CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/99

CHIEF DIREKO LESAPO	Applicant
versus	
NORTH WEST AGRICULTURAL BANK	First Respondent
MESSENGER OF THE COURT, DITSOBOTLA	Second Respondent

Heard on : 14 September 1999

Decided on : 16 November 1999

JUDGMENT

MOKGORO J:

[1] This case raises important questions concerning the principle against self help, which is an aspect of the rule of law. It concerns the constitutionality of section 38(2) of the North West Agricultural Bank Act 14 of 1981 ("the Act") which permits the North West Agricultural Bank ("the Bank") to seize a defaulting debtor's property, without recourse to a court of law, and to sell it by public auction in defrayal of the debt owed to the Bank. On 20 May 1999 in the Bophuthatswana High Court, Mogoeng J granted Chief Direko Lesapo ("the applicant") an order invalidating section 38(2) of the Act[1] on account of its inconsistency with the Constitution and

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[1] The Act was amended by the North West Agricultural Bank Amendment Act 8 of 1995.

granting certain consequential relief. The matter came before this Court for confirmation pursuant to section 172(2)(a) of the Constitution.[2]

[2] In response to directions issued by the President of this Court, the first respondent filed written submissions opposing the confirmation of the order of Mogoeng J. The applicant however submitted no written argument in support of confirmation of the order. This Court therefore appointed Mr Freund as amicus curiae to advance argument in support of the order and to raise any other issues which might assist this Court. The Court is indebted to Mr Freund for his helpful argument.

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[2] Section 172(2)(a) reads:

> "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."

[3] The applicant, a farmer, had borrowed R60 000 from the first respondent, the Bank, to enable him to buy certain farming implements. The loan was made in terms of a written agreement pursuant to the provisions of the Act. When he fell into arrears with his payments, the Bank, acting in terms of section 38(2) of the Act, gave notice to the applicant and, upon his continued failure to pay, wrote a letter to the Messenger of the Court for the district of Ditsobotla ("the messenger"), authorising him to seize and sell by auction movable property which the applicant had pledged as security for the loan.[3] In an effort to prevent the messenger from proceeding in terms of the notice, the applicant applied, amongst other things, for urgent relief and for an order declaring section 38(2) of the Act to be in conflict with the Constitution.

[4] Section 38(2) of the Act provides:

> "The Board may, in the circumstances contemplated by subsection (1) where the loan or advance has already been paid over to the debtor, by written notice addressed to the debtor, recall the said loan or advance in whole, and require the debtor to repay such loan or advance together with interest thereon up to the date of such notice within the time specified therefor in such notice, and in the event of default of payment on such specified date, the Board may in writing and under the official seal of the Bank, require the messenger of the court or any other person designated by the Board to seize-
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> (*a*) in the case where such loan or advance has been secured by mortgage, the immovable property encumbered thereby; or
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> (*b*) in the case where such loan or advance has been secured by a deed of

[3] The property in question comprised two tractors, a planter, a ten-ton trailer, a chisel plough and a soil master.

> hypothecation of *movable property*, or where any other form of security has been given, the property encumbered by such deed or constituting such other form of security,
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> *without recourse to a court of law*, and, irrespective of whether or not such messenger of the court or such other person is a licensed auctioneer, to sell such property by public auction on such date, and at such time and place and on such conditions as the Board may determine, of which at least fourteen days notice has been given in the Provincial *Gazette* and in a newspaper circulating in the district where the said property is situated or, as the case may be, where the said property was kept or used before such seizure, or the Board may itself sell the property so seized by public tender on such conditions as it may determine: Provided that the provisions of this section shall not be construed so as to derogate from the provisions of subsection (4)."
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> [emphasis supplied]

Section 38(1) deals with the preconditions for the Bank to withdraw its approval of an advanced loan or refuse payment thereof. Ten circumstances are identified, encompassing: the debtor's failure "to pay any amount payable in respect of a loan . . . on or before due date"; the commission of an act of insolvency or the debtor's sequestration; being sentenced to a term of imprisonment without the option of a fine; if the debtor "in the opinion of the Board[4] arrived at after the carrying out of any inspection in terms of section 36 does not apply the loan . . . for the purposes for which . . . [it] was granted"; failure by the debtor to comply with a section 37 notice;[5] breach of the loan conditions; the debtor's being declared mentally ill or incompetent; in the case of a company,

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[4] In s 2(d) of the Act, the Board is defined as "the Board of Directors of the Bank contemplated by and constituted in terms of section 4".

[5] Section 37 empowers the Board by written notice to order a debtor to apply the loan amount in accordance with the loan term or to repay it to the Bank "[w]henever, after an inspection in terms of section 36 has been made the Board is satisfied that any sum of money . . . has not been applied for the purposes for which . . . such loan . . . was granted".

liquidation; failure by the debtor to apply the loan "on a substantial scale" within a reasonable time or a time specified by the Board; and conviction of various offences under the statute.[6]

[5] Mogoeng J held that section 38(2) was inconsistent with the provisions of 34 of the Constitution which provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

According to Mogoeng J, this section embodies a fundamental rule of natural justice, according to which everyone has the right to have a dispute settled by a court of law or an unbiased, independent and impartial tribunal, where appropriate; and nobody should be allowed to take the law into his or her own hands or to usurp the functions of a court of law.

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[6] These are listed in s 44 of the Act, and include applying the loan for a purpose other than that for which it was granted; failing to disclose material information or giving false information; obtaining the Bank's financial assistance though fraud; destroying, disposing of or damaging the secured property; and breach of the terms of the loan agreement.

[6] In the High Court the Bank contended that the applicant had not disputed that the debt was due and that there was accordingly no averment that there was a dispute between the parties. Mogoeng J held that it was not necessary that a dispute be raised against the Bank's claim. The applicant had been summarily dispossessed of property and was aggrieved thereby. That was sufficient to entitle him to challenge the constitutionality of the legislation.

[7] When the matter came before this Court, Mr Lever, counsel for the Bank, correctly conceded that the approach to be adopted for determining questions of constitutionality is objective.[7] Whether there was in fact a dispute between the parties in this case is thus irrelevant to the present inquiry. The subjective position in which the parties find themselves cannot affect the constitutional status of the law under attack.

[8] The Bank contended that the right had not been infringed on two bases. First, Mr Lever submitted that there is no conflict between section 38(2) of the Act and section 34 of the Constitution. Section 38(2), he argued, pertains to the attachment and subsequent sale of property, while section 34 concerns the adjudication of disputes. Central to this argument was the contention that section 34 applies only where a dispute exists that can be resolved by the application of law. The extraordinary execution procedure authorised by the impugned provision, he argued, comes into operation only within a narrow compass - where there is no dispute. Thus if there was a dispute, section 38(2) could not be invoked.

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7 *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1)

BCLR 1 (CC) at para 26.

[9] Mr Lever conceded that if section 38(2) allows for seizure and sale where there is a dispute, this would be contrary to section 34. He however contended that it is possible and desirable that section 38(2) be interpreted as being applicable only where there is no dispute. Section 38(2) does not appear to be reasonably capable of such a restrained interpretation. Thus, properly construed, the application of section 38(2) is not limited to circumstances where there is no dispute, nor is the requirement of the absence of a dispute anywhere implied. If the legislature had indeed intended such a prerequisite, there seems to be no reason why it should not have provided so expressly.

[10] Mr Lever further contended that because the notice to the messenger authorising the attachment is preceded by a notice of demand to the debtor, if there is a dispute, there is an opportunity for the debtor to raise it in response to the notice. That, however, is no answer to the challenge to the constitutionality of the section. Section 38(2) allows the Bank to bypass the courts. Without any judgment or order from any court and without any of the statutory or other safeguards applicable to the attachment and sale in execution of a judgment debt, section 38(2) authorises the Bank itself to bypass the courts and these other safeguards and to seize and sell the debtor's property of which the debtor was in lawful and undisturbed possession. This is so even where, under section 38(2), the messenger of the court is required by the Bank to seize and sell the property because under the subsection the messenger can only be acting as the Bank's agent and not, as is normally the case, as an officer of the court.[8] His instructions and authority

[8] See *Weeks and Another v Amalgamated Agencies Ltd* 1920 AD 218 at 225; *Syfrets Bank Ltd and Others v Sheriff of the Supreme Court, Durban Central, and Another; Schoerie NO v Syfrets Bank Ltd and Others*

emanate solely from the Bank and not from any court or court order.

[11] A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the state can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalising the resolution of disputes, and preventing remedies being sought through self help. No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails, as envisioned by section 1(c) of our Constitution, which provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
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> . . . .
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> (c) Supremacy of the constitution and the rule of law."

1997 (1) SA 764 (D&CLD) at 773E-774A; and *Sedibe and Another v United Building Society and Another* 1993 (3) SA 671 (T) at 674H-676C.

Taking the law into one's own hands is thus inconsistent with the fundamental principles of our law.[9]

[9] See *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) at 511H-512A and *Nino Bonino v De Lange* 1906 TS 120 at 122.

[12] There are circumstances in which the coercive power of the state may be invoked without the sanction of a court. For instance, arrest and detention for the purposes of trial, are permitted if there are reasonable grounds therefor.[10] There may even be circumstances where self help might be permissible,[11] but once again good reasons must exist for this to be permitted. Whether good reasons must exist for the provisions of section 38(2) is an issue that can be decided later. What has to be decided first is whether section 38(2) is inconsistent with section 34 of the Constitution.

[13] An important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a means of enforcing a judgment or order of court and is incidental to the judicial process. It is regulated by statute[12] and the rules of court and is subject to the supervision of the court which has an inherent jurisdiction[13] to stay the execution if the interests of justice so require.[14]

[14] If the debt itself is disputed, the seizure of property in execution of the debt must equally be disputed. To permit a creditor to seize property of a debtor without an order of court and to cause it to be sold by the creditor's agent on the conditions stipulated by the creditor to secure

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10 See also the discussion in *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 99-100.

11 See *Yeko v Qana* 1973 (4) SA 735 (AD) at 739B-D.

12 See for example ss 36-40 of the Supreme Court Act 59 of 1959. Similar provisions exist for the execution of the orders of other courts.

13 See s 173 of the Constitution.

14 See s 45A of the Supreme Court Act; Erasmus *Superior Court Practice* (Juta) at B1-330 and ss 62(2) and (3) of the Magistrates' Courts Act 32 of 1944.

payment of a debt, denies to the debtor the protection of the judicial process, and the supervision exercised by the court through its rules over the process of execution. Yet this is what section 38(2) purports to do. It entitles the Bank to seize and sell property in execution whether the debt alleged to be due is disputed or not.

[15] The judicial process, guaranteed by section 34, also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That protection extends to the circumstances in which property may be seized and sold in execution, and includes the control that is exercised over sales in execution.

[16] On this analysis, section 34 and the access to courts it guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order. The effect of this underlying principle on the provisions of section 34 is that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land. Dicey's first principle of the rule of law is that:

> ". . . no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."[15]

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15 Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (Macmillan, London 1959) at 188.

So, too, in *De Lange v Smuts NO and Others*,[16] Ackermann J held:

[16] Above n 10 at para 31.

> "In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional State) 'citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors.' "[17]

[17] The Bank, as an organ of State, should be exemplary in its compliance with the fundamental constitutional principle that proscribes self help. Respect for the rule of law is crucial for a defensible and sustainable democracy. In a modern constitutional state like ours, there is no room for legislation which, as in this case, is inimical to a fundamental principle such as that against self help. This is particularly so when the tendency for aggrieved persons to take the law into their own hands is a constant threat.

[18] This rule against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary. It is a guarantee against partiality and the consequent injustice that may arise. In *Bernstein and Others v Bester and Others NNO*,[18]

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17 Footnotes omitted.

18 1996 (2) SA 751; 1996 (4) BCLR 449 (CC) at para 105. This case concerned s 22 of the Interim Constitution. Although the wording of s 22 differs somewhat from that of s 34 of the Constitution, this is

this Court, per Ackermann J, held:

> "When s 22 is read with s 96(2), which provides that '(t)he judiciary shall be independent, impartial and subject only to this Constitution and the law', the purpose of s 22 seems to be clear. It is to emphasise and protect generally, but also specifically for the *protection of the individual*, the separation of powers, particularly the separation of the Judiciary from the other arms of the State. Section 22 achieves this by ensuring that the courts and other *fora* which settle justiciable dispute are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional State, the 'regstaatidee' . . ."
> [emphasis supplied]

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irrelevant for present purposes.

[19] As discussed above,[19] the ordinary way of securing execution in settlement of debts due is through the court process, and the seizure of property against the will of a debtor in possession of such property for that purpose without an order of court amounts to self help. This is an infringement of section 34. It would be unacceptable to construe section 34 in such a way that it permitted self help which infringed a person's property rights, provided that such self help was carried out in such a way that it precluded a dispute from being raised by the debtor. This would in fact be an a fortiori case where the section ought to operate in protection of the rule of law underlying its provisions.

19 See para 13 above.

[20] Section 38(2) authorises the Bank, an adversary of the debtor, to decide the outcome of the dispute. The Bank thus becomes a judge in its own cause. The authority to adjudicate over justiciable disputes and to order appropriate relief and the enforcement of the order by attachment and sale of the debtor's goods in a civil matter, vests in the courts of the land.[20] Section 38(2), however, limits the debtor's rights in section 34 by vesting that authority in the Bank. The Bank itself decides whether it has an enforceable claim against the debtor; the Bank itself decides the outcome of the dispute and the subsequent relief; and the Bank itself enforces its own decision, thereby usurping the powers and functions of the courts. The fact that the debtor may have recourse to a court of law after the attachment takes place does not cure the limitation of the right; it merely restricts its duration.[21] For the period of limitation, the debtor has been deprived of possession of the assets in question without the intervention of a court of law and in a manner inconsistent with section 34.[22] I am thus in agreement with Mogoeng J that section 38(2) is to that extent inconsistent with section 34.

[21] Having found that section 38(2) of the Act limits section 34 of the Constitution, what remains to be considered is whether this is justifiable in terms of section 36(1) of the Constitution.[23]

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20 See *Bernstein* above n 18 at para 105; and *De Lange* above n 10 at paras 128-131.

21 Compare *De Lange* above n 10 at para 90.

22 Compare *De Lange* above n 21.

23 Section 36(1) reads:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
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> (a) the nature of the right;

(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

[22] In this analysis, an important consideration in terms of section 36(1)(a) is the nature of the right impaired. The right of access to courts is important in the adjudication of justiciable disputes.[24] In *Concorde Plastics (Pty) Ltd v NUMSA and Others*,[25] Marcus AJ expressed the importance of the right as follows:

> "In my view, access to the courts of law is foundational to the stability of society. It ensures that parties to a dispute have an institutionalised mechanism to resolve their differences without recourse to self-help. The nature of civil proceedings has been eloquently described by Eduardo Couture *The Nature of Judicial Process* (1950) 25 *Tulane Law Review* 1 at 7 in the following way.
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> > 'The facts tells [sic] us that when a plaintiff wants to instigate a suit, he can do so although the defendant does not want him to do so, nor even the judge. This is a fact derived from legal experience, from the life of law.
> >
> > Those who have been able to see this fact in historical perspective and have noted its slow but steady growth, have realised that the law has proceeded in this direction from necessity, not from expediency. Primitive man's reaction to injustice appears in the form of vengeance, and by "primitive" I mean not only primitive in a historical sense, but also primitive in the formation of moral sentiments and impulses. The first impulse of a rudimentary soul is to do justice by his own hand. Only at the cost of mightly [sic] historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities.
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> > A civil action, in final analysis, then, is civilisation's substitute for

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[24] See in this regard *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) at para 17.

[25] 1997 (11) BCLR 1624 (LAC) at 1644F - 1645A.

> vengeance. In its present form, this civilised substitute for vengeance consists in a legal power to resort to the court praying for something against a defendant. Whether the claim is well-founded or not, is a totally different and indifferent, fact.' "

The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms[26] to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.

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[26] Above n 25.

[23] When the importance of the purpose of section 38(2) of the Act in terms of section 36(1)(b) is evaluated, what needs to be considered at this stage is not the purpose of the Act (although it may be of some relevance), but the purpose of the impugned provision itself. Mr Lever submitted that its` purpose was "to provide a quick, effective and inexpensive procedure" that enables the Bank to protect whatever real rights it has in the secured property. He contended that the use of this procedure avoids the delays and costs associated with the normal legal procedures. In this way, he argued, more money would be available to service loans. He further argued that the North West Agricultural Bank is not a commercial concern, but a statutory body entrusted with public funds.[27] Because public funding is scarce, the protection of the Bank's funds becomes particularly important.

[24] That the Bank needs to recover its property from defaulting debtors in a manner that saves time and costs is indeed an important consideration. The risks to which the Bank is

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[27] The rational basis and the justification for a similar provision, s 55(2) of the Land Bank Act 13 of 1944, has been considered in various judgments. In *Ixopo Irrigation Board v Land and Agricultural Bank of South Africa* 1991 (3) SA 233 (N) at 237J-238A, Hugo J said:

> "The overwhelming impression one gains from a reading of ss 55 and 56 of the Land Bank Act in particular is that the Legislature is intent upon giving the Bank's funds the greatest possible protection. This is no doubt being because the Land Bank is funded by public moneys.
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> In authorising the bank to attach and sell land without court intervention the object must surely have been to raise the greatest possible amount on the Bank's security with the least possible cost or delay."

In *Land and Agricultural Bank of SA v Sentraal Westelike Kooperatiewe Maatskappy Bpk en Andere* 1979 (2) SA 346 (N), Didcott J, dealing with the same clause of the Land Bank Act, said at 349H:

> "The applicant is not a commercial concern which does business for its own profit and may fairly be expected to take the rough with the smooth. It is a statutory body, entrusted with public funds and charged with the duty of using them in the national interest by fostering agriculture in South Africa."

See also *Strydom v Die Land- en Landboubank van Suid-Afrika* 1972 (1) SA 801 (A) at 814F-H.

exposed and the fact that it is entrusted with a scarce public resource, to be utilised for the development of agriculture in the North West Province, emphasise the value of its ability to protect its resources. The importance of these time and cost-saving measures in the interests of the Bank and other debtors does not, however, detract from the importance of the public interest served by the need for justiciable disputes to be settled by a court of law.

[25] When considering the nature and extent of the limitation,[28] it is apparent that section 38(2) does not permanently limit the right in section 34, since a debtor may apply to court to restrain the Bank from proceeding in terms of section 38(2) until a court has adjudicated upon the debtor's alleged defences.[29] The nature of the limitation is that section 38(2) deprives the debtor of her or his right of access to courts in that it allows the Bank to resort to self help by by-passing the courts in enforcing its claim, instead of utilising normal court procedures. The extent of the limitation is substantial in relation to the harm it causes. Limitation of proprietary or possessory rights in the manner contemplated by the impugned provision may be extremely prejudicial to debtors. If the goods subject to seizure and sale are farming implements (as in the present case), and the Bank proceeds against the debtor without the safeguards of the judicial process, such a debtor may be unfairly deprived of her or his livelihood. Moreover, security over property and the seizure and sale thereof, need not only be limited to farming implements.[30] It is

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28 See s 36(1)(c).

29 See para 20 above.

30 See s 27 of the Act, which deals with security for loans and advances, and provides in subsection (3):
"The Board may upon such terms and conditions as it deems fit and on completion of a deed of hypothecation grant a loan or make an advance upon a hypothec of *movable property of which the applicant is the owner and in respect of which he or she has the right of use and disposal*." [emphasis supplied]

conceivable that household property or any other goods may be pledged. However, even if the debtor has agreed to the terms of seizure and is in breach of contract, the seizure could make serious inroads into her or his proprietary rights. The measures adopted by the legislation are thus too drastic for their purposes.

[26] It was contended by the Bank that there would be little purpose in the legislation having been enacted in the first place if the time and costs saved were so minimal as to not justify a departure from normal procedures of court. The Bank thus argued that the section 38(2) procedure saves time and costs to such a degree that the infringement of section 34 is justified. However, if one evaluates the ostensible purpose of the limitation (to save time and money) in relation to the effect of the provision itself, it is apparent that the section does not really achieve its objective: the extent to which it succeeds in its purpose is at best minimal. It is true that, by proceeding in terms of section 38(2), the Bank may avoid the "reasonable" summons period which would be necessary if it were required to approach the court to obtain a default judgment as well as an interim interdict preventing the debtor from abusing and/or disposing of the secured property after the summons has been received. However, the Bank would still have to give the debtor reasonable time to respond to the notice of demand prior to the seizure by the messenger. Not much time is saved. Additionally, the property seized by the Bank is subject to a pledge and/or hypothec in terms of section 27 of the Act.[31] It also enjoys a preferential claim against all

[31] See s 27(1) of the Act, which provides:

"Subject to the provisions of this Act, no loan or advance may be granted or made by the

other debtors.[32] The Bank is thus armed with security.

Bank except on the security of a mortgage of land or a real right in land in the Province or of a deed of hypothecation of movable property in terms of this section."

[32] In addition, the loan amount may be insured in favour of the Bank: see s 22(2)(e) of the Act.

[27] As shown above, the purpose of saving time and costs is achieved by section 38(2) only minimally, while it makes serious inroads into the rights of debtors. There are other less invasive remedies in the ordinary procedures of court which are commonly available to the Bank to realise its purpose, but do not prejudice debtors to the extent that the section 38(2) procedure does. In appropriate circumstances an interdict against the alienation of the goods could be obtained on an urgent basis. The concerns of the Bank are common to all comparable land or agricultural banks throughout the Republic. If the concerns for a speedy remedy are indeed so great, no reason was advanced and no good reason suggests itself why national legislation could not be passed to make provision in the rules of courts for simplified procedures for obtaining interdicts or attachment orders which nevertheless do not limit a debtor's section 34 rights.[33]

[28] We were referred in argument to *Hindry v Nedcor Bank Ltd and Another*,[34] where the High Court held that the statutory provision permitting the internal revenue service to resort to a measure of self help to collect taxes, with only a subsequent opportunity for the determination of legal rights, was not unconstitutional. However, the decision in the present case must be understood in the context of its particular circumstances, which differ from those of the revenue cases. We are not called upon to decide the correctness or otherwise of the conclusion in *Hindry* and we refrain from doing so.

[29] Application of the section 36(1) limitations analysis involves a process set out in *S v*

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33 Similar mechanisms already exist. See, for example, the automatic rent interdict and attachment provisions in ss 31 and 32 of the Magistrates' Courts Act 32 of 1944.

34 1999 (2) SA 757 (W).

Makwanyane and Another[35] as a:

> ". . . weighing up of competing values, and ultimately an assessment based on proportionality . . . . which calls for the balancing of different interests."

In the process of balancing such interests and in the proportionality evaluation:

[35] 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104.

". . . one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose."[36]

[36] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 35 (footnote omitted).

The limitations inquiry and the requirements that must be considered aim to "strike the appropriate balance of proportionality between means and end."[37] Applying the above analysis in the present matter, the importance of the purpose of section 38(2) - i.e., the interest of the Bank in speedy and inexpensive realisation of its securities - may only properly be evaluated by considering its weight relative to the interest of its debtors in having disputes that can be resolved by the application of law decided before a court, and the importance of the principle against self help. In addition,[38] the Bank is able to utilise less restrictive means to achieve its purpose. The purpose and significance of section 38(2),[39] when weighed against the object and importance of section 34,[40] make it clear that section 38(2) is not a justifiable limitation of the right of access to court. Thus it is clear that section 38(2) is unconstitutional and cannot stand. I therefore agree with Mogoeng J that it is invalid. The above finding makes it unnecessary to consider whether

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37 See *Beinash* above n 24 at para 21.

38 See para 27 above.

39 See para 24 above.

40 See para 22 above.

section 38(2) of the Act is in conflict with the right to privacy in section 14(c) or any other right in the Constitution.[41]

[41] Section 14(c) provides:

"Everyone has the right to privacy, which includes the right not to have -

. . . .

(c) their possessions seized;

. . . ."

[30] It was the submission of Mr Lever that, should section 38(2) be found to be unconstitutional, and therefore invalid, this Court should exercise its powers under section 172(1)(b) of the Constitution,[42] suspending the invalidity, to afford the provincial legislature of the North West reasonable opportunity to remedy the defect in the legislation. Striking down section 38(2) would, he submitted, bring down with it all other non-offending advantages in the provision. Mr Freund's approach was that the order of Mogoeng J should be varied and that the portion of section 38(2) beginning with "and in the event of default of payment", up to the end of the subsection, should be declared inconsistent with the Constitution and severed. He recognised, however, that this might require a consequential amendment of sections 38(3) and 38(4)(b),[43] as these sections are premised on the assumption that the sale of property has been in terms of section 38(2). His alternative submission was that if the phrase "without recourse to a court of law" were to be found to be necessarily implied in the whole of section 38(2) and

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[42] Section 172(1)(b)(ii) provides:

> "When deciding a constitutional matter within its power, a court -
>
> . . . .
>
> (b) may make any order that is just and equitable, including -
>
> . . . .
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[43] Section 38(3) provides:

> "If the proceeds of any sale of property in terms of subsection (2), after the deduction of the costs of the seizure and sale thereof, exceed the amount to be repaid to the Bank with the amount of interest thereon as contemplated by that subsection, the balance shall be paid over to the debtor or any person who is in law entitled to receive such payment, and where such proceeds, after such deductions, are less than the sum of the amount so repayable and interest thereon as hereinbefore contemplated, such proceeds shall first be applied towards reducing the amount of interest payable to the Bank before being applied in redemption of capital, and the Bank shall have a claim against the debtor or his or her estate (as the case may be) in respect of the deficit";

and s 38(4)(b) reads:

> "The Board may after giving written notice to the Master or the trustee or the assignee or the liquidator, as the circumstances may require, cause the said hypothecated property to be sold in the manner provided by subsections (2) and (3)."

therefore not severable from the section, he would support a striking down of section 38(2) with an ancillary order of suspension of a declaration of invalidity, thereby availing the legislature the opportunity of correcting the law.

[31] In *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*,[44] the severance test was set out as follows:

> "[I]f the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?"[45]

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44 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16.

45 Footnote omitted. The footnote in the quoted text makes reference to *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822. See also *Ferreira v Levin* above n 7 at para 130.

Although severance is a constitutionally plausible option in questions of legislative invalidity,[46] it does not seem to be a viable choice in this matter. If this Court severs the provisions of section 38(2) in the manner proposed by the amicus, it would indeed require a consequential amendment of sections 38(3) and 38(4)(b). Whereas section 38(3) provides for the application of the proceeds of the sale of property in terms of section 38(2), section 38(4)(b) gives authority to the Board to act in terms of sections 38(2) and 38(3). Thus section 38(2), read with sections 38(3) and 38(4)(b), creates a system of debt recovery where, once a debtor has been subjected to the provisions of section 38(2), the debt recovery process, including distribution of the proceeds of the sale of the property, is placed under the control of the Bank instead of a court, where the court itself should be determining whether the substance and process of debt recovery is fair.

[46] See above n 42.

[32] Severing the proposed portions of section 38(2), as suggested by the amicus,[47] is therefore hardly viable. It is legitimate for the Bank to enforce a legal claim, but not by by-passing the courts at the expense of the constitutional rights of the debtor and in the manner of section 38(2). The need for the Bank to recover its property from defaulting debtors in a manner that saves time and costs is inextricably woven with the notion of the Bank by-passing the courts. Severing the words "without recourse to a court of law", as proposed by the amicus in the alternative, will also not provide the Bank with a "quick, effective and inexpensive" remedy against its debtors. Striking down is thus the only viable option. Section 38(2) must therefore, in its entirety, be declared invalid. Although striking down section 38(2) also has implications for sections 38(3) and 38(4)(b), the constitutionality of these sections is not before us. Amending these provisions accordingly is a matter for the legislature, not this Court.

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47 At para 30.

[33] Counsel agreed that, should section 38(2) be found to be unconstitutional and invalid, this Court would need to suspend its order of invalidity in terms of section 172(1)(b)(ii) of the Constitution. However, there was no evidence to support that submission, nor are there any other grounds for so doing. This Court has, in several of its judgments, stressed the importance of laying a proper foundation for the granting of ancillary orders of suspension of invalidity, retrospectively or prospectively.[48] Although the rule was formulated in terms of section 98(6) of the interim Constitution,[49] which required this Court to take into account "the interests of justice and good government" before suspending an order of invalidity, these requirements are included in section 172(1)(b)(ii) of the Constitution, which provides that an order made must be "just and equitable". Such evidence would relate to what the effect of the order would be on the successful litigant and on those prospective litigants in positions similar to that of the former, as well as the effect on the administration of justice or state machinery. No such evidence is before this Court.[50] There is therefore no basis for this Court to suspend an order of invalidity.

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48 *S v Ntsele* 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC) at para 13, where the following observation was made with regard to the evidence which must be placed before the court:

> "[A]ll the relevant evidence should be received and evaluated by the court of first instance. Courts would also be well-advised, when it appears that the constitutionality of a statute is in jeopardy, to consider whether notice of the proposed invalidation should not be given to organs of State - and possibly others - concerned with the administration of the targeted provision or likely to be affected by its demise." [footnote omitted]

See also *S v Mello and Another* 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at para 11; *S v Julies* 1996 (4) SA 313 (CC); 1996 (7) BCLR 899 (CC) at para 4; *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 30; *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 30.

49 Act 200 of 1993.

50 In argument before this Court, Mr Lever read out a letter dated 23 August 1999, written by Mr MJ Khasu, Member of the Executive Council for Agriculture, Conservation and Environment for the North West Province and addressed to the attorneys on record for the first respondent. Apart from stating his opposition to the confirmation of the order of Mogoeng J and stating that an order of unconstitutionality would cause serious hardship for the public, neither compelling factual evidence nor persuasive reasons which would justify the suspensive effect of an order of invalidity, were provided.

[34] In the result, the following order is made:

1. The order of the Bophuthatswana High Court, declaring section 38(2) of the North West Agricultural Bank Act 14 of 1981 as amended, inconsistent with section 34 of the Constitution and invalid, is confirmed.
2. In terms of section 172(1)(b) of the Constitution, it is ordered that the declaration of invalidity confirmed in paragraph 1 shall invalidate any application of section 38(2) of the North West Agricultural Bank Act 14 of 1981 to attachments of the property of the first respondent's debtors, carried out in terms of section 38(2) of the Act, provided that on the date of this judgment, such property has not yet been sold in execution.
3. There is no order as to costs.

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

For the first respondent:	H Lever SC and D Spitz instructed by Deneys Reitz.
Amicus curiae:	AJ Freund.