SACHS J ABRIDGED JUDGMENT WRITTEN JOINTLY WITH GOLDSTONE AND O'REGAN JJ

Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another

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. 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 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. 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.

[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). 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.

[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). 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 but it was extended to Bophuthatswana on 28 September 1998 by the Land Affairs General Amendment Act,[1][5] which made provisions of the Upgrading Act applicable throughout South Africa. Deeds of grant 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 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 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.