

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 11678/2006

In the matter between:

STEPHEN SEGOPOTSO TONGOANE	First Applicant
PHAHLELA JOAS MAGAKULA	Second Applicant
MORGAN MOGOEELWA	Third Applicant
RECKSON NTIMANE	Fourth Applicant

And

THE NATIONAL MINISTER FOR AGRICULTURE & LAND AFFAIRS	First Respondent
THE NATIONAL MINISTER FOR PROVINCIAL & LOCAL GOVERNMENT	Second Respondent
THE PREMIER OF EASTERN CAPE	Third Respondent
THE PREMIER OF FREE STATE	Fourth Respondent
THE PREMIER OF GAUTENG	Fifth Respondent
THE PREMIER OF KWAZULU-NATAL	Sixth Respondent
THE PREMIER OF MPUMALANGA	Seventh Respondent
THE PREMIER OF NORTHERN CAPE	Eighth Respondent
THE PREMIER OF LIMPOPO	Ninth Respondent
THE PREMIER OF NORTH WEST	Tenth Respondent
THE PREMIER OF WESTERN CAPE	Eleventh Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Twelfth Respondent
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Thirteenth Respondent
THE NATIONAL HOUSE OF TRADITIONAL LEADERS	Fourteenth Respondent

JUDGMENT

LEPWABA, J

[1] The order sought by the applicants is that the Communal Land Rights Act 11 of 2004 (CLARA) alternatively, certain sections thereof, mentioned in the notice of motion some of which will be dealt with in detail latter in this judgement and sections 5 and 20 of Traditional Leadership and Governance Framework, Act 41 of 2003 (the TLGFA) be declared unconstitutional and invalid. Further that the word 'role' in section 20 of the TLGFA is to be read wherever it appears as "customary, non-governmental role".

[2] The four applicants herein represented various communities and for the proper understanding of the issues in this matter I will hereunder quote some of the historical backdrop of the said communities which have been eruditely summarised by the applicants' counsel in their heads of argument on pages 20-39 as follows:

"THE KALKFONTEIN COMMUNITIES

1. The first applicant, Mr Tongoane, brings this application on behalf of what is known as the Kalkfontein B & C community. That community consists of the heirs of a group of African people who, as co-owners, purchased the land in private ownership in the early part of the 20th century. The land consists of two farms which are colloquially known as Kalkfontein B & C, in the province of Mpumalanga.
2. The ownership of the original co-purchasers and the heirs has always been exercised through a trust arrangement. This was imposed by racial practices which prevailed at the time when the properties were originally acquired. At that time, the trustee imposed on the co-purchasers was the Minister of Native Affairs. The trusteeship changed at various times as government structures changed, and in due course the Minister of Agriculture and Land Affairs (the first respondent) became the trustee, in her official capacity.
3. The farm known as Kalkfontein B was purchased by a group of 30 co-purchasers in 1924. One of the purchasers was the grandfather of the first applicant. The Deed of Transfer No 545 of 1924 reflects the official name of the farm-Remaining Extent of Portion marked "A" of the Quitrent Farm Kalkfontein No 570 -and the names of the purchasers. This farm is now commonly known as Kalkfontein B.
4. The same group of co-purchasers then acquired another farm, in terms of Deed of Transfer No

2199/1925. That deed of Transfer records the official name of the farm - Portion 1 of Portion "A" of the Farm Kalkfontein No 570 - and the names of the purchasers. That land is known as Kalkfontein C

5. The apartheid government subsequently placed the land within the area of jurisdiction of the Pungutsha Community Authority, which was established in terms of section 21(a)(ii) of the Black Authorities Act 68 of 1951. The land was thereafter, in 1978, placed within the area of jurisdiction of the newly created Ndzundza (Pungutsha) tribal authority.

6. There have been a number of disputes between the Kalkfontein B & C community and the tribal authority which was given jurisdiction over the area which includes the community's land.

7. As a result of various complaints of misconduct by members of the imposed tribal authority, a commission of enquiry (the Kruger Commission) was established to investigate the matter. The commission found that the irregularities set out below had indeed taken place. It recommended that Daniel Mahlangu's recognition as a chief be withdrawn, and that consideration be given to the disestablishment of the Ndzundza (Pungutsha) tribal authority.

8. Some of the irregularities related to money. They included the following:

8.1 There was widespread unlawful collection of funds using the chiefs position, and diverting them for his own use. These included funds for "chief's protection", "chief's lobola", "chiefs residence", "celebration fees" and "chiefs petrol". The chief also unlawfully collected money from pensioners.

8.2 Bank accounts were unlawfully opened in the name of the tribe instead of depositing tribal authority funds into the trust account regulated by the local magistrate.

8.3 Tribal levies were collected at the rate of R50 per annum when the official gazetted rate was R5 per annum.

8.4 Pensions of pensioners were cancelled when they refused to make payments to the chief which had been unlawfully demanded.

8.5 The chief used his position to monopolise business opportunities.

8.6 Generally the tribal authority failed to account on financial matters.

9. The irregularities relating to land, which undermined the community members' security of tenure, included the following:

9.1 Many outside families were settled on the farms without the consent of the co-purchasers of the land or their heirs. Those settler families have built permanent homes

on the land, where they have been grazing their cattle, cultivating the land and burying their dead.

9.2 Roads were built for the new settlers using gravel that had been dug from a quarry established in the middle of Kalkfontein B & C.

9.3 A police station was built on the land belonging to Kalkfontein B & C.

9.4 A dam wall which had previously demarcated the boundary between Kalkfontein A on the one hand, and Kalkfontein B & C on the other, was partially destroyed in order to consolidate the control of the tribal authority over the areas.

9.5 Land was unlawfully taken for the building of homes, the chief taking seven stands for himself, without the permission of the co-owners of the land.

9.6 Persons were prevented from building houses on land where they were the lawful successors in title to the original co-purchasers. In certain instances, where houses had been built without the chiefs consent, people were detained under the emergency regulations.

9.7 The chief allowed his brother to build a dairy on land permanently allocated to an heir of the original co-purchasers of the land. When the heir questioned this he was fined.

9.8 A surgery was built on the land without compensation being paid to the owners of the land.

9.9 Furrows were constructed, which have caused the flooding of some houses.

10. In addition to the use of unlawful detention as a means of punishment for resistance to the authority, there was also shooting of one of the members of the community, illegal use of a firearm and a public flogging.

11. After the Commission had issued its report, the particular chief was deposed in line with its recommendations. However, the tribal authority has continued to exist and to assert jurisdiction and authority over Kalkfontein B & C

12. As a result of the disputes, the heirs of the co-purchasers of Kalkfontein A, B and C brought legal proceedings against the tribal authority and the "Acting Chief, Mr S A P Mahlangu. The other respondents were the Chief Minister of KwaNdebele, the Minister of regional and Land Affairs, and the Kwandebele National Development Corporation. The third applicant was the father of the present first applicant.

13. The application culminated in the grant of an order by this Court, under Case No: 17808/92. The order was ultimately granted unopposed by the respondents. The order speaks for itself: it included the following:

13.1 The tribal authority, the "Acting Chief and the

Chief Minister of KwaNdebele were interdicted from:

13.1.1 permitting any persons to occupy the

land, whether for commercial; industrial; agricultural or residential purposes;

13.1.2 performing any action which will alter

the character of the land without the written consent of the Kgotla of the community resident on the land.

14. The respondents were interdicted and restrained from continuing with the construction of certain

roads and from excavating sand and stone from the land for the purposes of the roads, without the necessary consent as aforesaid.

15. The respondents were interdicted from establishing an industrial park on Kalkfontein A and B.

16. It was declared that the Minister of Regional Land Affairs was no longer entitled to hold the land as registered representative of the purchasers or their heirs by virtue of the abolition of the Black Land Act 27 of 1913.

17. It was declared that the original purchasers or heirs of the original purchasers were entitled to the transfer and/or registration of the farms referred to in the Notice of Motion in their name, either individually or collectively in a manner and fashion to be determined once the identity of the various heirs had been finally established.

18. The Kalkfontein B and C community formed the Kalkfontein B & C Community Trust to take transfer of the property. Administrative efforts to secure the transfer of the land pursuant to the court order failed. A new application was launched to the Land Claims Court under section 3 of the Restitution of Land Rights Act No. 22 of 1994. Pursuant to that application an order was granted directing that the first respondent transfer the land to the Kalkfontein B & C Community Trust.

19. Subsequent to the filing of the replying affidavits in this application, the Kalkfontein B & C farms were duly transferred to the Kalkfontein B & C Community Trust in terms of Deed of transfer 7890/2008 dated 23 May 2008.

THE MAKULEKE COMMUNITY

21. Historically, the Makuleke community occupied approximately 26 500 hectares of land known as the Pafuri Triangle in what is now the Limpopo Province.

22. During 1969, the Makuleke community was subjected to a forced removal. The greater part of the Pafuri land was incorporated into the Kruger National Park. The remainder was incorporated into the Madimbo Corridor where it was used primarily for

purposes of border defence, and into the homeland of Venda.

23. The community was removed to Portion of the Farn Ntlhaveni 2 MU, which was later incorporated into the homeland of Gazankulu. When this happened, the) were moved into the area of jurisdiction of the Mhinga tribal authority, the Chief of which was Adolf Mhinga.

24. Instead of being appointed as a chief, which was his rightful position according to customary rules, the second applicant was appointed as a headman under the Mhinga tribal authority.

25. This has been an ongoing source of considerable tension in the community, affecting the educational, economic, social, health and welfare development of the Makuleke community.

26. Since the Makuleke community has been under the jurisdiction of the Mhinga Tribal Authority, the latter has abused its powers, thereby undermining the security of tenure of the community.

27. As a result, the Ralushai Commission (whose task was to investigate instances where legitimate traditional leaders had been banished, deposed or driven into exile during apartheid) recommended that the second applicant be reinstated as chief of the Makuleke community.

28. The irregularities include the following:

28.1 The successor to Adolf Mhinga, namely Acting Chief Cedric Shilungwa Mhinga has been giving people permission from as far away as Vendaland to graze their cattle on the Makuleke lands, without consulting the community;

28.2 The headman appointed for block H, one Nwamba, allocated sites that belong to Makuleke

people, to outsiders who do not accept the authority of the Makuleke tribal council.

28.3 In one instance Nwamba reallocated a site with a house on it, which belonged to a member of the Makuleke community, to an outsider.

28.4 Nwamba arrested Makuleke women who were collecting firewood, and who were within their rights to do so as this was dry wood. Nwamba restricted the rights of these women to collect firewood because he sells firewood to outsiders.

29. As a result of the tensions between second applicant and the Mhinga tribal authority, the former's salary was suspended.

30. The recommendations of the Ralushai Commission have never been implemented. Consequently the Makuleke community is still under the rule of the Mhinga tribal authority. That authority is now recognised as a traditional council for the purposes of

the Traditional Leadership and Governance Framework Act (the TLGFA), in terms of section 28(4) of that Act. By contrast, the Maluleke tribal council which was never statutorily recognised despite representations to the various authorities, does not become a traditional council under the new legislation.

31. After the enactment of the restitution of Land Rights Act 22 of 1994, the Maluleke community lodged a claim for restoration of their land in Pafuri Triangle. The claim was opposed by Mhinga. It was successfully resolved by way of a settlement agreement, which provided for restoration of the land to a Communal Property Association formed by the Maluleke community. On 15 December 1995, the Land Claims Court approved the settlement agreement, which was made an Order of Court.

32. Pursuant to the settlement agreement and order, the claimed land was transferred to the Maluleke Communal Property Association (CPA) by way of Deed of Grant No T135289/99. The land transferred is 22 733 hectares in extent. It is a term of the settlement agreement that the Maluleke community will not re-occupy Pafuri, but will co-manage the land with the South African National Parks for eco-tourism project. This is being done, in order to alleviate poverty, provide employment and revenues, and remedy the negative effects that the force removal had on the livelihoods of the Maluleke community, while at the same time respecting the protected status of the area.

33. Co-management of the land takes place through a Joint Management Board which is made up of the CPA and SA National Parks on a 50/50 basis. The Board has prepared a "Master Plan for the

Conservation and Sustainable Development of The Makuleke Region". This was completed in 2000 with the assistance of donor funding, which covered the cost of employing an ecologist to work with the board on the drafting of the management plan. The CPA has since concluded major agreements with two private sector companies to build and jointly manage two up-market lodges. Ultimately ownership of these lodges will be transferred to the community. Implementation of these agreements is already under way.

34. Divesting the CPA of ownership will completely disrupt the carefully constructed contractual and land management functions which have been put in place. There are a number of other contracts, including for donor funding, which have been entered into on the basis of the long term ownership of the land by the CPA.

THE MAKGOBISTAD COMMUNITY AT MAYA YANE

38. The members of the Makgobistad community belong to the Barolong boo Ratlou ba ga Mariba of Makgobistad. They established land rights in respect of land at

Mayayane, which is some distance from Makgobistad village. The Motsewakhumo tribal authority was established for the Barolong boo Ratlou ba ga Mariba tribe in terms of the Bantu Authorities Act 68 of 1951. The tribal authority is now recognized as a traditional council in terms of section 28(4) of the TLGFA.

39. The tenure security of members of the community farming at Mayayane has been undermined by the activities of one Peter Motsewakhumo, who is the uncle of the current chief, Sandyland Motsewakhumo. The farmers complain that Mr Motsewakhumo has established a housing project on the agricultural land at Mayayane in order to provide himself with a power base and justify a headman's salary. The members of the community complain that his unilateral actions are contrary to custom and practice, but are condoned by the Chief.

40. The specific complaints in this regard are the following:

40.1 Mr Motsewakhumo has been allocating residential sites in the new development at Mayayane to people from outside the community without consulting the people who have established rights to agricultural land at Mayayane, and contrary to customary protocol.

40.2 Contrary to an agreement reached decades ago, the Chief and the headman intend to turn the area of Mayayane into a residential area, without consulting the co-owners of the land.

40.3 Both Mr Motsewakhumo and the chief have allocated land belonging to the third applicant's family to outsiders, for a fee, despite protests by third applicant and other members of the community.

40.4 The chief and the headman allowed a school to be built on a field belonging to a member of the community, without her consent, without any prior consultation and without the sanction of the community. The school is used to cater for the outsider families.

40.5 The headman has permitted the Department of Public Works of the North West Province to construct a new road between Mayayane and Makgobistad which cuts through the established fields of some farmers, against their wishes and without consultation.

40.6 Chief Sandyland Motsewakhumo is currently facing serious theft charges in relation to payments made during the road construction process.

40.7 Since the settling of outsiders at Mayayane, there are problems related to over-grazing because there are too many cattle in the area.

40.8 A number of elderly widows whose families had cattle in a Government grazing

camp at Mayayane were instructed by the headman to remove their cattle. The headman now uses the camp to graze his own cattle.

THE DIXIE COMMUNITY

42. The members of the Dixie community live at Dixie village on the Farm Dixie 240KU, in the Pilgrims' Rest district of the Limpopo Province.

43. The Dixie community is a distinct community. It is recognised by the neighbouring communities as an independent community with independent control in its own right over the farm.

44. The community exercises its rights in relation to the land in terms of customary law. Their system provides that rights to the land vest in the families which make up the Dixie community. The rights of each family (and the rights of the members of each family) to the residential sites and fields for cultivation are recognised as being exclusive to that family. They vest in the family in perpetuity and are therefore capable of being inherited through the successive generations. Grazing land is used on a communal basis, with every member of the community having the right to make use of the communal grazing land.

45. A statutory tribal authority, the Mnisi Tribal authority -which is now a traditional council - has purported and purports to exercise jurisdiction over the farm and the village of that tribal authority.

46. The Mnisi tribal authority has signed a 99-year lease with a private company for the use of a certain section of the farm for the purposes of a tourism lodge. Community members were subsequently informed that the Mnisi tribal authority had entered into a 40-year lease with that same company for the construction of a tourist lodge. They were given this information by a representative of the department of Land Affairs, Mr Mogashoa.

47. The community then instructed their attorneys to issue summons against the company concerned, the Department of Land Affairs, and the Mnisi tribal authority. The relief sought in the action was aimed at preventing the development from proceeding without the rights of the Dixie community being respected and their consent to the development being obtained. The investment company then indicated that no lease agreement had been signed. It had no further interest in developing the farm. The department of Land Affairs confirmed this. The summons was then withdrawn.

48. The Dixie community has had to secure tenure apart from some interventions by the Mnisi tribal authority. Those interventions have taken place despite the fact that this area is not included in the official area of jurisdiction of the Mnisi tribal authority.

49. The chief of the Mnisi community asserts that Dixie properly falls within his area of jurisdiction, and that "to the extent that" the jurisdictional notice excludes Dixie, that is a mistake. He has lodged a claim with the Restitution Commission to have Dixie farm included within the Mnisi land restitution claim to Manyeleti Game Reserve in the Kruger park. The claim appears, on Mnisi's version, to be an attempt to have Dixie brought under his jurisdiction and control. If he succeeds in this endeavour to have the jurisdiction "corrected", the Mnisi traditional council will become the land administration committee for the land held and occupied by the Dixie community. Their tenure security will be reduced in a manner which appears from the efforts which the traditional council has already made to dispose of the land, and also from the prejudicial contracts entered into by John Ndlovu on behalf of the Mnisi Traditional Council in respect of the Manyeleti land claim. These contracts were brought to the light in the matter of Van Vuuren and others v Bekker, Hosi Phillip Phendulane Mnisi. Johan Ndlovu and others under case 31208/2006 in this Court.

[3] The genesis of CLARA is from the provisions of section 25 (6), read with, section 25 (9) of The Constitution of the Republic of South Africa of Act 108 of 1996 (the Constitution), which reads as follows:

"25 (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.

(9) Parliament must enact the legislation referred to in subsection (6)."

[4] Basically the applicants submit that CLARA will interfere with their right to ownership, control and management of the land which they presently own or occupy. Furthermore, the applicants submit that CLARA will not only negatively impact on them but it extends across the board as an invalid law. Applicants further argued that the two legislations viz, CLARA and TLGFA do not make exceptions in favour of people who have acquired full and secure ownership by their own effort and it imposes new rules on them which will again strip them of determination of their destiny. Applicants' challenge the validity of CLARA on various grounds that I will deal with hereunder.

DECLARATION OF CLARA TO BE UNCONSTITUTIONAL DUE TO INCORRECT CLASSIFICATION

[5] When CLARA was passed by parliament. The procedure set out in section 75 of the Constitution being a process of various Bills not affecting provinces was followed. Applicants submitted that the procedure that was to be followed is the one set out in section 76 of the Constitution because CLARA falls within the functional areas set out in schedule 4 of the Constitution, viz, indigenous law and customary law. The consequence, as submitted on behalf of the applicants is that CLARA, on that basis, is unconstitutional and invalid in its entirety.

[6] The factual background on the procedure before the bill was passed can be summarised as follows:

6.1 On 29th October 2003 the first respondent introduced Communal Land rights Bill in the National Assembly as a section 75 Bill.

6.2 The Bill was referred to the Joint Tagging Mechanism (JTM) classification in terms of Joint Rule 160.

6.3 On 3rd November 2003 the Parliamentary legal advisory provided a legal opinion to the effect that it was a section 75 Bill.

6.4 On 10th November 2003 JTM consisting of The Speaker, Deputy Speaker; and The chairperson and the permanent Deputy Chairperson of the council (National Council of Provinces [NCOP]) unanimously classified the Bill as section 75 Bill.

6.5 During the period 11th-14th November 2003 the Portfolio Committee on Agriculture and Land Affairs, a committee of the national Assembly held public hearings on the Bill.

6.6 On 26th January 2004 when further Portfolio Committee deliberations were held. The issue on the impact of the bill on the provinces became apparent on 27th January 2004, there were recommendations by the Portfolio Committee, and a vote for amendments to the Bill that the Bill was to be reclassified as a section 76 Bill.

6.7 On the 2nd February 2004 THE Legal Resources Centre on instructions of communities wrote to the Chairperson of the NCOP and the Speaker of the National Assembly requesting that the Bill be reclassified as a section 76 Bill.

6.8 On 4th February 2004, the parliamentary legal advisors furnished an opinion based on a purported application of the "pith and substance" test, that the Bill was a section 75 Bill.

6.9 On the 9th February 2004 the then Chairperson of

NCOP addressed a memo to the legal advisors wherein she stated that she did not subscribe to the view that the classification of the Bill as a section 75 should not be changed.

6.10 The Deputy Minister of Agriculture and Land

Affairs addressed a letter to the Speaker and Chairperson of the NCOP wherein it was stated that the Bill should not be reclassified.

6.11 On 11 February 2004 parliamentary legal

advisors in response to the memo from the Chairperson of the NCOP dated 9th February 2004 persisted in their view that upon an application of 'the pith and substance test' the Bill is a section 75 Bill.

6.12 On 12th February 2004 Second reading debate

on the bill, as amended took place in the national Assembly and it was passed and transmitted for concurrence to the NCOP.

6.13 On 18th February 2004 the Select Committee in

the NCOP agreed to the Bill. On the 26th February 2004 the NCOP considered the Bill in its amended form in accordance with section 75 of the Constitution.

6.14 On 27th February 2004 the National Assembly

agreed to the amendments made before the NCOP passed the amended bill and submitted it to the State President. The Bill was assented to and signed by the State President on 14th July 2004.

6.15 CLARA has not yet been put in force by the government.

[7] The provisions of Part 18 of the Joint Rules of Parliament

and other relevant section of the joint Rules were attached to the twelfth and thirteenth respondents heads of argument. I do not deem it necessary to quote the said provisions herein unless it is necessary.

[8] Now in determining whether the classifications was correct or not it should be noted that in terms of the Constitution there are three spheres of government viz, National, Provincial and Local, legislative power is vested in Parliament in respect of the national sphere of government, in provincial legislature in respect of the provincial sphere of government and in the municipal council in respect of the local sphere of government.

[9] It will be convenient and germane to start by quoting the provisions of section 44 (1) (a) (ii), section 44 (1) (b) (ii) and 76 (3) of the Constitution which reads as follows:

"44 National legislative authority

(1) The national legislative authority as vested in Parliament-(a) confers on the National Assembly the power-

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and

(b) confers on the National Council of Provinces the power-(ii) to pass, in accordance with section 76, legislation with

regard to any matter within a functional area listed in

Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76."

"Ordinary Bills effecting Provinces 76(1)...

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

(a) Section 65 (2);

(b) section 163;

(c) section 182;

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

(e) section 196; and

(f) section 197."

[10] According to the provisions of section 44(1)(b)(ii) and

section 76(3) of the Constitution respectively, the section 76 procedure is applicable to Bills falling within a functional area listed in Schedule 4 of the Constitution. The principal differences between the section 75 and section 76 procedure was articulated by Cameron AJ, as he then was, in *Ex Parte President of The RSA: in re Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC) (The Liquor Bill case), in paragraph 25 at page 747-748 as follows:

"There are three principal differences between the procedure stipulated in s 75 for ordinary Bills not affecting provinces and that in s 76. First, the latter gives more weight to the position of the National Council of Provinces. This occurs chiefly through the invocation of the Mediation Committee. If one House rejects a Bill passed by the other, or if one House refuses to accept a Bill as amended by the other, the legislation must be referred to the Mediation Committee, which consists of nine members of the National Assembly and one delegate from each provincial delegation in the NCOP. Second, if the NCOP raises objections to a version of the Bill approved by the Mediation

Committee in circumstances where the Bill was introduced in the National Assembly, the bill lapses unless the National Assembly passes it again with a two-thirds majority. Third, when the NCOP votes on a question under s 75, the provisions of s 65-in terms of which each province has a single vote in the NCOP 'cast on behalf of the province by the head of its delegation', and in terms of which questions before the NCOP are 'agreed when at least five provinces vote in favour of the question'- do not apply. Instead, in terms of s 45 (2), each delegate in a provincial delegation has one vote and the question is decided by a majority of the votes cast (the presiding delegate having a casting vote), subject to a quorum of one-third of the delegates".

[11] Mr. Potgieters (SC), submitted on behalf of the twelfth and thirteenth respondents that in the classification of CLARA, to determine its subject matter or substance in order to ascertain whether it falls within a functional area listed in Schedule 4 there is one test viz, the 'substance of the legislation, which depends not only on its purpose and effect, see *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Kwa-Zulu-Natal Amakhosi & Iziphakanyiswa Amendment Bill of 1995*; *Ex Parte Speaker of the Kwa-Zulu Natal Provincial Legislature: In re Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill 1995*, 1996 (4) SA 653 (CC).

[12] He submitted that CLARA is a national legislation envisaged in section 25(6) and (9) of the Constitution. Having regard to its preamble, history of the bill and the statute when it is read as a whole, it is clear, that substance of CLARA is to give effect to the provisions of the Constitution.

[13] He argued with vigour that there is no second special test of 'tagging' as applicants' counsel Mr. Trengrove SC submitted. Mr. Potgieter submitted that the 'tagging test' mentioned in the Liquor Bill case was just stated in obiter and same should not be considered. He submitted that the test would be impractical, intricate and cause a delay in the classification of the Bill.

[14] He stated that it is only necessary to determine the subject or substance of CLARA in ascertaining whether it falls within a functional area listed in Schedule 4. He further denied that CLARA would replace customary law of land tenure and submitted that applicants wrongly interpreted the provisions of section 21(2) of CLARA upon which they also base their argument that CLARA falls within the functional area listed in Schedule 4 of the Constitution.

[15] He further argued that because there was consensus when classification was made the court should be slow to interfere with the classification made.

[16] Mr. Trengrove (SC), on behalf of the applicants, on the contrary, submitted that the

choice of procedure is either wrong or right and Parliament did not have the discretion to override the procedure set out in the Constitution.

[17] He further eloquently elaborated that in terms of the Liquor Bill case, there are two tests viz, substance of the legislation test and the special tagging test. He explained that if the substance of the bill lies in Schedule 4 then obviously Parliament is competent to legislate. If the substance lies out of Schedule 4 the province is not competent to act.

[18] He submitted that the Constitutional Court in the Liquor Bill case, laid down the second test. He argued that when the tagging is done the test is to determine whether the Bill in substantial measure falls within Schedule 4, that is, you do not determine the substance of the Bill. If the Bill is substantial and intrudes into Schedule 4 the section 76 procedure should be followed. To substantiate his point he referred to the Liquor Bill case and submitted that from page 117 the case deals with Procedural Challenge.

[19] In the Liquor Bill case the Bill was procedurally dealt with in terms of section 76. The challenge was that it should have been dealt with in terms of section 75 because the substance of the Bill did not lie in Schedule 4. The Constitutional Court rejected the argument and the court in paragraph 26 said the following:

"[26] It would be formalistic in the extreme to hold a Bill invalid on the ground that those steering in through Parliament erred in good faith in assuming that it was required to be dealt with under the s 76 procedure, when the only consequence of their error was to give the NCOP more weight, and to make passage of the Bill by the National Assembly in the event of inter-cameral disputes more difficult. It is hard to see how a challenge based on the first two differences between the relevant parliamentary procedures can invalidate the enactment of a statute. The third, is however, of import, since whether provincial delegation votes corporately through its head delegation, as prescribed by s 65, or individually by each member casting a vote, as prescribed by s 75(2), may in defined circumstances be as determinative as to whether the NCOP passes a Bill." Own underlining.

[20] My understanding of the Liquor Bill case is, especially when you read paragraphs 61-68 wherein, the court deals with the substance case. Mr. Trengrove, correctly in my view, submitted that there are two tests.

[21] It is indeed so that the regime by which communal land is administered, customary law and traditional leaders play a role.

[22] As Mr. Trengrove argued that the bill in a substantial measure falls within the functional area in Schedule 4 that, in my view, does not per se mean the Bill is invalid and unconstitutional.

[23] I am in agreement with what Judge Cameron, said in paragraph 26 of the Liquor Bill case

[24] I am well aware of the fact that in this case a less cumbersome procedure was adopted. However, I do not think that the NCOP acted in bad faith in adopting the section 75 procedure. They did not intend to stop the views of the provinces because the provinces were duly represented and there was a public hearing on the matter.

[25] Mr. Trengrove's submission that the proceeding is either right or wrong is not casting stones. The court in determining the validity of the procedure adopted should, in my view, consider if there is substantial or material breach of the audi alterem parti rule.

[26] The procedural points raised, by Mr Trengrove cannot in my view, render CLARA invalid and unconstitutional.

CONSTITUTIONALITY OF CLARA

[27] Mr. Budlender SC, in his address, concentrated on the topic that CLARA undermines secure land tenure and made much reference to the Makuleke people as an example.

[28] He explained in detail the essential elements of the secure land tenure system in respect of communal land in terms of customary law and the impact of CLARA on it.

[29] To illustrate his point he said much as what he described as customary land tenure of different tribes or places may not exactly be the same, the common feature applying across the board is that rights are 'layered'. He further referred the court to various learned writers on customary law. Professor Benjamin Cousins in paragraphs 69-71 on page 375-376 of the indexed pages said the following:

"69. Different land uses attract varying degrees of control at different levels of socio-political organization. For example, allocations of arable land are often controlled at the level of the family and the neighbourhood, while grazing and woodland use is the concern of a wider segment of society. Members have the right to participate in decision-making processes at the appropriate level.

70. The fact that control of land is vested at different levels of social organisation is vitally important. Many scholars have pointed out that colonial authorities misunderstood and misrepresented the strength of individual and family rights, and that the term "communal tenure" is somewhat of a misnomer given the strength of family and individual rights to residential and arable plots.

71. Some aspects of land tenure do have a "communal" character. A key feature of indigenous systems is the right of access to and use of shared resources such as grazing, water, forests and a variety of other natural resources. These are the common property of communities of rights holders. Regulation of shared resource use in the common interest is a key aspect of the functions exercised by structures of authority."

[30] According to section 1 of CLARA the community is defined as follows:

"Community means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group."

[31] Mr. Budlender submitted that the aforesaid definition include a family, a clan, a village, a group such as the Makuleke group, a large group like the Mhinga which has a traditional council.

[32] Now having regard to the provisions of section 21 (1) and (2) of CLARA which read as follows:

21 Establishment of land administration committee

(1) A community must establish a land administration committee which may only be disestablished if its existence is no longer required in terms of this Act.

(2) If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council."

The aforesaid cannot all be classified as a community for the purpose of section 21 because if they were each a community they would have to establish a land administration committee to administer land and there would be a bureaucratic nightmare since committees should be registered.

[33] The crucial issue is to determine if in terms of section 21(2) traditional council will have more powers compared to the land administrative committee.

[34] Mr. Budlender in making reference to the Makuleke community said after they obtained ownership of their land in terms of clause 19.4 of the settlement agreement: "The Sate will, in accordance with the law applicable at the time, take any steps required so as to secure the tenure rights in Ntlhaveni used by the Makuleke community on an individual and communal basis within this area." However, the arrangement did not practically work out because the land falls in the area of jurisdiction of the Mhinga Tribal Authority. The problems encountered by the Makuleke people have been mentioned in the historical factual background above.

[35] He submitted that in terms of CLARA the body set up by the people for administration would be now controlled by the Minister and in terms of section 21.2 the

community has no choice when the traditional council is in existence.

[36] He further submitted that the land administration committee was intended to exist for larger communities. The Makuleke community, since they are in the area of jurisdiction of the Mhinga will have to lump what the Mhinga local authority say or do.

[37] Logically, it follows that the community which acquired the land and which until now has been recognised as the owner of the land would find that its ownership rights are subject to the decision of a larger group and it may only have a minority voice.

[38] The other vexed issue about the provision of section 21(1) and (2) of CLARA will arise, assuming that it is the Mhinga community that is to establish the administration committee, do they have a choice of not to establish same because they have the traditional council.

[39] The other crucial factor that needs to be considered, considering the Mhinga community viz a viz the Makuleke community is whether the Mhinga community can established a land administration committee. In my view, the wording of CLARA is peremptory and the land administration committee should be established. In the composition of the Land Administartion Committee the interest of women, children and the youth, elders and disabled must be represented by at least one member and at least one third of the total members must be women, see section 22.

[40] However, section 22(1) and (2) which deals with the election of a land administration committee reads as follows:

"(2) Subject to section 21 (2), the members of a land administration committee must be persons not holding any traditional leadership position and must be elected by the community in the prescribed manner."

[41] Because of the words 'subject to section 21(2)' it may imply that section 21(2) is a dominant section, when there is a recognised traditional council section 22(2) is therefore not applicable. Clarity is needed on this aspect.

[42] On careful analysis of section 21(2) of CLARA the act conferred powers on the traditional council to do the functions of the land administration committee and that may undermine the tenure security of the other community e.g. the Makuleke people. In my view, some of the existing traditional council have not been democratically elected and the interest of women, children, elderly and youth may not be represented in such council. For that reason provisions of section 9 of the Constitution are infringed.

[43] Mr. Budlender correctly, in my view, submitted that the making and adoption of community rules in terms of section 19(1) is not going to solve or protect the communities from the powers of the traditional council. Furthermore, the said rules will be applicable when the land about to be registered in the name of the community.

[44] I was told that there are at least 892 communities which are affected and it will take a long time before land enquiries and registration take place.

[45] The submission made by the Minister of Land Affairs that the other protection for communities is that land can be registered in the name of families and clans and groups is

not valid because in terms of the Deeds Registry Act 47 of 1937 land can only be registered in the name of a natural person or a legal persona.

[46] Section 18 of CLARA reads as follows:

"18 Determination by Minister

(1) If the Minister, having received a report by a land rights enquirer, is satisfied that the requirements of this Act have been met, he or she must, subject to subsections (4) and (5) and having regard to-

(a) such report;

(b) all relevant law, including customary law and law governing spatial planning, local government and agriculture;

(c) the old order rights of all affected right holders;

(d) the need to provide access to land on an equitable basis; and

(e) the need to promote gender equality in respect of land, make a determination as contemplated in subsections (2) and

(3)."

[47] The process, having regard to the provisions of section 14 and 12 of CLARA will take long and the rights of communities which own land may be prejudiced.

[48] Mr. Sikhakhane further submitted on behalf of the applicants' that section 18 of CLARA gives the Minister a discretion without guidelines under which rights of land tenure are placed. The said section should therefore, be declared unconstitutional.

[49] After thoroughly considering the decide cases, in my view, section 18 should not be declared unconstitutional solely because the Minister's discretion is too wide. Of importance is that in terms of the provision of subsection 4 and 5 the Minister in exercising his or her discretion should take certain factors into account. There are therefore some guidelines in CLARA.

CONSTITUTIONALITY OF CLARA READ WITH TLGFA REGARDING CREATION OF FOURTH SPHERE OF GOVERNMENT

[50] Mr. Dobson, on behalf of the applicants, in his argument makes a comparison on the effect of CLARA read with section 5 and 20 of the Traditional Leadership and Governance Framework Act 41 of 2003 on whether the conferred power to the traditional councils does not give rise to a separate fourth sphere of government contrary to the three spheres of governance envisaged by the Constitution. Government is constituted as national, provincial and local spheres which are distinctive, interdependent and interrelated.

[51] Section 41(1) of the Constitution states that:

"41 Principles of co-operative government and intergovernmental relations

(1) All spheres of government and all organs of state within each sphere must-

- (a) preserve the peace, national unity and the indivisibility of the Republic;
- (b) secure the well-being of the people of the Republic;
- (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
- (d) be loyal to the Constitution, the Republic and its people;
- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the Constitution;
- (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- (h) co-operate with one another in mutual trust and good faith by-
 - (i) fostering friendly relations;
 - (ii) assisting and supporting one another;
 - (Hi) informing one another of, and consulting one another on, matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another."

[52] On the issue raised by Mr. Dobson, provisions of section 211(1) and (2) of the Constitution which deal with Traditional Leaders are important and they read as follows:

"211 Recognition

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs."

[53] Section 18 of the Local Governance and Municipal Structures Act 117 of 1998 made provision for traditional leaders to participate in meetings of municipal councils.

[54] Section 212 (1) does not provide a constitutional platform for the powers conferred on traditional councils. However, the National legislation may provide a role for traditional leadership as an institute at local level.

[55] In terms of Section 21 (2) of CLARA traditional councils could exercise certain powers of a governmental nature to some extent in administering land. However, the status of traditional leadership according to customary law, if it is not in conflict with the Constitution, is recognised.

[56] In my view, CLARA and TLGFA in giving certain powers to traditional leaders does not make it to be unconstitutional in that it creates a fourth sphere of government.

[57] The applicants further submitted that section 5 and 20 of TLGFA is contrary to the provisions of section 212 (1) of the Constitution, in that it also permits delegation of governmental power via provincial legislation. I disagree because the status and role of traditional leadership is recognised by the constitution

[58] The role which traditional leaders would be involved in mentioned in section 5 and 20 of TLGFA is in my view not unconstitutional. Customarily traditional leaders played an important role in the administration of land.

[59] The scope of the Act is set out in Section 2 and in terms of section 2 (i) (a)-(d) it applies to:

2 Application of Act

(1) This Act applies to-(a) State land which is beneficially occupied and State land which-

(i) at any time vested in a government contemplated in the Self-governing Territories Constitution Act, 1971 (Act 21 of 1971), before its repeal or of the former Republics of Transkei, Bophuthatswana, Venda or Ciskei, or in the South African Development Trust established by section

4 of the Development Trust and Land Act, 1936 (Act 18 of 1936), but not land which vested in the former South African Development Trust and which has been disposed of

in terms of the State Land Disposal Act, 1961 (Act 48 of 1961);
(ii) was listed in the schedules to the Black Land Act, 1913 (Act 27 of 1913), before its repeal or the
schedule of released areas in terms of the Development Trust and Land Act, 1936 (Act 18 of 1936), before its repeal;
(b) land to which the KwaZulu-Natal Ingonyama Trust Act, 1994 (Act 3 KZ of 1994), applies, to the extent provided for in Chapter 9 of this Act;
(c) land acquired by or for a community whether registered in its name or not; and
(d) any other land, including land which provides equitable access to land to a community as contemplated in section 25 (5) of the Constitution.

The aforesaid land is vast and is according to the statistics occupied by not less than twenty million people.

[60] Most of the communities who occupy communal land administer customary law and their traditional leaders still play some important part in the administration of the land they occupy.

[61] Mr. Trengrove, correctly submitted that CLARA is introducing a new regime for the administration of communal land and for the security of tenure. CLARA does not scrap everything, it retains some elements of the existing regime and formalise and reform others.

[62] CLARA does not, in my view, harmonise the right of the Makuleke and the Kalkfontein communities to make rules vis a vis the role of traditional leaders.

[63] In terms of section 5 (2) of CLARA communities like the Kalkfontein and Makuleke communities, the minister may still make a determination in terms of section 18 of CLARA. That in my view, puts their tenure at a risk.

[64] Messrs Tokota SC and Sithole SC in their arguments submitted that certain sections of CLARA would not be applicable to the Kalkfontein people because they have a court order in their favour. It should be noted that when the court order was made CLARA had not yet been passed.

The Act now gives the Minister and Traditional councils powers to interfere with some of the communities who own

property privately. Section 5 (2) (a) (4) says: "(2) Despite any other law-

(a) on the making of a determination by the Minister in terms of section 18, the ownership of communal land which is not State land but which is registered in the name

of-

- (i) a person;
- (ii) a traditional leader or traditional leadership whether recognised in terms of law or not;
- (iii) a communal property association contemplated in the Communal Property Associations Act, 1996 Act 28 of 1996); or
- (iv) a trust or other legal entity, vests in the community on whose behalf such land is held or in whose interest such registration was effected, and such land remains subject to limitations and restrictions in relation to and rights or entitlements to such land;
- (b) the community referred to in paragraph (a) succeeds in all respects as the successor in title to such person, traditional leader or traditional leadership, communal property association, trust or other legal entity;
- (c) the title deed relating to land contemplated in paragraph (a) and any mortgage bond or other deed registered in respect of such land must, in the prescribed manner, be endorsed by the Registrar of Deeds to reflect the community as the registered owner of such land; and
- (d) the provisions of this Act must apply with the necessary changes to land contemplated in paragraph (a)."

COSTS

[65] The Makuleka and Kalkfontein people, as examples, have bought or acquired land, have established trusts and associations. Certain sections of CLARA has an effect or potential effect of destroying their mark instead of protecting them as required by the Constitution.

[66] The number of advocates who were involved in this matter indicates how important and complex this matter is. Applicants were represented by five counsel, including two senior counsel. A lot of research had to be done in respect of each topic that was argued by each counsel representing the applicants. The total number of advocates who represented the respondents were seven including three senior counsel. I think a cost order awarding more than three counsel costs would not be unreasonable.

[67] I therefore, make the following order:

- (i) Prayers 1, 3 and 4 of the Notice of Motion are dismissed.
- (ii) I declare sections 2(1)(a), in so far as it concerns the land already owned or securely held by a community, 2(1)(c) and (d), 2(2); 3; 4(2), 5, 6, 9, 18, 19(2), 20, 21, 22, 23, 24

and 39 to be unconstitutional and invalid.

(iii) In terms of the provisions of section 167(5) of the Constitution the order number (ii) above is referred

to the Constitutional Court for the confirmation thereof.

(iv) The respondents who opposed the application are ordered to jointly and severally pay the costs of the application, which costs include the employment of five counsel.

A. P. LEDWABA

JUDGE OF THE HIGH COURT