

Explanatory Note

---

*The following explanation is provided to assist the media in reporting this case and is not binding in the Constitutional Court or any member of the Court.*

Although the Court was divided on the outcome, all the judges accepted the following summary of the issues in this case: The apartheid law in question was Proclamation R293 of 1962, 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. That Act was one of two infamous statutes 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 conveyed the demeaning and racist nature of the system of which it was a part. There could 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 and on that account unconstitutional. Its terms were a timely reminder of where we had come from and the progress we had made in our transformation to democracy.

The issues in this case arose from the enactment by the legislature of the North West Province of the North West Local Government Laws Amendment Act, 7 of 1998, section 6 of which purported to repeal the Proclamation in its entirety. In the Bophuthatswana High Court, the applicant, DVB Behuising (Pty) Limited, challenged the constitutional validity of that section, contending that the purported repeal of certain provisions of the Proclamation was beyond the legislative competence of the North West. The result, it claimed, was to make it impossible for persons to whom it had sold houses in a township established under the Proclamation, to have their deeds of grant registered, or to get bank loans on their properties. Mogoeng J upheld the application, holding that the purported legislative repeal dealt with a question of land tenure, which fell exclusively within the competence of the national legislature. He declared the repeal to be invalid to that extent, and his judgment was referred to this Court for confirmation.

Writing for a majority of the Court, Ngcobo J refused to confirm the order of invalidity made by Mogoeng J, except insofar as it related to provisions concerning registration of title. In his view, the Proclamation dealt with a number of matters, some to do with regional planning and development, rural and urban development and local government, others related to the registration of land tenure rights. While the province did have the power to repeal the Proclamation insofar as it related to regional planning and development, rural and urban development and local government, it did not have the power to repeal provisions relating to the registration of title. This, latter, he held, was a matter that required to be regulated by the national sphere of government in order to provide uniformity throughout the country. It was therefore competent for the North West to repeal the whole Proclamation, save for those provisions that dealt with registration of title.

He stated that the North West Province, as a democratic government, was entitled to repeal the racist provisions of the Proclamation in order to bring an end to apartheid forms of ownership rights in land so that their local government laws could be brought into line with the new constitutional order. The repeal of the Proclamation would not have a negative impact on anyone, since the holders of deeds of grant were already protected by the deeds registration laws. In addition, prospective applicants could still acquire similar rights in land under more recent national statutes. These made provision for the development of less formal settlements and townships and provided a national framework for the development of land in urban and rural areas for residential purposes, as well as for the grant of full rights and upgrading of lesser rights of ownership in land.

Agreeing with the general tenor of the majority judgment, but dissenting jointly on one aspect, Goldstone, O'Regan and Sachs JJ expressed doubt as to whether the tenure provisions in the Proclamation were indeed provisions that could have been assigned to the North West Province. They stated that in any event, all the matters in issue related to land tenure, required uniform regulation across the Republic and therefore could not be regulated effectively by provinces. They emphasised the complexity of the task of land reform, the constitutional obligation placed on the national legislature to provide redress by legislative means for past discrimination in relation to land, and read section 25(6) of the Constitution to imply that insecure forms of land tenure arising from discriminatory legislation in the past could not be abolished or reformed by any legislature other than Parliament.

In their view, the jurisprudence of the transitional era necessarily involved a measure of contradiction, so that fundamental fairness at times required that aspects of the old had to survive immediate removal from the statute books and be kept alive pending their replacement by appropriate forms of the new. They saw the meritorious desire manifested in the majority judgment for a clean sweep of the

past in the name of modernisation and de-racialisation, as having an unintended and ironic consequence - depriving underprivileged communities from gaining access to a cheap form of land tenure that in terms of national legislation could now be upgraded to full ownership. They would accordingly uphold the substance of Mogoeng J's order.

Madala J dissented from the majority on a different aspect. In his view, the Provincial legislature had the power to repeal the whole of the Proclamation since its land registration provisions were incidental to its planning provisions. He stressed that the overarching purpose of the Proclamation was to establish and administer racially and ethnically exclusive townships. Although the section in question provided for the establishment of deeds registries for the registration of deeds of grant (and other land rights), and thus created certain land tenure rights, it had to be read in the context of the whole of the proclamation, which was primarily aimed at the administration and control of black people. The function of the Proclamation was to regulate land use control as part of provincial planning, which was within the provincial legislative competence. The creation and regulation of land tenure rights was accordingly 'incidental to' the achievement of this purpose and the repealed part could not be separated from the rest of the Proclamation. He would hold that the land registration provisions were validly repealed along with the rest of the Proclamation and accordingly decline to confirm any part of Mogoeng J's order.