



CONSTITUTIONAL COURT OF SOUTH AFRICA

Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others

CCT 40/15

Date of hearing: 16 February 2016

Date of judgment: 28 July 2016

MEDIA SUMMARY

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

Today, the Constitutional Court handed down judgment in a matter concerning the obligation on Parliament to facilitate public participation in its legislative process, and its effect on the validity of the Restitution of Land Rights Amendment Act (Amendment Act), which amended the Restitution of Land Rights Act (Restitution Act). The Restitution Act was enacted in 1994 to give effect to the constitutional imperative of restitution of land. Section 25(7) of the Constitution provides that persons or communities dispossessed of land after 19 June 1913 as a result of past racially discriminatory laws or practices are entitled to restitution or equitable redress. The Restitution Act provided that all claims for restitution were to be lodged by 31 December 1998.

In 2014, a draft Restitution of Land Rights Amendment Bill (Bill) providing for, amongst other things, the re-opening of claims, was tabled and passed by the National Assembly. The Bill was subsequently referred to the National Council of Provinces (NCOP), which sent the Bill to the Provincial Legislatures to facilitate public participation on its behalf. Less than two weeks were made available to the Provincial Legislatures to advertise and hold public hearings, invite and consider all oral and written submissions from members of the public, and provide negotiating and final mandates. By the end of March 2014, all but one of the Provincial Legislatures had approved the Bill. The NCOP passed the Bill in the same month; it was assented by the President on 29 June 2014 and duly enacted into law as the Amendment Act on 1 July 2014.

In their primary challenge, the applicants – organisations with interests in land rights and agrarian reform, and communal property associations – alleged that the curtailed timeline resulted in a failure by the NCOP and Provincial Legislatures to comply with the duty imposed by sections 72(1)(a) and 118(1)(a) of the Constitution to facilitate public participation. As the Amendment Act was national legislation, Parliament – of which the NCOP is one house – had failed in a constitutional obligation, and therefore the Constitutional Court’s exclusive jurisdiction was engaged. An alternative challenge impugned a provision introduced by the Amendment Act (section 6(1)(g)), which compelled the Land Claims Commission, when considering claims for restitution, to “ensure that priority is given to claims lodged not later than 31 December 1998 and which were not finalised at the date of the commencement of the Amendment Act”. The applicants argued that the provision was impermissibly vague, being open to multiple interpretations as to what “priority” meant in respect of claims lodged before 31 December 1998 (old claims) and those lodged after the re-opening (new claims).

The NCOP, National Assembly and eight Provincial Legislatures opposed the primary challenge, averring that the public participation process passed constitutional muster. The Western Cape Provincial Legislature merely argued that *it* had acted reasonably within the timeline imposed upon it by the NCOP. The Minister for Rural Development, the Chief Land Claims Commissioner and the President of South Africa opposed the alternative challenge, and contended that section 6(1)(g) is clear in the context of the amended Restitution Act if interpreted purposively. The Matabane and Maphari Communities, the Mlungisi and Ezibeleni Disadvantaged Groups, and the Lady Selborne Concerned Group, submitted that section 6(1)(g) is procedural in nature and thus not susceptible to the applicants’ vagueness argument.

A unanimous judgment by Madlanga J (concurrent in by Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mhlantla J, Nkabinde J and Zondo J) upheld the primary challenge.

The Court reiterated that the right to restitution in land plays a pivotal role in South Africa’s constitutional democracy, and is a means to achieving the guarantee of dignity for those who continue to suffer from the racist practices and laws of the past. The legislative processes which resulted in the Amendment Act, enacted to give effect to the right, by implication needed to include comprehensive public participation.

The truncated timeline – of two weeks – in which the Provincial Legislatures had to hold public hearings, was found to be objectively unreasonable. The Court pointed out the following in respect of the provinces: notices were given only a few days prior to the hearings; hearings were held in certain municipalities excluding many affected individuals; and at the hearings themselves, members of the public affected were not afforded an opportunity to share their views in relation to the Amendment Act. These failures meant that the Provincial Legislatures, and – by extension – the NCOP failed to facilitate adequate public participation.

As a result, the Amendment Act was declared invalid. However, the Court made the declaration prospective, as without the Amendment Act, the new claims lodged would cease to exist. This way new claims lodged by the date of the judgment, continue to exist, but none can be lodged in future under the impugned legislation. Moreover, the Court interdicted the Land Claims Commission from considering, processing and settling new claims for a period of 24 months, pending the re-enactment by Parliament of the Amendment Act or finalisation of those claims filed by 31 December 1998, whichever occurred first. In this way, Parliament is afforded time to facilitate a constitutionally compliant public participation process, and consider how best to deal with the new claims lodged to date of the judgment. The Chief Land Claims Commissioner was also directed to approach the Court for further relief should Parliament fail to re-enact the Amendment Act within the 24 month period. As the NCOP was the primary cause of the failed public participation process, it was ordered to pay the costs of the applicants.