liability acquired, accrued or incurred" under the repealed law.[120] It is clear from these provisions that people who were already in possession of deeds of grant at the time of the repeal are protected. In addition, persons who had acquired "any right" or "privilege" in the township prior to the repeal of the Proclamation are also protected. It is not necessary here to determine the nature and the extent of such rights or privileges. Finally, the deeds of grant are now registered in the Deeds Registry under the Deeds Registries Act, read with Chapter 9 of the Proclamation. They may be transferred, encumbered or hypothecated by holders thereof through the office of the Registrar of Deeds.[121]

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119 See *Mahomed NO v Union Government* 1911 AD 1 at 8, where the court said:

> "Now, the principle that (in the absence of express provision to the contrary) no Statute is presumed to operate retrospectively is one recognised by the civil law as well as by the law of England. The law-giver is presumed to legislate only for the future; and therefore a Statute which repeals another is considered not to interfere with vested rights under that other, unless it does so in clear terms."

120 Section 12(2) reads as follows:

> "Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not -
>
> (a) . . . .
>
> (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed;
>
> . . ."

121 See above para 12.

[66] In regard to the view expressed in the joint judgment that at times fairness may require that aspects of the old order should survive and be "kept alive pending their replacement by appropriate forms of the new", and that the repeal of the tenure provisions of the Proclamation has the effect of depriving "underprivileged communities from gaining access to a cheap form of land tenure", I would draw attention to the provisions of the Less Formal Township Establishment Act, 113 of 1991, and the Development Facilitation Act, 67 of 1995.

[67] Implicit in section 2(5) of Act 7, read with schedule 3 thereof,[122] is that the provisions of the Less Formal Township Establishment Act are applicable in the North West.[123] This statute makes provision for the development of less formal settlements and townships. It provides, among other things, "for shortened procedures for the designation, provision and development of land, and the establishment of townships [and] for less formal forms of residential settlement" and it also regulates the use of land by rural communities for communal forms of residential settlement. In the case of development of less formal settlements, it provides that laws regulating township development and planning are not applicable.[124] In addition, provision is made for the acquisition and registration of ownership in respect of an erf allocated to a person.[125] In the case

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122 Section 2(5) of Act 7 provides:

> "All transitional councils shall, within their areas of jurisdiction, exercise all the powers and perform all the duties and functions of a local authority in terms of the laws mentioned in the first column of Schedule 3 to the extent mentioned in the second column of Schedule 3."

Schedule 3, which lists applicable laws and the extent of the application of such laws as provided for in section 2(5), provides that, apart from sections 3(5), 9(2) and (3), 12(2A) and (3), 19(6A) and (7), and 26(2) and (3), the whole of the provisions of the Less Formal Township Establishment Act are applicable.

123 The administration of the Less Formal Township Establishment Act was assigned by the President to the provinces on 31 October 1994 under Proclamation R159 (*Government Gazette* 16049, 31 October 1994). At the same time the President made the provisions of this statute applicable in the national territory of the Republic.

124 Section 3(5)(e).

125 Section 9(1).

of less formal townships it provides for the exclusion of such laws if their application "will have an unnecessary dilatory effect on the establishment of the contemplated township or will otherwise be inappropriate in respect of the establishment of the township".[126] This statute, in my view, provides an accessible form of land tenure.

[68] The Development Facilitation Act provides a national framework for the development of land in urban and rural areas for residential purposes, and for the grant of land tenure rights. It "lay[s] down general principles governing land development throughout the Republic". In Chapter VII, the Act makes provision for the grant of land tenure rights and their registration with the Registrar of Deeds. It also makes provision for the upgrading of informal settlements and for the conversion of "informal or unregistered tenure arrangements" into ownership.[127]

[69] The North West legislature is itself a democratic institution and, in my view, it was fully entitled to make the legislative choice of repealing the Proclamation even if the effect of the repeal was to put an end to the apartheid-based form of tenure. What the North West is in effect saying by the repeal of the Proclamation is that in that province apartheid forms of tenure will no longer be available in future. I should have thought that the provisions of section 25 of the Constitution and the Upgrading Act are a clear indication that apartheid forms of land tenure that are legally insecure are no longer to be tolerated in our new democratic dispensation. The repeal of the tenure provisions is consistent with this policy. The North West was fully entitled to adopt a policy that future land development should be undertaken in terms of the Less Formal Township Establishment Act and the Development Facilitation Act.

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126 Section 19(5)(a).

127 Section 63.

[70] That the rights conferred by the deeds of grant were, and continue to be, of practical and commercial value to the holders thereof, cannot be gainsaid. They can be sold and inherited, subject to the approval of the township authorities. As indicated above, the holders of the deeds of grant are protected by virtue of the provisions of the Deeds Registries Act and Chapter 9 of the Proclamation, read with the provisions of the Interpretation Act. This, of course, does not prevent a province from adopting a policy to the effect that in future apartheid-based forms of land tenure will no longer be available, but that those who are already in possession of those titles can keep them and, where applicable, have them upgraded and converted into full ownership. This, in my view, is the effect of the repeal of the Proclamation.

[71] The constitutional challenge in the High Court was premised on the proposition that the North West lacked the competence to deal with land tenure, and, therefore, could not repeal the "tenure" provisions of the Proclamation. It was never contended that the repeal was constitutionally invalid because it interfered with existing property rights. The question whether the repeal does in fact interfere with existing property rights was therefore not canvassed in the papers or in argument, either in the High Court or in this Court. That question is therefore not before us. However, nothing said in this judgment prevents any person whose rights might be adversely affected by the repeal from approaching any court of competent jurisdiction to seek relief, if so advised.

*SUMMARY OF CONCLUSIONS*

[72] To sum up, therefore, I conclude that what was assigned pursuant to section 235(8) of the interim Constitution was the whole Proclamation save for regulations 1 and 3 of Chapter 1 and the provisions of Chapter 9 as amended by Proclamation R9 of 1997. These provisions dealt

with the registration of deeds of grant, a matter that is required to be regulated by uniform norms and standards, and thus a matter referred to in paragraph (b) of section 126(3) of the interim Constitution. When the Constitution took effect, the Proclamation, save for regulations 1 and 3 of Chapter 1 and the provisions of Chapter 9 as amended, was administered by the North West. It was, therefore, provincial legislation in terms of section 239 of the Constitution to that extent only. In the event, it was competent for the North West to repeal the whole Proclamation, but not the provisions of the Proclamation which it did not administer. The North West lacked the competence to repeal regulations 1 and 3 of Chapter 1 and the provisions of Chapter 9 as amended. It follows that the repeal of those provisions was unconstitutional. It is only to this extent that the order of the High Court must be confirmed.

*ORDER*

[73] The following order is therefore made:

> The repeal of regulations 1 and 3 of Chapter 1 and of the provisions of Chapter 9 of Proclamation R293 of 16 November 1962, as amended by Proclamation R9 of 24 January 1997, by section 6 of the North West Local Government Laws Amendment Act, 7 of 1998, is inconsistent with the Constitution and invalid.

NGCOBO J

Chaskalson P, Langa DP, Ackermann J, Mokgoro J, Yacoob J and Cameron AJ concur in the judgment of Ngcobo J.

MADALA J:

[74] I have had the benefit of reading the joint judgment prepared by Goldstone, O'Regan and Sachs JJ on the one hand and that prepared by Ngcobo J on the other in this matter, and have decided to air my own views as to how the matter should be determined. I align myself somewhat with the views expressed by Ngcobo J but hold a different opinion with regard to Chapter 9 of Proclamation R293 of 1962 (the Proclamation). The facts of this case are well catalogued in the judgment of Ngcobo J and accordingly I do not have to repeat them. For the reasons which follow, I am of the view that Chapter 9 also constituted provincial legislation which was validly repealed by the North West legislature.

[75] The issue is whether the North West provincial legislature had the requisite power to repeal the Proclamation or whether that is a national competence. To understand the legislation with which we are now grappling, it is, in my view, important to appreciate that it was a continuum in the process of separate development which had started before Union and had become pronounced with the coming into force of the Native Land Act,[1] (the 1913 Land Act). Under the 1913 Land Act, rights to acquire, rent or even share-crop land in South Africa depended on a person's racial classification.

[76] The 1913 Land Act continued the process of dispossessing black persons of land and put in place a system of land use and occupation which was calculated to be legally insecure, racially discriminatory and devised to obliterate investment opportunities for black persons, whether in urban or rural areas. Black people were to be accommodated in the urban areas only as temporary sojourners and contract workers who were expected to return to their rural homes on the expiry of their labour contracts or so soon as they were no longer in employment. In terms of this Act, the black majority population of South Africa was allocated 13% of the land while 87% went to the minority white population.

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[1] Act 27 of 1913, subsequently called the Black Land Act of 1913.

[77] This process was carried further by the Native Trust and Land Act,[2] (the 1936 Land Act) in terms of which black people lost even the right to purchase land in the reserves and were obliged to utilize land administered by tribal authorities appointed by the government. Black families who had owned land under freehold title outside the so-called reserves before 1913 were initially exempted from the provisions of the 1913 Land Act : this resulted in a number of so called "black spot" communities in areas designated for whites. Later they were the subject of further forced removals which took place between the 1950's and the 1980's.

[78] To a large extent, the government expelled most of these farmers to homelands and confined the remainder as tenants of the South African Development Trust which purchased farms occupied by white people for the consolidation and enlargement of areas occupied by blacks. Because of such dispossession, forced removals which had become the order of the day and the racially designed distribution of land and allied resources, and the weak land rights that remained, the whole issue of land became a source of tremendous conflict.

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2 Act 18 of 1936, now called the Development Trust and Land Act.

[79] Other Acts which aggravated the situation were the Natives (Urban Areas) Consolidation Act,[3] the Group Areas Act,[4] and the Natives Resettlement Act[5] - to mention but a few.

[80] Section 235(8)[6] of the interim Constitution granted the President the power to assign the administration of certain laws to a competent authority within the framework of section 126. The President exercised that power when he issued Proclamation 110 of 1994, and assigned the administration of certain laws, specified in the schedule to that Proclamation, to the relevant competent authority designated by the Premier of the North West Province. Among the laws which were assigned by the President was the Proclamation R293.

[81] The Proclamation sought, as stated in its preamble, to establish racially and ethnically

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3 Act 25 of 1945.

4 Act 41 of 1950.

5 Act 19 of 1954.

6 Section 235(8)(a) provides that :

> "The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the *Gazette* assign, within the framework of section 126, the administration of a law referred to in subsection (6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation."

exclusive townships and to institute:

> ". . . a suitable form of local authority . . . for the control of the said townships by the Bantu inhabitants thereof;
>
> And whereas it is expedient that, until the State President is satisfied that the Bantu inhabitants have attained such degree of development as to warrant the introduction of such form of local government, interim regulations should be promulgated for the control of the said townships;
>
> And whereas it is expedient to provide for the establishment of deeds registries and the registration of deeds in respect of land in such townships . . . "

In terms of the Proclamation, and because of the apartheid policies which it espoused, millions of black persons were pushed into overcrowded and impoverished reserves, homelands and townships. This resulted in endemic overcrowding, poverty and extreme pressure on resources, with the resultant social ills.

[82] The North West provincial legislature sought to repeal the whole of the Proclamation. Initially before this Court was the validity of the repeal of chapters 1, 2, 3 and 9 of the Proclamation. These chapters deal respectively with the following matters, among others:

Chapter 1 - establishment and abolition of townships, lease agreements.

Chapter 2 - township administration, allotment and occupation of sites, manner of dealing in deceased holders' property, registers of occupiers, lodgers' permits, cancellation of certificates and deeds of grant, control of traffic entering and leaving the township,

control of the use of water, and slaughtering of stock.

Chapter 3 - trading

Chapter 9 - establishment of deeds registries in the offices of the "Bantu" Affairs Commissioner with registrars of deeds and the registration of deeds of grant.

[83] I now deal in detail with the provisions that were repealed. The establishment of townships and their disestablishment as provided for in Chapter 1 of the Proclamation was in the hands of the Minister who could :

> "(a) define and set apart any one or more townships for the occupation, residence and other reasonable requirements of Bantu;
> (b) extend, curtail, redefine or otherwise modify any township;
> (c) abolish any township or any portion of a township".[7]

The townships so established had an ethnic character and persons who did not belong to a particular ethnic group were not permitted to become residents of such townships.

[84] Chapter 2 deals with the administration of townships, the designation of officers who must administer the township, namely the manager and the superintendent, who handles the allocation and occupation of sites in the townships, determining whether a person is a fit and proper person to reside in the township, the rent payable, lodgers' permits, soliciting, slaughtering of stock, control of traffic leaving or entering the townships and many other

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[7] Regulation 4(1) of the Proclamation.

administrative aspects.

[85] As has already been noted, Chapter 3 deals with trading, but this is confined to trade in the townships with the written permission of the "Bantu Affairs Commissioner". Schedule 6 of the interim Constitution enabled the Premier to make regulations in his or her province in respect of a fairly wide range of matters relating to businesses and business practices. In terms of both Parts A and B of schedule 4 of the Constitution, trade and trading regulations are entrusted to the provinces. Street trading is an exclusive provincial competence, in terms of Part B of schedule 5. In my view it is untenable that provinces could be entrusted with regulating trade, but be deprived of the power to amend the trading provisions in the Proclamation.

[86] The Proclamation made statutory provision for the creation of so-called "grant rights", which is a lesser form of ownership of immovable property. Chapter 9 deals with the establishment of deeds registries in the offices of Chief Bantu Affairs Commissioners. The purpose of the Proclamation was to grant blacks under the apartheid system title to property rights short of full ownership, by means of a deed of grant which Mogoeng J describes as a "peculiar equivalent to a title deed". The Proclamation, however, created a simple, speedy and inexpensive procedure in terms whereof deeds of grant could be registered. No township registers needed to be opened and the involvement of surveyors was largely eliminated, according to regulation 3(2) of the Proclamation.[8]

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[8] Regulation 3(2) provides:

> "Notwithstanding the provisions of subregulation (1), the provisions of the Land Survey Act, 1927 (Act 9 of 1927), shall not apply to the survey of land granted under these regulations and the provisions of the Deeds Registries Act, 1937 (Act 47 of 1937), shall not apply to the registration of any deeds in respect of any such land."

[87] I hold the view that this was a lesser form of land right than the traditional or conventional title deed because:

(a) the land was township land, held by the South African Development Trust;

(b) to qualify for a deed of grant one had to satisfy the manager and /or the superintendent that one was a fit and proper person to reside in the township;

(c) one graduated to the deed of grant through the permit-based occupation of land;

(d) one had to be "ethnically correct" to be issued with a deed of grant in a particular township;

(e) the deed of grant was registered in the deeds registry in the offices of the Chief Bantu Affairs Commissioner; and

(f) the deed of grant, as described also by Mogoeng J, is a "peculiar equivalent" to the title deed as we know it.

[88] A glance at the titles of the other chapters of the Proclamation reveals the topics with which they dealt:

(i) Chapter 4 - General Sanitation;

(ii) Chapter 5 - Communal Halls;

(iii) Chapter 6 - Public Meetings and Assemblies of Bantu Persons;

(iv) Chapter 7 - Cemeteries; and

(v) Chapter 8 - Township Councils.

These clearly are matters which fall within the functional areas of schedules 4 and 5 and

are therefore provincial competences.

[89] To decide whether the North West Province had competence to repeal the impugned provisions of the Proclamation, it is necessary to consider the essential nature of the provisions contained in the regulations. Mogoeng J in his judgment attempted to carry out this analysis when he looked for "predominating features" in the said chapters. One must analyse Chapters 1, 2, 3 and 9 of the Proclamation to determine whether the regulations therein fall within the functional areas listed in schedules 4 or 5 of the Constitution.

[90] The Western Cape Province and the Free State Province both agreed that there should be no confirmation, not even a partial confirmation, of the order of Mogoeng J. On behalf of the Western Cape Province it was submitted that the regulations in the Proclamation fall within two specific functional areas of concurrent provincial legislative competence in schedule 4 of the Constitution, namely housing and urban and rural development. The submissions made on behalf of the Free State Province were to similar effect, although they contended that numerous other functional areas listed in schedule 4 are also involved. In its written submissions, the Northern Province suggested a midway position, seeking a partial confirmation, submitting in this regard that the land tenure issues as contained in the Proclamation were national and not provincial competences.

[91] In my view, the Proclamation had all to do with the administration and the control of black people and nothing to do really with land tenure, because up to the 1990's it was government policy that black people should not own land in South Africa. In the townships and homelands the form of land rights was generally subservient, permit-based or held in trust. The

land was generally registered in the name of the South African Development Trust or as the property of the government. Some people had permission to occupy, others not; some had deeds of grant, others not. The administration of this land became inefficient and chaotic. In my view, the enactment of the Upgrading of Land Tenure Rights Act[9] was to ameliorate this state of affairs.

[92] The manner of administering land in black areas created land insecurity and made it difficult for people to protect their land, whether from confiscation or from invasion. Sometimes people or communities who had lived for many decades on land, regarding themselves as owners, did not have their ownership reflected in the title to the land because of racially discriminatory legislation.

[93] It is against this backdrop that one must consider the Proclamation. That it is a piece of obnoxious legislation not befitting a democratic society based on human dignity, equality and freedom admits of no doubt. This is acknowledged by all my colleagues. Goldstone, O'Regan and Sachs JJ hold the view that the repeal represents an invasion of land rights, weak and poor as they might be, and further hold that the repeal went quite beyond the legislative powers of the North West Province.

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9 Act 112 of 1991.

[94] In my view it is clear, in any event, that the necessity to rid the statute books of a separate system of land occupation or weak ownership which is discriminatory and offensive, is a constitutionally mandated priority.[10] The repeal by the North West Province is, in my view, consistent with the need to rid the country of discriminatory land laws. The Free State provincial legislature has already repealed the Proclamation.[11]

[95] The main argument advanced by the Northern Province, and reiterated by the other provinces, is that a distinction must be made between:

(a) Land tenure, relating to ownership of land, which is a national competency. Sections 25(6) and (7) of the Constitution, particularly when read in the context of the history of dispossession of rights to land, make it clear that the issue of land tenure is a national competence.

(b) Land use control which falls to be legislated on by the provinces either exclusively or concurrently:

(i) Schedule 5 areas of exclusive provincial legislative competence include

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10 Section 25(5) of Constitution provides:

> "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

11 Townships Ordinance Amendment Act, 10 of 1998.

provincial planning.

(ii) Schedule 4 areas of concurrent national and provincial competence include housing, regional planning and development, indigenous law and customary law, municipal planning, trading regulations, traditional leadership, and urban and rural development.

[96] The primary function of the Proclamation was to regulate land-use control as part of provincial planning. The creation and regulation of land tenure rights was accordingly "incidental to"[12] the achievement of this function. Accordingly, the North West Province correctly repealed the Proclamation as all the aspects dealt with in Chapters 1, 2, 3 and 9 thereof fall within provincial areas of competence.

[97] In my view the Proclamation cannot stand. It is inconsistent with the values espoused in our Constitution.

[98] I would accordingly decline to confirm any part of Mogoeng J's order.

GOLDSTONE, O'REGAN AND SACHS JJ:

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12 As contemplated by section 144 of the Constitution.

[99] This case arose because an accessible form of land tenure coupled with a cheap and speedy method of deeds registration provided for in Proclamation 293 of 1962 (the Proclamation) was repealed by the North West legislature. We concur in large measure with the majority decision of Ngcobo J. We have one significant point of difference. In our view, not only was it incompetent for the provincial legislature to repeal the registration provisions contained in chapter 9 of the Proclamation, it was also beyond its powers to repeal the system of land tenure, established in chapters 2 and 3 of the Proclamation, to which the special registration provisions in chapter 9 apply. In our view, these aspects of the Proclamation, like chapter 9, were never assigned to the province because they are matters which in terms of section 126(3) of the interim Constitution are to be regulated at national level. Accordingly, just as the majority judgment finds that the registration process provided for in chapter 9 was not assigned because it falls to be dealt with at national level, so we believe that the provisions establishing this special form of tenure in chapters 2 and 3 of the Proclamation were not assigned either.

[100] On 17 June 1994, acting under the provisions of section 235(8) of the interim Constitution,[1] the President assigned the administration of a substantial number of national laws, including the Proclamation, to the North West Province.[2] To the extent therefore that the Proclamation was assigned to the North West legislature it constitutes provincial legislation and the North West legislature is competent to repeal it. It is clear however that those provisions of

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1 Section 235(8)(a) provides that:

> "The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the *Gazette* assign, within the framework of section 126, the administration of a law referred to in subsection (6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation."

2 The relevant terms of the assignment are set out in para 27 of Ngcobo J's judgment. The assignment was published as Proclamation No. 110, dated 17 June 1994.

the Proclamation which do not fall within the functional areas referred to in schedule 6 of the interim Constitution[3] were not assigned. Furthermore, even if the provisions fall within such functional areas, such provisions could not have been assigned if they concern matters which, in terms of section 126(3)(a) to (e) of the interim Constitution,[4] must be dealt with by national government.

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3 The text of schedule 6 is set out in full in para 32 of Ngcobo J's judgment.

4 These provisions are set out in full in para 31 of Ngcobo J's judgment.

[101] Ngcobo J has eloquently described the contents of the Proclamation.[5] We agree with his analysis of the history of the Proclamation and its provisions. Our disagreement with him is on the narrow question of whether the provisions in chapter 2 and 3 of the Proclamation which establish the deed of grant tenure were assigned. Regulation 9 of chapter 2 provides the following:

> "(1) Any person who is the head of a family and desires to purchase from the Trust a site in the township on which he is to erect his own dwelling, or on which a dwelling has been erected by or belonging to the Trust, for occupation by him and members of his family for residential purposes, shall apply for a deed of grant in respect of such site.
>
> (2) The Secretary on being satisfied that—
>
> (a) a suitable site, which has not been reserved for some other purpose, is available;
>
> (b) such site will be occupied by the applicant and his family;
>
> (c) the applicant is a fit and proper person to reside in the township;
>
> (d) the applicant is not otherwise debarred by these regulations from acquiring the site;
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> (e) adequate arrangements have been made for the payment of the purchase price of the site;
>
> (f) a deed of sale substantially in the form set out in Schedule E to these regulations has been entered into,

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[5] In para 48 Ngcobo J provides an overview of the Proclamation; in para 49 he describes the preamble to the Proclamation; in para 52 he describes chapter 1; in para 53 he describes chapter 2; and in para 54 he describes chapters 3 and 9 briefly. The remaining chapters provided for the following matters: sanitation (chapter 4); communal halls (chapter 5); public meetings (chapter 6); cemeteries (chapter 7) and township councils (chapter 8). The only provisions giving rise to disagreement in this case are provisions in chapter 2 (township administration) and 3 (trading).

> may issue to such applicant a deed of grant in respect of such site and may impose in respect of such site such servitudes as he may deem fit. Such a deed of grant shall be substantially in the form set out in Schedule F to these regulations.
>
> . . ."[6]

Regulation 23(2) of chapter 2 makes it clear that the tenure afforded by the deed of grant is insecure. It provides that:

> "The Minister may, upon such conditions as to the removal of improvements or the payment of compensation, or both, and in the case of an ownership unit in respect of which a mortgage bond is registered, after such prior notification to the mortgagee, as he may in his discretion approve, declare the deed of grant of an ownership unit forfeited and such unit shall thereupon revert to the Trust, free of all restrictions, endorsements or encumbrances—
>
> (a) in the event of a breach by the grantee of any of the conditions of the deed of grant other than a condition relating to the payment of any fees, charges or rates;
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> (b) if any instalment of the purchase price of the unit remains unpaid for a period of three months from the date on which such instalment became payable;
>
> (c) on the grantee failing to pay any sum for which he may be liable in terms of this chapter within two months of the date on which such sum became due and payable;
>
> (d) if the grantee obtained such deed of grant by making a false, incorrect or misleading statement material to the issue thereof;
>
> (e) if the grantee abandons or fails to occupy the site bona fide for residential purposes for a period in excess of twelve months after the date of first occupation of such site by such grantee unless he shall have obtained prior

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[6] An equivalent provision regulating deeds of grant in relation to sites for trading purposes is to be found in chapter 3, regulation 4.

written permission from the Manager to absent himself in excess of the said period."[7]

[7] The equivalent provision relating to trading sites is to be found in chapter 3, regulation 21(2).

It is plain from a reading of regulation 23(2) with regulation 9 that the deed of grant is an insecure form of tenure. Nevertheless, chapter 9, regulation 3 of the Proclamation provides for the registration of deeds of grant and for the registration of mortgage bonds against them.[8] The majority have held that chapter 9 falls outside the terms of the assignment but regulation 9 and 23 of chapter 2 (and the equivalent provisions in chapter 3) do not. We disagree.

[102] There is much to be said, in our view, for the proposition that the provisions in the Proclamation which regulate these deeds of grant are provisions regulating matters which fall outside schedule 6 of the interim Constitution. It is clear that "land tenure and registration" are not functional areas within the scope of schedule 6 as Mogoeng J observed.[9] We accept that regulating the allocation of sites for trading and residential purposes are matters which fall within the functional areas of local government and/or urban development. Similarly, we accept that establishing a township involves creating sites and selling them or leasing them to the public and even attaching specific conditions to title.[10] However, the proposition that it is an integral part of local government or urban development to establish specific and limited forms of land tenure or procedures for their registration, seems much less certain. In our view, the functional

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8 See also chapter 9, regulation 8.

9 See page 9 of the typescript judgment.

10 See Ngcobo J's judgment at para 56 and *Broadacres Investments Ltd v Hart* 1979 (2) SA 922 (A) at 931H.

area of urban development requires the process of land alienation and allocation within the framework of the land tenure and registration system provided nationally. We find it hard to accept that establishing novel forms of land tenure or registration is an aspect of the functional area concerned with local government or that concerned with urban development.

[103] It is not necessary for us to decide that question in this judgment, however. For it is our firm view that even if these specific provisions do fall within a functional area listed in schedule 6, they are nevertheless matters which require regulation at national level and according to uniform norms. One of the clear purposes, and indeed one of the most devastating effects of apartheid policy, was to deny African people access to land. Where access to land was afforded, tenure was generally precarious. It is not surprising then that the Constitution recognises this deep injustice. Section 25 of the Constitution (the property rights clause) provides as follows:

> ". . .
>
> (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
>
> (6) 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.
>
> (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
>
> . . ."

It is thus clear that the national legislature is placed under an obligation to provide redress

through legislative means for the discrimination which happened in the past.[11] Furthermore, and of particular relevance in this case, it is obliged to seek to transform legally insecure forms of tenure into legally secure tenure. The clear corollary, in our view, is that section 25(6) does not contemplate that insecure forms of land tenure arising from discriminatory legislation in the past may be abolished or reformed by any legislature other than Parliament.

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[11] Although section 25 is not a provision of the interim Constitution which determines which provisions of the Proclamation were assigned in the present case but a provision of the 1996 Constitution, it is in our view nevertheless relevant to determining the proper ambit of that assignment. Constitutional Principle XVIII.2 (contained in schedule 4 to the interim Constitution) stated that provincial powers under the 1996 Constitution could not be "substantially less than or substantially inferior to" the powers under the interim Constitution. In our view section 25 elaborates in express terms what was implicit in the interim Constitution. In neither Constitution was land tenure allocated to the provinces. Section 25 provides expressly that land tenure, in so far as it is concerned with equitable access to land, is a matter reserved for national government. There is no reason to suggest that the position under the interim Constitution was any different.

[104] It is logical that section 25(6) of the Constitution imposes the obligation of land tenure reform on the national legislature. The myriad apartheid land laws, all characterised by pedantic detail, created a labyrinthine system. The chaotic nature of this system was further compounded by the creation of the homelands, each with its own legislative provisions. The geographical location of those homelands has relatively little connection with current provincial lines. Some provinces have within their boundaries parts of two or more homelands. The complex legislative pattern that emerges renders the task of land reform a task that only the national legislature can undertake. The process of land registration is already a matter unequivocally dealt with in national legislation, namely the Deeds Registries Act (the Deeds Act).[12] The regulation of land tenure and registration, including land reform, are matters which require uniform regulation across the Republic and which therefore cannot be effectively regulated by provinces as contemplated by section 126(3)(a) to (e) of the interim Constitution.

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12 Act 47 of 1937.

[105] The deeds of grant introduced by the Proclamation are insecure forms of land tenure. That is not surprising. As part of apartheid policy, a range of insecure forms of land tenure were created for Africans. In 1991, during the period of transition from apartheid to democracy, Parliament passed the Upgrading of Land Tenure Rights Act (the Upgrading Act).[13] The express purpose of this legislation, as its name suggests, was to provide for the conversion into full ownership of the tenuous land rights which had been granted during the apartheid era to Africans. One of the forms of tenure targeted for upgrading is the deed of grant established by the Proclamation. When the Upgrading Act was introduced, it was not applicable in Bophuthatswana[14] but it was extended to Bophuthatswana on 28 September 1998 by the Land Affairs General Amendment Act,[15] which made provisions of the Upgrading Act applicable throughout South Africa. Deeds of grant[16] in some but not all townships were converted into ownership in terms of the provisions of section 2(1) of the Upgrading Act. Section 6(1) of the Upgrading Act provides, in effect, that the land tenure and registration provisions of the Proclamation will continue to apply in townships in respect of which no general plan has been approved or in respect of which a township register has not been opened in a deeds registry established under the Deeds Act. It is clear that in this case, the relevant township in the North West province, Meriteng, is not a township in respect of which a township register has been opened. At this stage, therefore, the provisions of the

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13 Act 112 of 1991.

14 The Upgrading Act was also not applicable in the other former "independent homelands" — Transkei, Venda and Ciskei.

15 Act 61 of 1998, which inserted section 25A in the Upgrading Act.

16 Which are included in the definition of "land tenure right" in section 1 of the Upgrading Act which reads as follows:

> "'land tenure right' means any leasehold, deed of grant, quitrent or any other right to the occupation of land created by or under any law . . .".

Proclamation would, but for their repeal, still apply there.

[106] Moreover, in terms of the Upgrading Act the Proclamation continues to provide a method of acquisition of tenure which is cheap and accessible in those townships to which it applies and which may be upgraded to freehold. Read with the Upgrading Act, therefore, the tenure and registration provisions of the Proclamation constitute a cheap and straightforward mechanism for providing access to land to people in townships which may in due course become freehold tenure. We cannot agree therefore with the view expressed by Ngcobo J where he states at paragraph 9 that it is implicit within the Upgrading Act that limited forms of title were to be phased out and that only those who already had such titles would be permitted to upgrade them. If that were indeed the purpose of the Upgrading Act, it would not have contemplated that limited forms of title in terms of the Proclamation (and other similar measures) would continue to be granted and then upgraded as cadastral requirements for upgrading were met. In our view, the Upgrading Act is not only a measure which transforms existing insecure title to freehold but is one which permits the continued granting of those forms and their upgrading. It is a measure which, in the language of section 25(5) of the Constitution, "foster[s] . . . access to land" by South African citizens in disadvantaged communities.

[107] In our view, therefore, matters relating to land tenure and registration in the context of land reform are matters which in terms of section 126(3)(a) to (e) of the interim Constitution are to be dealt with by national government. The provisions of the Proclamation which provide for an insecure form of land tenure therefore, together with the land registration provisions governing it, are matters which in our view were not capable of assignment to the provinces because they fall within the terms of section 126(3)(a) to (e) of the interim Constitution.

[108] In our view, therefore, the North West province did not have the competence to repeal the provisions of the Proclamation relating to land tenure because those provisions were not (and could not have been) assigned to the province to administer in terms of section 235 of the interim Constitution. In the circumstances, it follows that Mogoeng J was correct (albeit for somewhat different reasons) in holding that the repeal of the land tenure rights contained in Chapters 1, 2, 3 and 9 of the Proclamation was beyond the powers of the North West legislature. In our view, therefore, the order granted by Mogoeng J should in substance be confirmed.

[109] We make two final observations. The first is that the difference in practice between our judgment and that of the majority may well be narrow. Both judgments accept that rights already acquired under the former system of land tenure have not themselves been abolished and that they can be transferred, bequeathed and used for mortgage purposes. Moreover, because it is common cause between us that the repeal of Chapter 9 has to be invalidated, the accessible system of registration of such acquired rights as provided by that chapter would still exist. However, the effect of the majority judgment will mean that such rights may not be granted in future. The speedy and accessible form of registration coupled with the deed of grant tenure is no longer available in the North West. For the reasons given above, we think this result is in conflict with the constitutional scheme in terms of which land tenure reform and the manner in which it is achieved is a matter reserved for national government.

[110] The second is that jurisprudence of the transitional era necessarily involves a measure of contradiction. Fundamental fairness at times requires that aspects of the old survive immediate obliteration and are kept alive pending their replacement by appropriate forms of the new. In the

*Mpumalanga* education case[17] this Court said:

> "This case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured."

The result in that case was to perpetuate, during a short transitional period, the privileges of the advantaged. In the present matter, the meritorious desire manifested in the majority judgment for a clean sweep of the past in the name of modernisation and de-racialisation has an unintended and ironic consequence. It deprives underprivileged communities from gaining access to a cheap form of land tenure which in terms of national legislation can be upgraded to freehold. The Constitution requires government to foster access to land. The repeal of the Proclamation by the North West province, in one sense at least, does the reverse.

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17 *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 1.

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| For the Western Cape Provincial Government: | AM Breitenbach instructed by the State Attorney, Cape Town. |
| For the Free State Provincial Government: | WH Olivier SC instructed by the State Attorney, Bloemfontein. |
| Amicus Curiae: | P Kennedy appointed by the Johannesburg Bar Council. |