CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 73/03

XOLISILE ZONDI	Applicant
versus	
MEMBER OF THE EXECUTIVE COUNCIL FOR TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS	First Respondent
WILLIAM STEENBURG	Second Respondent
KOBUS BOTHA	Third Respondent
RICHARD COOK	Fourth Respondent

Heard on : 9 March 2004

Decided on : 15 October 2004

JUDGMENT

NGCOBO J:

Introduction

[1] This case concerns the constitutional validity of sections 8, 10(2), 12, 16(1), 29(1), 33, 34, 37, and 41(4) of the Pound Ordinance (KwaZulu-Natal), 1947[1] (the "Ordinance"). The question is whether these provisions unjustifiably limit the right of

[1] No 32 of 1947. These provisions are cited in full at paras 65, 88, 107 and 110.

access to courts;[2] the right to equality;[3] the right to administrative action;[4] and the other rights asserted by the applicant.[5]

[2] In substance, the impugned sections make provision for: immediate seizure and impoundment of trespassing animals by a landowner without notice to the livestock owner unless the livestock owner happens to be an "owner of land immediately adjacent and which bears the registered brand of that owner";[6] the assessment of damages by "two disinterested persons", who must be voters, as defined in the Electoral Act, 1979[7] (the "Electoral Act"), or landowners;[8] payment of impoundment fees and damages by the livestock owner;[9] the sale in execution of impounded animals if the livestock owner is unable to pay such fees and damages;[10] the disposal of animals that are not sold after the auction, including animals that are either too vicious to be driven to the pound or kept at a pound;[11] and notice to be given to livestock

[2] Section 34 of the Constitution.

[3] Section 9 of the Constitution.

[4] Section 33 of the Constitution.

[5] These include the constitutional rights: against arbitrary deprivation of property (section 25(1)); the right to have access to sufficient food (section 27(1)(b)); every child's right to basic nutrition (section 28(1)(c)); the right to dignity (section 10); the right to enjoy culture (sections 30 and 31); and the obligation of the state to respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2)); and international human rights.

[6] Section 16(1) of the Ordinance.

[7] Act 45 of 1979.

[8] Section 29(1) of the Ordinance.

[9] Sections 26-30 of the Ordinance.

[10] Sections 33-34 and 37 of the Ordinance.

[11] Sections 10(2), 37 and 41(4) of the Ordinance.

owners who are known.[12] From start to finish there is no intervention of the judicial process.

Factual Background

[3] The applicant is Mrs Xolisile Zondi. She is the widow of the late Mr Makhelwane Zondi who was a labourer on a farm, Thornview, where he resided with the applicant. Mr Cook, the fourth respondent in these proceedings, owns the farm. The deceased and the applicant had resided on the farm for more than 25 years. Her only asset is her livestock, consisting of 28 head of cattle and 18 goats, conservatively valued at R44 600, which she inherited from the deceased. She is unemployed and has no cash in the bank. To meet her daily expenses, she depends on the proceeds of her livestock. From time to time, she sells calves to meet her expenses, such as school fees, medical bills and other household costs. The livestock also provides a source of nourishment in the form of meat and milk. She also uses the cattle in the observance of traditional ceremonies and rituals. She has no land that she can call her own. She has resided on the farm since the death of her husband.

[4] What gave rise to the present litigation is a letter of demand that was sent to the applicant on 14 February 2003, at the instance of Mr Cook. That letter called upon the applicant to remove her livestock from the farm by 14 March 2003. It warned that if she failed to comply with the demand, her livestock would be impounded. The letter further told her that arrangements had already been made to remove her livestock to

[12] Sections 10(2) and 41(4) of the Ordinance.

the pound on 15 March 2003 were she to fail to comply with the demand. The pound to which they were to be removed was not identified, despite a request by the applicant to do so.

[5] It is apparent from the letter of demand that Mrs Zondi had previously been required to remove the livestock from the farm and that she had not complied. It is not clear from the papers and we do not know why this demand was issued because Mr Cook did not oppose the proceedings. The terms of the letter do not suggest that Mrs Zondi's cattle have wandered onto his land without permission, but rather that he has terminated permission previously given to Mrs Zondi to keep the cattle on the land. Whether Mr Cook is entitled to terminate such permission is not something that is in issue in the case at this stage. Nor is it something we can determine on the papers as they stand. It should be mentioned that in her papers, however, Mrs Zondi alleges that "the arbitrary removal of the livestock of poor Blacks in the rural areas is a favoured means of harassing or intimidating them," and that in her knowledge and experience, it occurs regularly for reasons that have nothing to do with trespass of livestock. As we have not heard Mr Cook's reason for issuing the letter of demand we cannot surmise further as to why the demand was issued.

[6] The letter of demand precipitated a two-part urgent application to the High Court in Pietermaritzburg (the "High Court") to block the threatened impoundment. The first part of the application sought an interdict restraining the fourth respondent and the poundkeepers of Weenen and Dundee from impounding the applicant's

livestock. Both poundkeepers were cited because the applicant was uncertain as to which pound her livestock would be taken to for impoundment. The second part of the application sought an order declaring the impugned provisions to be inconsistent with the Constitution. On 11 March 2003, the interdict part of the application, which was not opposed, was granted. It blocked the threatened impoundment pending the final determination of the constitutional challenge.

[7] The Member of the Executive Council for Traditional and Local Government Affairs, KwaZulu-Natal (the "MEC"), was one of the respondents against whom the relief was sought and granted. While the MEC elected to abide by the decision of the High Court on the constitutional challenge, an affidavit was nevertheless filed on his behalf. In that affidavit, he expressed the belief that it was not appropriate for the High Court to decide the constitutional validity of the impugned provisions as there had been no trespass on the applicant's version and pointed to the fact that the Ordinance did not apply to local authorities. Despite being called upon by the High Court to make submissions on the appropriate relief, the MEC persisted in his attitude that the constitutionality of the impugned provisions should not be reached.

[8] The High Court upheld the constitutional challenge and found that: (a) sections 16(1), 29(1), 33 and 34 of the Ordinance permit self-help and therefore violate the right of access to courts guaranteed in section 34 of the Constitution; and (b) sections 8, 10(2), 12, 16(1), 29(1), 37 and 41(4) violated sections 33 and 34 of the Constitution in that they make no provision for prior notice to the livestock owner or they require

notice only if the stockowner is known. These provisions were also found to be inconsistent with section 3(1) and (2) of the Promotion of Administrative Justice Act ("PAJA").[13] In addition, the High Court found that section 29(1) discriminates on the basis of race and landlessness in that it requires a person who assesses damages to be either a voter or a landowner. It also found section 16(1) inconsistent with section 25(1) of the Constitution in that it permits arbitrary deprivation of property.[14]

[9] Having found that neither reading-in nor severance was appropriate in this case, the High Court declared the impugned provisions to be inconsistent with the Constitution and therefore invalid. It thereafter referred its order of invalidity to this Court for confirmation in terms of section 172(2)(a) of the Constitution, which provides that an order of constitutional invalidity made by a High Court is of no force unless confirmed by this Court. However, the MEC has also noted an appeal against the decision of the High Court. What this Court therefore now has to consider is whether or not to confirm the order declaring the impugned provisions invalid.

[10] Before considering the constitutional validity of the impugned provisions, it will be convenient at this stage to deal with the preliminary matters that arose in this case. These are: the application for direct access by the applicant to enable her to now challenge the constitutional validity of the entire Ordinance, or alternatively to challenge further provisions of the Ordinance; the application by the MEC for leave to

[13] Act 3 of 2000.

[14] The judgment of the High Court has since been reported as *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* 2004 (5) BCLR 547 (N).

introduce further evidence in this Court; and the question whether the order of invalidity is subject to confirmation by this Court.

Application for direct access

[11] On the eve of the hearing of this matter, the applicant brought an application for direct access in which she sought an order permitting her to challenge the validity of the entire Ordinance or, alternatively, further provisions of the Ordinance. This application, which was opposed by the MEC, was heard in limine. After argument, the Court made an order dismissing the application and indicated that reasons for that order would be furnished in the course of this judgment. Here are those reasons.

[12] The frequency with which applications for direct access occur renders it necessary to restate the legal principles that are applicable in the granting of such applications. Such applications are governed by rule 18 of the rules of this Court read with section 167(6)(a) of the Constitution, read further with section 8 of the Constitutional Court Complementary Act.[15] Under these provisions, this Court has discretion whether to grant direct access but an application will only be granted if it is in the interests of justice to grant it.[16] And the question whether it is in the interests of justice to grant direct access must be decided in the light of the facts of each case.[17] In

[15] Act 13 of 1995.

[16] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at paras 9-11; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 8; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 25; and *Dudley v City of Cape Town and Another* 2004 (8) BCLR 805 (CC) at para 6.

[17] *Member of the Executive Council* id at para 32; *Dudley* id at para 7.

this regard this Court will consider a range of factors. These include the importance of the constitutional issue raised and the desirability of obtaining an urgent ruling of this Court on that issue, whether any dispute of fact may arise in the case, the possibility of obtaining relief in another court, and time and costs that may be saved by coming directly to this Court.

[13] An important factor, which this Court has emphasised time and again, is the undesirability of this Court sitting both as the court of first and final instance in a matter in which other courts have jurisdiction.[18] In terms of section 169[19] of the Constitution, the High Courts have constitutional jurisdiction, including the jurisdiction to make an order concerning the validity of a provision in an Act of Parliament or a provincial Act. The Constitution contemplates that such orders will be referred to this Court for confirmation. Effect must be given to this by ensuring that courts are not bypassed in matters that fall within their jurisdiction unless there are compelling reasons to do so.[20]

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[18] *Brink* above n 16 at para 14; *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 18; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 8; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 103 (CC) at para 12; *National Gambling Board v Premier, KwaZulu-Natal, and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 38; *Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* 2002 (5) SA 392 (CC) at para 19; 2002 (10) BCLR 1092 (CC) at para 18; and *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at para 6.

[19] Section 169 of the Constitution states that:

> "A High Court may decide –
> (a) any constitutional matter except a matter that –
> (i) only the Constitutional Court may decide; or
> (ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and
> (b) any other matter not assigned to another court by an Act of Parliament."

[20] Compare *Dudley* above n 16 at para 8.

[14] If constitutional matters could, as a matter of course, be brought directly to this Court, this Court could be called upon to decide cases without the benefit of the views of the lower courts having constitutional jurisdiction.[21] Yet the views of other courts are especially important in this early stage of the development of our constitutional jurisprudence. They help to refine our jurisprudence. As this Court held in *Bruce*:

> "Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."[22]

[15] This Court has therefore held that it is not ordinarily in the interests of justice for this Court to act as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given.[23] Compelling reasons are required to persuade this Court to exercise its discretion to grant direct access and sit as a court of first and last instance.[24]

[16] With these legal principles in mind, I now turn to consider the merits of the application for direct access.

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[21] Id at para 7.

[22] *Bruce* above n 18 at para 8.

[23] Id; *Satchwell* above n 18 at para 6.

[24] Id

[17] The applicant's challenge to the entire Ordinance rests on the proposition that "pounds" fall within the functional areas of a provincial legislative competence only to the extent set out for the provinces in section 155(6)(a) and (7) of the Constitution.[25] It was contended that the Ordinance, which is provincial legislation, does not deal with the matters comprehended in section 155(6)(a) and (7). The Ordinance is therefore beyond the competence of the province, the applicant asserted. In essence the applicant now raises the question of the competence of the provinces to deal with matters relating to pounds.

[18] The High Court had jurisdiction under section 172(2)(a) not only to deal with this question, as it involved the constitutionality of an Ordinance, but also with the challenge to the further provisions of the Ordinance. However, these matters were not raised in the High Court. The only explanation given for the omission was to avoid a situation where it becomes apparent at the hearing that either the entire Ordinance or further provisions should have been challenged so as to obtain appropriate relief. In other words, the application for direct access is an attempt to remedy a possible omission to challenge what should have been challenged in the High Court. Indeed it

[25] In relevant part, section 155 provides:

> "(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must -
> (a) provide for the monitoring and support of local government in the province;
> . . .
> (7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)."

was submitted on behalf of the applicant in the course of oral argument that the application in effect represents an attempt to amend the pleadings on appeal.

[19] In *Prince v President, Cape Law Society and Others*[26] this Court held that a party who wishes to challenge the constitutionality of a provision in a statute must raise the challenge at the time of the institution of the legal proceedings.[27] A party cannot hope to supplement and make its case on appeal.[28] In effect what the applicant is now seeking to do through the application for direct access is to introduce a cause of action that is fundamentally different to that relied upon in the High Court. The constitutional challenge in the High Court was directed at specific provisions of the Ordinance and it was based on specific provisions of the Constitution. Applications for direct access are to be granted in exceptional circumstances and not merely to avoid consequences of failure to properly formulate a constitutional challenge.[29]

[20] There are further considerations that militate against the granting of direct access in this matter. The application raises complex and difficult questions relating to the powers of municipalities and provinces in relation to pounds. A decision of this Court on this issue will have far-reaching implications for the provinces and municipalities as well as the national government. None of these spheres of

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[26] 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

[27] Id at para 22.

[28] Id

[29] Compare remarks by this Court in *Zuma* above n 16 at para 11; and *Bruce* above n 18 at para 22.

government has been joined in these proceedings. Counsel for the applicant submitted that this being a KwaZulu-Natal ordinance, other municipalities and provinces have no direct or substantial interest in the outcome. This submission overlooks the very real consequences a ruling of this Court on this issue will have for the powers of the provinces and municipalities in relation to the establishment and management of pounds. This is sufficient to call for a joinder of these spheres of government. In addition, the application was made on the eve of the hearing of this matter and left the MEC with inadequate time to investigate the issues raised in the application.

[21] For all these reasons, the Court considered that it was not in the interests of justice to grant direct access and made the order dismissing the application.

The application to introduce further evidence

[22] The MEC seeks leave to introduce further evidence in this Court. Applications to lead further evidence in this Court are governed by rule 30, which incorporates by reference section 22 of the Supreme Court Act, 1959.[30] Section 22 confers on the court hearing an appeal a wide discretion to receive further evidence.[31] As a general

[30] Act 59 of 1959.

[31] Section 22 states that:

> "The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—
> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

matter, leave to receive further evidence will be granted where special grounds exist.[32] A factor that is generally accepted as constituting a special ground is the fact that the evidence sought to be led was either not available at the time of the trial or could not have been obtained by the exercise of proper diligence.[33]

[23] In the *Prince* case, this Court held that considerations applicable to allowing further evidence on appeal in constitutional matters are however not necessarily the same as the considerations applicable in other matters.[34] And in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*,[35] this Court made it clear that although this Court may have greater flexibility than the Supreme Court of Appeal in allowing additional evidence on appeal, it is a power which should not be exercised unless there are compelling reasons to do so. Furthermore, in the *Prince* case, this Court sketched the obligation of the parties when pleading in constitutional matters and said:

> "Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the Court information relevant to the issue of justification. I would emphasise

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[32] *Shein v Excess Insurance Company, Ltd* 1912 AD 418 at 428-9; *Staatspresident en 'n Ander v Lefuo* 1990 (2) SA 679 (A) at 691C-J; and see n 26 at para 21.

[33] *Deintje v Gratus & Gratus* 1929 AD 1 at 6-7; also see n 26 at para 21.

[34] Above n 26 at para 23.

[35] 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 119.

> that all this information must be placed before the Court of first instance."[36] (Footnote omitted.)

[24] The evidence that the MEC seeks leave to introduce relates firstly to the importance of the pound legislation and "the known and notorious dangers" of straying animals; and secondly to the steps taken by the Department of Traditional and Local Government to revise the pound legislation and to reconcile it with the Constitution as evidenced by the KwaZulu-Natal Pound Bill of 2000 which was published for comment on 21 February 2000. The revision of the Ordinance was referred to by Mr Pienaar who deposed to an affidavit on behalf of the MEC in the High Court. However, he did not give any details of the steps taken, nor did he refer to the KwaZulu-Natal Pound Bill of 2000. It was the applicant in her reply who referred to the KwaZulu-Natal Pound Bill which was first published for comment on 29 August 1996. She alleged that no progress appears to have been made. It follows therefore that the further evidence sought to be led is either already on record or, as the MEC puts it, known and notorious.

[25] The only explanation for not placing this information before the High Court was the attitude of the MEC both in this Court and in the High Court, namely, that it was not necessary to reach the constitutionality of the Ordinance. The High Court specifically requested the MEC to place before it information relating to the consequences of an order of invalidity. The MEC persisted in his attitude that it was not necessary to consider the constitutionality of the Ordinance. This was an

[36] Above n 26 at para 22.

unfortunate stance for the MEC to take, in particular, after being called upon by the High Court to make representations on the appropriate order.

[26] What the MEC now seeks to do is to place before this Court evidence that he was supposed, and was called upon, to place before the High Court. If the MEC wished to justify the pound legislation, he should have placed before the High Court information relevant to that justification. This information was not placed before the High Court because of a deliberate decision taken by the MEC not to place such information before the High Court. The MEC tied himself to a particular defence and as a result refused to place information before the High Court that he now seeks to place before this Court. This attitude of the MEC cannot be countenanced.

[27] In the *Prince* case, this Court made it clear that parties must make out their case in their founding papers and that they would not ordinarily be allowed to supplement and make their case on appeal.[37] This Court will not grant leave to lead further evidence "unless the circumstances are such that compelling reasons exist to do so."[38] Those circumstances do not exist in this case.

[28] For all these reasons the application to lead further evidence must be refused.

Are the orders subject to confirmation?

[37] Id

[38] Above n 35.

[29] The High Court and the parties approached the matter on the footing that the orders of invalidity are subject to confirmation in terms of sections 167(5)[39] and 172(2)(a)[40] of the Constitution. Only orders of invalidity concerning an Act of Parliament, a provincial Act or any conduct of the President are subject to confirmation. Subsequent to the hearing, a question arose as to whether the orders of invalidity are subject to confirmation in view of the fact that we are concerned here with an ordinance. The Chief Justice issued further directions requesting the parties to submit written argument dealing with the question whether the orders of invalidity are subject to confirmation, and if not, whether the MEC's appeal should be treated as an application for leave to appeal and non-compliance with the rules of this Court be condoned.

[30] Inasmuch as there is an appeal by the MEC, it is not necessary to decide whether the declaration of invalidity of the Ordinance is subject to confirmation under sections 167(5) and 172(2)(a) of the Constitution. This matter will be approached on the basis of the appeal by the MEC. To this extent the MEC's notice of appeal will be treated as an application for leave to appeal. And in all the circumstances of this case,

[39] Section 167(5) of the Constitution states that:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[40] Section 172(2)(a) of the Constitution states that:

> "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."

it is in the interests of justice that non-compliance with the rules be condoned and that leave to appeal be granted.

[31] Since Mrs Zondi has been referred to as the applicant, she will continue to be referred to as the applicant and the MEC as the respondent.

[32] The MEC contended that it was not appropriate for either the High Court or this Court to determine the constitutional validity of the impugned provisions. This contention rests on the premise that on the papers it had not been shown that there was trespass so as to trigger the Ordinance. It is necessary to determine this question first.

Should the constitutionality of the impugned provisions be reached?

[33] In support of the contention that this is not the appropriate case to reach the constitutionality of the Ordinance, counsel for the MEC placed much reliance on the rule that requires courts, where possible, to decide cases without reaching constitutional issues. This rule was first announced by this Court in *S v Mhlungu and Others*[41] and its basis was later explained in *Zantsi v Council of State, Ciskei, and Others.* [42]

[41] 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59.

[42] 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at paras 2-5.

[34] The rule contended for by the MEC has no application in this case. In the first place, Mrs Zondi was threatened with the use of the Ordinance. Under section 38[43] of the Constitution, she was entitled to approach the High Court for relief. In the High Court, no argument was advanced as to why the constitutional validity of the provisions of the Ordinance should not be considered. The High Court was therefore entitled to consider the constitutional validity of the impugned provisions. In the second place, the rule has no application where, as here, a High Court has declared the impugned provisions invalid. The declaration of invalidity creates an uncertainty as to the constitutional validity of the impugned provisions. It is necessary to remove this uncertainty.

[35] It is also clear from the *Zantsi* judgment that, where the order of a High Court creates such uncertainty, it is necessary for this Court to consider the constitutional challenge.[44] Indeed this was the reason why this Court considered the constitutional issue in the *Zantsi* case even though it was not strictly necessary for the High Court in that case to have considered the issue.

[36] Finally, where a court is concerned with legislation that is rooted in apartheid, it is necessary to cleanse the statute books of such statutes. Such statutes are

[43] Section 38 of the Constitution provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
> (a) anyone acting in their own interest".

[44] Above n 42 at para 8.

inconsistent with the Constitution and they cannot be allowed to remain in our statute books.

[37] The contention by the MEC that this is not the appropriate case to determine the constitutionality of the Ordinance must fail. It now remains to consider the constitutionality of the impugned provisions. In order to appreciate the basic purpose and effect of the impugned provisions and to evaluate the cogency of the constitutional challenge, it is necessary to understand the scheme of the Ordinance and the social context in which it operates.

The social context in which the Ordinance operates

[38] The impoundment of livestock occurs in a complex setting of historical deprivation of land to black South African people, the struggle for land and the need to protect farms against trespassing livestock. This setting is a consequence of our history. The Ordinance was enacted under the old legal order, which was premised on the apartheid policy. That policy was characterised by the denial of the franchise and land rights to African[45] people and racial segregation was its cornerstone. To give effect to this policy, large-scale land dispossessions and forced removals of black people, in particular, African people, took place over almost a century.[46] In the end, African people were confined to 13% of the total land in the country while white

[45] Whereas the Black Administration Act uses the term "Black" to describe a member of the indigenous race in South Africa, the term "African" has been used in this judgment. Its use should not be construed as conferring legal or constitutional validity for its exclusive use to describe one race group, nor is it intended to exclude persons of other race groups who are entitled to or describe themselves as "Africans".

[46] *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at para 41.

people owned almost all the remaining 87%.[47] African people were driven into the desolation of homelands. The Natives Land Act[48] and the Native Trust and Land Act[49] effectively "made it impossible for members of the African community, a racial majority by far in this country, to own land in some 87% of the country."[50] By law, African people could not own or even occupy land in a white area like Weenen, except as labourers.[51]

[39] What emerged from this policy were racially segregated residential areas, in which it was unlawful for the majority racial group to own or occupy land in an area that had been designated for occupation by the minority racial group. Residential segregation ensured that white and black people did not live side by side. This policy produced and ensured landlessness, amongst other things, for African people, and therefore social and economic disempowerment for African people. Because African people were confined to small, overcrowded and often desolate areas, they had insufficient grazing land for any livestock that they were allowed to keep. By contrast, white farmers owned vast amounts of land which was adequate for farming, grazing and irrigation. Thus it is reported that in about 1985, Weenen's 133 farmers

[47] Id

[48] Act 27 of 1913 at sections 2, 4 and 6.

[49] Act 18 of 1936 at sections 10-12, 21 and 24-27.

[50] See n 46 at para 2.

[51] Id at para 41.

had an estimated 80 500 hectares of grazing land, 2 000 hectares of irrigated fields and 110 hectares of dryland pastures.[52]

[40] In the Weenen area alone it is reported that about 22 000 people were forcibly removed from Weenen into relocation sites in Msinga,[53] a nearby "black area". In some cases people were relocated to sites right next to their former homes and grazing land. Although people were generally prevented from taking their livestock with them, some managed to "smuggle" their livestock into Msinga, which offered nothing but desolation. Since there was insufficient grazing land in the overcrowded and underdeveloped areas in which they were constrained, the livestock strayed back onto the now only white farms, the animals' old grazing grounds.[54]

[41] In search of grazing land for their livestock African people found themselves trespassing on land, which they saw as historically theirs. Therefore they also saw livestock impounding as illegitimate. White farmers, on the other hand, saw livestock impounding as "their only peaceful recourse to discourage the poaching of grazing or trespass by livestock"[55] on their legally owned land. The nature of this conflict in the Weenen area has perhaps been accurately described by one farmer as follows: "It is

[52] Kockott *The Fields of Wrath, Cattle Impounding in Weenen, Special Report no. 8* (The Association For Rural Advancement (AFRA) and the Church Agricultural Project (CAP), 1993) 27-28.

[53] Id at 24.

[54] Id at 21-29.

[55] Id at 17.

simple. It's a struggle for land. A struggle between the haves and the have-nots. And the haves don't have that much anyway."[56]

[42] In this historically tragic setting, livestock impounding still provides some farm owners with a means to discourage the poaching of grazing or trespass by livestock. It is in this historical and current context that the impounding scheme of the Ordinance operates.

The impounding scheme of the Ordinance

[43] In order to appreciate the effect of the challenged provisions and to evaluate the cogency of the constitutional challenge, it is necessary to have some understanding of the impounding scheme. The scheme has a number of provisions. For present purposes, a brief outline of the basic functioning of the scheme and the main provisions will suffice. In particular, the provisions of the Ordinance are described without considering the proper interpretation to be attached to them in the light of the Constitution and PAJA. What follows does not therefore purport to be an authoritative analysis of any provision of the Ordinance that is referred to in the course of this introduction. This is no more than a summary of the main provisions of the Ordinance.

[44] The Ordinance was promulgated in 1948 by the Provincial Council of the Province of Natal. In terms of Proclamation 107 of 1994 published in Government

[56] Id at 18.

Gazette 15813 of 17 June 1994, the administration of the whole of the Ordinance was assigned to KwaZulu-Natal with effect from 17 June 1994. This was done pursuant to the provisions of section 235(6)[57] and 235(8)[58] of the interim Constitution.[59] In terms

[57] Section 235(6) of the interim Constitution provides:

> "The power to exercise executive authority in terms of laws which, immediately prior to the commencement of this Constitution, were in force in any area which forms part of the national territory and which in terms of section 229 continue in force after such commencement, shall be allocated as follows:
>
> (a) All laws with regard to matters which—
> (i) do not fall within the functional areas specified in Schedule 6; or
> (ii) do fall within such functional areas but are matters referred to in paragraphs (a) to (e) of section 126 (3) (which shall be deemed to include all policing matters until the laws in question have been assigned under subsection (8) and for the purposes of which subsection (8) shall apply mutatis mutandis), shall be administered by a competent authority within the jurisdiction of the national government: Provided that any policing function which but for subparagraph (ii) would have been performed subject to the directions of a member of the Executive Council of a province in terms of section 219 (1) shall be performed after consultation with the said member within that province.
> (b) All laws with regard to matters which fall within the functional areas specified in Schedule 6 and which are not matters referred to in paragraphs (a) to (e) of section 126 (3) shall—
> (i) if any such law was immediately before the commencement of this Constitution administered by or under the authority of a functionary referred to in subsection (1) (a) or (b), be administered by a competent authority within the jurisdiction of the national government until the administration of any such law is with regard to any particular province assigned under subsection (8) to a competent authority within the jurisdiction of the government of such province; or
> (ii) if any such law was immediately before the said commencement administered by or under the authority of a functionary referred to in subsection (1) (c), subject to subsections (8) and (9) be administered by a competent authority within the jurisdiction of the government of the province in which that law applies, to the extent that it so applies: Provided that this subparagraph shall not apply to policing matters, which shall be dealt with as contemplated in paragraph (a).
> (c) In this subsection and subsection (8) 'competent authority' shall mean—
> (i) in relation to a law of which the administration is allocated to the national government, an authority designated by the President; and
> (ii) In relation to a law of which the administration is allocated to the government of a province, an authority designated by the Premier of the province."

[58] Section 235(8) of the interim Constitution provides:

> "(a) The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the Gazette assign, within the framework of section 126, the administration of a law referred to in subsection (6) (b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.
> (b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary for the efficient carrying out of the assignment, he or she may—

of Proclamation 5 of 13 June 2003, the administration of the Ordinance was entrusted to the provincial member of the executive council responsible for local government, the MEC.

[45] The Ordinance puts in place a scheme which provides for the immediate impoundment of trespassing animals and their disposal. Section 16(1) permits a landowner to impound animals found trespassing on his or her land. The landowner is not expressly required to give any notice to the livestock owner unless the livestock owner happens to be the owner of land immediately adjacent to that of the landowner and the animals bear the registered brand of its owner. In such a case, the livestock owner is entitled to 12 hours written or verbal notice of trespass. Other livestock owners are not expressly entitled to such notice. Even if they are known or could, with reasonable diligence, be established, it matters not.

(i) amend or adapt such law in order to regulate its application or interpretation;
(ii) where the assignment does not relate to the whole of such law, repeal and re-enact, whether with or without an amendment or adaptation contemplated in subparagraph (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and
(iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer or secondment of persons (subject to sections 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of state, administration, force or other institution.

(c) In regard to any policing power the President may only make that assignment effective upon the rationalisation of the police service as contemplated in section 237: Provided that such assignment to a province may be made where such rationalisation has been completed in such a province.
(d) Any reference in a law to the authority administering such law, shall upon the assignment of such law in terms of paragraph (a) be deemed to be a reference mutatis mutandis to the appropriate authority of the province concerned."

[59] See *DVB* above n 46.

[46] Once the cattle have been seized, they may be driven to the nearest pound to be impounded. The pound is operated by a poundkeeper, who operates the pound for profit if it happens to be a private pound. The poundkeeper is obliged "without delay [to] receive into the pound . . . all animals which are tendered to him . . . for the purpose of being impounded."[60] The Ordinance does not expressly require the landowner to tell the poundkeeper who the owner of the livestock is, even if the landowner knows the livestock owner. The information that the landowner is obliged to furnish to the poundkeeper is the number and the description of the animals impounded, the land upon which they were trespassing, the distance between the place where they were found and the pound, and the trespass fees or damages claimed.[61]

[47] The poundkeeper, in turn, is not expressly obliged to inform the livestock owner of the impoundment unless the livestock owner is known.[62] Where the livestock owner is not known to the poundkeeper, the latter is not explicitly required to establish who the owner is, even if the animals are distinguishably branded or marked or the owner of the animals could, with reasonable diligence, be ascertained. Yet in terms of section 18[63] of the Ordinance, these are the steps that the landowner is

[60] Section 7 of the Ordinance.

[61] Section 25(1) of the Ordinance.

[62] Section 8 of the Ordinance states that:

> "Whenever the name of the owner of any impounded animal is known to the poundkeeper he shall forthwith send through the post or otherwise a written notice addressed to such owner at his place of residence, informing him of the fact that such animal has been impounded."

[63] Section 18 of the Ordinance provides:

required to take before a donkey or a pig found trespassing on his or her land can be destroyed.

[48] Once the animals have been impounded, they can only be released upon the payment of driving fees, trespass fees or damages assessed in terms of section 29(1) of the Ordinance and all the impoundment fees and expenses incurred by the poundkeeper.[64] If the owner is known "he shall be informed of such trespass" but only for the purposes of enabling the livestock owner to nominate one of the "two disinterested persons" who are required to assess monetary damages caused by the trespassing animals,[65] each of "whom shall either be a landowner or a voter as defined in section 1 of the Electoral Act, 1979".[66]

[49] If the animals are not claimed, they may be sold to defray these expenses.[67] They need not be sold at their market value, but only at a price that is sufficient to recover all the amounts due under the Ordinance.[68] Any animal that remains unsold may be destroyed.[69] In the event of any balance remaining after the proceeds of the

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> "Notwithstanding anything to the contrary contained in this Ordinance, the owner of any land may destroy any donkey or pig found trespassing thereon unless it is distinctively branded or marked or unless he knows or can with reasonable diligence ascertain to whom it belongs."

[64] Section 32 of the Ordinance.

[65] Section 29(1)(a) of the Ordinance.

[66] Section 29(1) of the Ordinance.

[67] Sections 33 and 34 of the Ordinance.

[68] Section 34(3) of the Ordinance.

[69] Section 37 of the Ordinance.

sale have been applied to the fees and the expenses, that amount may be paid to the livestock owner if known, otherwise it is forfeited to the provincial government.[70]

[50] The Ordinance does not expressly oblige anyone to tell the livestock owner about the sale. The livestock owners are expected to establish the sale of their livestock by going through the Provincial Gazettes or local newspapers. That the livestock owner may be illiterate matters not. Nor does it matter whether the livestock owner knows that he or she is required to find this information in this manner. Perhaps the livestock owner, though literate, does not understand the language of the local newspaper and thus receives news from Ukhozi FM or television, if he or she happens to have access to a radio or a television set. The livestock owner may not even be aware of the existence of the Provincial Gazette, let alone know how to find or read it. All of this matters not.

[51] Ordinarily, in the context of a population that is generally literate, cognisant of their basic rights with reasonable access to skills, knowledge or resources, a public notice in newspapers circulating in the area may be legally sufficient to give notice. However, in the case of someone like Mrs Zondi, who belongs to a group of persons historically discriminated against by their government under the old order, which still affects their ability to protect themselves under the laws of the new order, different considerations may apply. A general public notice through the Provincial Gazette or local newspapers, in many such cases, may not be sufficient to give notice where a

[70] Section 40 of the Ordinance.

large portion of the population which would be most affected by the notice is illiterate and otherwise socially disadvantaged. Mrs Zondi is indeed illiterate. The thumbprint mark she affixed to her founding affidavit bears testimony to this.

[52] The Ordinance further provides that if an animal is too vicious to be driven to the pound, a police officer has the "authority to issue instructions in regard to its destruction or other disposal as he may see fit, but only upon notice to the owner if he is known."[71] But if the viciousness only manifests itself after the animal is in the pound, the authority to give such instructions rests with the magistrate, after notice to the livestock owner if the owner is known.[72] The poundkeeper is required to record any injury to or death of the impounded animal as well as the cause of its death or injury.[73] These matters need only be entered in the pound book; nothing is said about notice to the livestock owner.

[53] Against this background I now turn to consider the constitutional challenge.

The constitutional challenge

[54] In the course of oral argument in this Court, the applicant abandoned the attack on sections 8, 10(2) and 12 of the Ordinance, but persisted with the attack on sections 16(1), 29(1), 33, 34, 37 and 41(4). This Court, however, must still consider the

[71] Section 41(4) of the Ordinance.

[72] Section 10(2) of the Ordinance.

[73] Section 12 of the Ordinance.

constitutional validity of all the provisions that were declared invalid by the High Court, including those in respect of which the applicant no longer seeks confirmation.

[55] The constitutional complaint against sections 16(1), 33, 34 and 37 was that they permit seizure and impoundment of trespassing livestock and their subsequent sale in execution without judicial intervention and without notice to the livestock owner where the stockowner is not known. This was said to be a violation of the right of access to courts. Subsection (1) of section 29, the assessment of damage provision, was challenged on the ground that it had a discriminatory effect on African people.[74] Its landownership and franchise requirements were said to be designed to exclude African people from assessing damages for trespass. It was contended that this violated the right to equality.

[56] The constitutional complaint against sections 37 and 41(4) was that they either do not make provision for notice to the stockowner at all or that they do not require steps to be taken to trace the stockowner where he or she is not known. This was said to be a violation of the right to just administrative action guaranteed in section 33 of the Constitution and a breach of the provisions of PAJA.[75] The applicant also contends that the impugned provisions violate other provisions of the Constitution.[76]

[74] See discussion at paras 87-97.

[75] Above n 13.

[76] Above n 5.

[57] For his part, the MEC contended that the impugned provisions do not prevent the owner of the impounded animals from approaching a court at any stage in the seizure and impoundment process to secure the release of animals that have been unlawfully impounded. He drew attention to the provisions of the Ordinance that make it an offence to unlawfully impound animals.[77] Lastly, he contended that if the impugned provisions limit any of the applicant's constitutional rights, such limitation is nevertheless justifiable under section 36(1) of the Constitution. The measures authorised by the impugned provisions are necessary to deal with the danger posed by trespassing animals, the MEC argued.

Does the scheme of the Ordinance violate the right of access to courts?

[58] Section 34 of the Constitution guarantees the right of access to courts:

> "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."

[59] In *Chief Lesapo v North West Agricultural Bank and Another*,[78] this Court considered the meaning of section 34 in the context of self-help. That case involved a statutory provision which expressly empowered the bank, "without recourse to a court

[77] Section 43 of the Ordinance in relevant part provides:

> "Any person who—
> . . .
> (b) unlawfully seizes any animal for the purpose of impounding it; or
> (c) unlawfully impounds any animal; or
> (d) claims payment of any fees or damages in respect of any impounded animal in excess of such fees or damages as are claimable or due under the provisions of this Ordinance,
> shall be guilty of an offence."

[78] 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

of law", to attach and sell the assets of its defaulting debtors through its own agents and on such conditions as the bank's board of directors might determine. The Court had the following to say of and concerning the constitutional guarantee contained in section 34:

> "The judicial process, guaranteed by s 34, also protects the attachment and sale of the debtor's property, even where there is no dispute concerning the underlying obligation of the debtor and 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.
>
> On this analysis, s 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 provision of s 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.
>
> . . .
>
> 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.
>
> 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."[79]

[60] In *Lesapo*, the Court found that the provisions involved infringed section 34 of the Constitution and breached the rule of law by sanctioning self-help and permitting

[79] Id at paras 15-18.

the bank to be the judge in its own cause. In two other cases involving similar powers vested in the Land and Agricultural Bank of South Africa, the Court struck down such provisions as an impermissible infringement of section 34.[80] In striking down the provisions in issue, the Court found that they permit the Land Bank to bypass the courts and give the bank the sole discretion over the conditions of sale. It also found that the provisions involved authorised the bank "to usurp the inherent powers and functions of the courts by deciding its own claims and relief."[81]

[61] Section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions. The sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts. As this Court said in *Lesapo*:

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms 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."[82]

[80] *First National Bank of SA Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another* 2000 (3) SA 626 (CC); 2000 (8) BCLR 876 (CC).

[81] Id at para 5.

[82] Above n 78 at para 22.

[62] Similar concerns informed an opinion of Harlan J in the United States Supreme Court in *Boddie et al. v Connecticut et al*.[83] The case concerned the "due process" requirements of the Fourteenth Amendment, and the Court reasoned as follows:

> "At its core, the right to due process reflects a fundamental value . . . .
> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a 'legal system,' social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the 'state of nature' . . . .
> It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement . . . .Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle."[84]

[63] Section 34, therefore, requires not only that individuals should not be permitted to resort to self-help, but it also requires that potentially divisive social conflicts must be resolved by courts, or other independent and impartial tribunals. Section 34

[83] 401 US 371 (1970).

[84] Id at 374-5. The scope of the decision, however, was reduced sharply in two subsequent decisions of the United States Supreme Court, *US v Kras* 409 US 434 (1972) and *Ortwein v Schwab* 410 US 656 (1973). See also *Concorde Plastics (Pty) Limited v NUMSA and Others* 1997 (11) BCLR 1624 (LAC) 1644D-I.

recognises that it is important to do so to ensure that orderly and fair solutions to such conflicts are found, to promote social cohesion and to avoid the exacerbation of division and unfairness. Determining whether it is necessary for such conflicts to be brought before courts will require a consideration of the potential for social conflict in relation to the particular matters concerned, the equality of arms of the parties that are likely to be involved in such conflict, and the practicalities of requiring such matters to be resolved by courts, amongst other things.

[64] With these legal principles in mind, I now turn to consider the constitutional challenges based on the violation of the right of access to courts. Provisions that were the target of this challenge were sections 16(1), 33, 34 and 37 of the Ordinance. It was contended and the High Court found that they violate section 34 of the Constitution which guarantees the right of access to courts.

[65] Shorn of words not germane to the present discussion, these provisions read as follows:

Subsection (1) of section 16 provides that:

> "The owner of any land upon which any animal is found trespassing may impound such animal: Provided that before any person may impound any animal which belongs to the owner of land immediately adjacent and which bears the registered brand of that owner, he shall give at least twelve hours' written or verbal notice of the trespass to such owner."

Section 33:

"Lists of impounded animals to be sent to Provincial Secretary. –(1) On the first and fifteenth days of every month the poundkeeper shall transmit to the Provincial Secretary in the form prescribed, a list of all animals in the pound which have not been included in any earlier list and the Provincial Secretary shall cause the sale of such animals to be advertised in the next issue of the *Gazette* and in a newspaper circulating in the district in which the pound is situate. The advertisement shall also indicate the place of sale and the date of sale being any date that he thinks fit not less than ten or more than thirty days from the date of the publication of such advertisement.[85]

(2) Notwithstanding anything to the contrary contained in subsection (1), whenever any donkey or pig is impounded the poundkeeper shall, as soon as may be, submit a statement of its sex and colour and a description and the position of any brand or mark upon it, to the Provincial Secretary, who shall cause the sale thereof to be advertised in the next available issue of the *Gazette* and in a newspaper, for any date that he thinks fit.

(3) The poundkeeper shall post a copy of the advertisement of sale in some conspicuous place at or near the pound until the date of sale and shall replace any copy which becomes damaged or illegible."[86]

Section 34:

"Sales of impounded animals. –(1) Sales of animals under this Ordinance shall commence at 10h00 on the day appointed therefor and shall be conducted by the poundkeeper or other person acting on his behalf, by public auction and for cash.

(2) All animals advertised for sale, unless previously released, shall on the day appointed for their sale be effectively marked, on the right shoulder with the letter P by or at the instance of the poundkeeper.

(3) The poundkeeper may whenever he may deem it proper so to do, place a reserve upon any animal offered by him for sale: Provided that such reserve shall not exceed

[85] Section 33 subsection (1) amended by section 5 of Ordinance 19 of 1986.

[86] Section 33 amended by section 1 of Ordinance 8 of 1954, further by section 1 of Ordinance 38 of 1956 and substituted by section 18 of Ordinance 16 of 1978.

> the amount which the owner of such animal would have been required to pay in terms of this Ordinance."[87]

And Section 37:

> "Animals unsuccessfully offered for sale. –If no offer is made for any animal put up for sale the poundkeeper shall report to the magistrate accordingly and state the estimated value of the animal and the fees, charges and other expenses incurred in respect thereof, and the magistrate may give the poundkeeper such instructions as he may deem proper whether the animal is to be re-offered for sale or is to be destroyed or otherwise disposed of: Provided that whenever any donkey or pig has been unsuccessfully offered for sale the poundkeeper may destroy the same at any time after the conclusion of the sale."[88]

(a) The impounding provision: section 16(1)

[66] Section 16(1) of the Ordinance permits a landowner to decide whether trespass has occurred and to act upon such decision by seizing and impounding the livestock. A reading that would require the landowner to first obtain a court order prior to impounding the trespassing animals would indeed be inconsistent with the scheme of the Ordinance, whose very purpose is the immediate seizure and impoundment of trespassing animals without a court order. It is arguable therefore that it may limit the right of access to courts. This question however need not be decided. Even if it did, it would certainly be justifiable.

[87] Section 34 substituted by section 19 of Ordinance 16 of 1978.

[88] Section 37 substituted by section 20 of Ordinance 16 of 1978.

[67] As will appear more fully below, powers of the kind authorised by section 16(1) are necessary to deal with trespassing and straying animals.[89] Such animals are a danger to property and human beings. It is therefore necessary to take immediate action against such animals. To require the landowner to first obtain a court order before impounding the trespassing or straying animals may well result in more damage to property or expose human beings and other animals to danger.

[68] Standing alone, there is therefore nothing wrong with section 16(1). The problem with this provision lies elsewhere. In combination with sections 33, 34 and 37, section 16(1) puts in place an impounding scheme that effectively prevents disputes that could give rise to social conflict from reaching the courts. Section 16(1) triggers the process. Section 16(1) therefore should be seen in the context of the scheme, which comprises sections 33, 34 and 37.

(b) The execution provisions: sections 33, 34 and 37

[69] In effect, under sections 33 and 34, if the stockowner is unable to pay the impoundment fees and other charges, the impounded animals must be sold by public auction to recover such amounts. The livestock is sold regardless of the amount owing in relation to the value of the impounded livestock. Once in the pound system, the poundkeeper is required to furnish a list of impounded livestock to the provincial secretary. This list must be furnished on the first and fifteenth day of every month.

[89] Below at para 80.

Upon receipt of the list, section 33 says that the "Provincial Secretary shall cause the sale of such animals to be advertised".

[70] The conditions of the sale are determined by the poundkeeper. In terms of section 34, the poundkeeper "may whenever he may deem it proper so to do, place a reserve upon any animal offered by him for sale". But "such reserve shall not exceed the amount" that the livestock owner is liable to pay under the Ordinance. There is nothing to guide the poundkeeper in the exercise of this wide discretion. In effect therefore livestock can be sold at a price that is significantly less than its market value.

[71] In terms of section 37, animals that remain unsold at the auction are to be reported to the local magistrate, who "may give the poundkeeper such instructions as he may deem proper whether the animal is to be re-offered for sale or is to be destroyed or otherwise disposed of". There is nothing to guide the magistrate in the exercise of these far-reaching powers. This of course does not apply to donkeys or pigs, which may be destroyed by the poundkeeper at any time after the conclusion of the sale. Once again, no guidance is given to the poundkeeper.

[72] In *Lesapo* this Court held that the protection guaranteed by section 34 extends to attachment and sale of a debtor's property. This protection was held to extend to cases where there is no dispute over the underlying obligation giving rise to attachment and execution. As the Court held, "[t]hat 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."[90] This protection is necessary to ensure that the sale is conducted in a manner that enables the debtor to recover the value of the property sold.

The combined effect of sections 16(1), 33, 34, and 37

[73] The combined effect of sections 16(1), 33, 34 and 37 is to put in place an impounding scheme which commences with the seizure and impoundment of livestock, followed by a process of assessment of damages for trespass, and culminates in the sale of the impounded livestock to recover the landowners' fees or damages and the fees and expenses incurred by the poundkeeper. These provisions are interlinked; the one cannot work without the others. It is therefore not helpful to look at these provisions separately from one another. They must be considered together as part of a scheme.

[74] The scheme permits the landowner to seize the livestock and cause it to be detained and sold by the poundkeeper. The sale is on conditions stipulated by the poundkeeper. The purpose of the sale is to secure payment of trespass fees or damages and other impoundment fees and expenses. The scheme denies the livestock owner the protection of the judicial process and supervision exercised by a court through its rules over the process of execution. From start to finish there is no judicial intervention.

[90] Above n 78 at para 15.

[75] Manifestly, the scheme does not contemplate the involvement of the courts. The execution process created by sections 33, 34 and 37 does not go through the ordinary courts. The ordinary civil process of execution is not employed. The landowner is permitted to bypass the courts and recover damages through an execution process carried out by a private businessperson or an official of a municipality without any court intervention.

[76] The effect of the scheme, therefore, is to remove from the court's scrutiny one of the sharpest and most divisive conflicts of our society. The problem of cattle trespassing on farm land must be seen in the context I have outlined above. It is not merely the ordinary agrarian irritation it must be in many societies. It is a constant and bitter reminder of the process of colonial dispossession and exclusion. The potential for conflict between landless stockowners, whose forebears were deprived of their land, and farmers must be acknowledged. Moreover, in many cases, landless stockowners, for whom cattle constitutes not only a form of material security, but also a way of life of tremendously significant social and communal importance, will have scant ability to approach courts for relief when their cattle are impounded. The effect of the impounding scheme as described, therefore, is to effectively remove from the arena of courts the sharp conflicts which will often underlie the process of impoundment.

[77] This kind of scheme manifestly limits the right of access to courts.

[78] In all the circumstances, the joint effect of sections 16(1), 33, 34 and 37 is to limit the right against self-help guaranteed in section 34 of the Constitution.

Are these provisions justified?

[79] The MEC contended nevertheless that sections 16(1), 33, 34 and 37 of the Ordinance are reasonable and justifiable under section 36(1) of the Constitution. It was submitted on behalf of the MEC that animals are an inherent danger to humans, crops, property and to other animals. If animals trespass unsupervised, this creates immediate and present danger which justifies impoundment, so it was argued.

[80] The need to take immediate action against trespassing animals cannot be gainsaid. Unattended animals may cause damage to crops and property. They could also pose safety or health hazards to other animals and members of the public. It is therefore necessary to have a mechanism for dealing quickly and effectively with animals found trespassing on land or straying in public places or on public roads. The need for such mechanisms must be viewed against the responsibility of livestock owners to ensure that their animals do not trespass onto other people's land. If they should neglect their livestock, they must be prepared to pay the price for such neglect. Pound legislation is therefore necessary to deal with those livestock owners who neglect their responsibilities.

[81] But the importance of the purpose of the limitation of a right must be viewed against the nature of the right limited, the nature and extent of the limitation and the

existence of less restrictive means to achieve that purpose. Measures taken must strike a balance between the rights of landowners and the rights of livestock owners. They should not emphasise the rights of landowners over those of livestock owners. They must respect the rights of each and, where possible, reconcile them, with due regard to the constitutional rights of each.

[82] The right of access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established. In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the resolution of disputes to "a court or, where appropriate, another independent and impartial tribunal or forum."[91] It is in this context that the right of access to courts guaranteed by section 34 of the Constitution must be understood.

[83] There is no reason why, once the animals have been impounded, the judicial process should not be allowed to supervise the process of execution through its rules. Once the animals have been removed to the pound, there is no longer any need for immediate action. It is not necessary therefore to deny the livestock owner the

[91] Section 34 of the Constitution.

supervision exercised by the courts through their rules over the process of execution. Yet this is what sections 33, 34 and 37 of the Ordinance permit.

[84] The system is not only liable to abuse by unscrupulous landowners but it undeniably works hardship against the vulnerable landless African stockowners. For some stockowners it has resulted in a huge loss of livestock, often their only asset. Once impounded, livestock may be sold at a significantly lower price than its actual market value. As Mrs Zondi alleges, the threat of impounding can also be used to harass labour tenants by ordering them to remove their livestock from the farms they may have occupied for many years. As the circumstances of Mrs Zondi illustrate, they have no cash at the bank. Livestock is their only valuable asset and forms their only source of livelihood. The impounding of livestock has far-reaching consequences for them as they stand to lose their only asset. They are caught in a vicious cycle of poverty and landlessness that has been historically perpetuated on them. Given these social conditions, the impounding scheme works harshly in rural areas. It is invasive of rights.

[85] The records of the Weenen Pound for the period January 1990 to January 1992 show the extent of impounding and who is most adversely affected by it. It is reported that during the period 1990-1991 more than R240 000 was paid to the Weenen Town Board for the release of impounded cattle. During this two-year period 332 African stockowners had their cattle impounded while only 7 white farmers were affected. Most of the African stockowners affected were labour tenants on white farms who had

to pay more than R105 000 in total.[92] It is further reported that between 1991 and 1992 more than 78 stockowners could not afford to pay for the release of their livestock, resulting in the loss of their livestock.[93]

[86] In all the circumstances, the impounding scheme permitted by the combined effect of sections 16(1), 33, 34 and 37 of the Ordinance cannot be said to be reasonable and justifiable under the Constitution. It is therefore inconsistent with the right of access to courts.

Does the scheme discriminate unfairly?

[87] Section 9(3) of the Constitution provides:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[88] Section 29(1) was challenged on the ground that it discriminates unfairly on the basis of race and landlessness. It provides:

> "If the owner of any land (other than ordinary grassland) on which any animal has trespassed has, in consequence of such trespass, suffered damage in an amount exceeding the applicable trespass fee contemplated by section 27, he may in the prescribed manner within a period of ninety-six hours of the discovery of such trespass have the extent of such damage monetarily assessed by two disinterested

[92] Above n 52 at 37.

[93] Id at 40.

persons each of whom shall be either a landowner or a voter as defined in section 1 of the Electoral Act, 1979 (Act 45 of 1979); provided that—

(a) if the owner of such animal is known he shall be informed of such trespass and may, within twelve hours of being so informed, nominate one of such disinterested persons;

(b) if such disinterested persons are unable to reach agreement as to the extent of such damage, the assessment of such extent shall be determined by an umpire appointed by such disinterested persons or, in the event of disagreement in this regard between such persons, by the Administrator, and

(c) every assessment under this subsection shall be subject to confirmation in the prescribed manner."

[89] The High Court found that section 29(1) discriminates unfairly against the landless on the grounds of colour and landownership in violation of section 9 of the Constitution. The reasoning of the High Court was based on the requirement in section 29(1) that "disinterested persons" who assess damages must either be a landowner or a voter as defined in section 1 of the Electoral Act. The High Court reasoned that because black people could not be voters under the Electoral Act, section 29(1) discriminated on the grounds of colour and landownership.

[90] The question whether section 29(1) is discriminatory requires an assessment of its purpose and effect. The purpose and effect of a statute are relevant in determining its constitutionality.[94] A statute can be held to be invalid either because its purpose or

[94] *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC);

its effect is inconsistent with the Constitution. If a statute has a purpose that violates the Constitution, it must be held to be invalid regardless of its actual effects. The effect of legislation is relevant to show that although the statute is facially neutral, its effect is unconstitutional. This will be the case where, for example, the legislation has a discriminatory impact on a particular racial group.

[91] Of course purpose and effect are interrelated. The object that the legislature seeks to achieve inspires statutes and this object is realised through the impact produced by the implementation of the statute. Thus purpose and effect, respectively in the sense of the legislative object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity. And in constitutional adjudication the assessment of the object of a statute ensures that the aims and objectives of a statute are consistent with the Bill of Rights in the Constitution.

[92] The constitutional validity of section 29(1) must therefore be assessed in the light of the purpose and effect of the franchise and land ownership qualifications required by the section.[95] And this must be considered in the light of our history.[96]

1996 (7) BCLR 903 (CC) at para 19; *DVB* above n 46 at paras 36-38; *R v Big M Drug Mart Ltd* 1985 1 SCR 295 at 331f-h.

[95] *DVB* above n 46 at para 18.

[96] Id

[93] One of the qualifications for eligibility to assess damages under section 29(1) is the right to vote under the Electoral Act.[97] The reference to the Electoral Act was deliberate and intended to ensure the exclusion of black people from assessing damages. This is manifest from the history of section 29(1).[98] In terms of section 3(1) of the Electoral Act, only white persons had the right to vote.[99] The manifest object of the voter qualification in the section was therefore to exclude black people, as they did not enjoy the right to vote under the Electoral Act. This is made clear by the reference in the section to a voter as defined in section 1 of the Electoral Act.[100]

[94] The alternative qualification for assessment of damages is land ownership. This qualification clearly discriminates against those who are landless. We know that the majority of the landless were, and continue to be, African people who were

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[97] Above n 7.

[98] The predecessor to section 29(1) referred to "landowners or registered voters" without any qualifications. On 28 September 1983, the Republic of South Africa Constitution Act, 1983 (Act 110 of 1983) was enacted. In terms of section 52 of that Constitution "every White person, Coloured person and Indian" were voters. Coloureds and Indians could then assess damages under the Ordinance. On 26 July 1983, the State President-in-Council enacted an amendment to section 29(1) which qualified voters to refer to a voter as defined in section 1 of the Electoral Act. It is significant to note that this reference to the Electoral Act was introduced into the Ordinance by Pound Amendment No. 20 of 1983 on 30 August 1984; that is, after the tricameral parliament had been established and the Constitution of 1983 came into effect, giving the franchise to Indians and Coloureds, in addition to whites who already had the franchise. In other words, to ensure that Indians and Coloureds did not assess damages, the Ordinance was amended to refer to the Electoral Act which gave the franchise to whites only. Given the definition of a voter in the Electoral Act, the manifest intention of amending section 29 was to exclude any black people from assessing damages under the Ordinance.

[99] Section 3(1) of the Electoral Act provides that:

> "Every white person who is a South African citizen, is of or over the age of eighteen years and is not subject to any of the disqualifications mentioned in section 4 (1) or (2), shall, on compliance with the provisions of this Act, be entitled to be registered as a voter."

[100] In a roundabout way the statute conferred the franchise only on white persons. Section 1 of the Electoral Act defines "a voter" as a person who, amongst other things, "has a right to vote at an election", and who is enrolled on a voters' list. To find out who this person is, you must go to section 6, which tells you that only persons who are on the voters' list and who are qualified or have applied for registration as voters may appear on the voters' list. To find out who these persons are, you must then go to section 3(1), which now says in unequivocal terms that only white persons are entitled to vote.

dispossessed of their land during the apartheid era. The landless are one of the most vulnerable groups. They had to tolerate all kinds of abuses in order to secure a place to stay. Their only valuable asset was livestock, as the case of Mrs Zondi amply demonstrates. They were denied the opportunity to take part in a process that could result in the loss of their only asset. The impact of this discrimination on the landless was severe. They were discriminated against on the basis of a condition over which they had no control.

[95] But the discrimination was not just against the landless; it was against landless black people. Landless white persons were eligible for appointment because they still would qualify under the franchise requirement. By contrast landless black people could not qualify, as they were hit by the franchise requirement. Thus white people could always qualify under the section, whether as landowners or voters, while black people could not. The object and effect of the qualifications in section 29(1) were to exclude black people from the scheme of the Ordinance. The franchise requirement in my view gives up the game. If it had been intended to allow all races to be eligible for the assessment of damages, the franchise requirement would not have been included in the provision.

[96] Section 29(1) is therefore manifestly and fundamentally racist in its purpose and effect. Its purpose and effect are to discriminate on the basis of race, a ground listed in section 9(3) of the Constitution. Its purpose cannot be reconciled with our Constitution, in particular, our Bill of Rights. A provision such as this, the object of

which is manifestly racist, is incapable of being read in conformity with our Constitution. The object of the section is a function of the intent of those who drafted and enacted the provision at the time. The section carries the stamp of its time.

[97] Section 29(1) therefore limits the right to equality as guaranteed in section 9(3) of the Constitution. Such a limitation can hardly be reasonable or justifiable under our new constitutional order. It follows therefore that section 29(1) of the Ordinance read together with, and seen against the backdrop of the impounding scheme of which it is an integral part, perpetuates an impounding scheme that is inconsistent with the right to equality guaranteed by section 9(3) of the Constitution.

The challenge based on the right to fair administrative action

[98] Two groups of sections were the target of this challenge: those that are silent on whether notice must be given to the stockowner (sections 12 and 37); and those that require notice to be given to stockowners who are known (sections 8, 10(2), and 41(4)). It will be convenient to follow this grouping in evaluating this challenge. But before evaluating the constitutionality of these provisions it is necessary to address two preliminary issues that arise from the finding of the High Court. The first is the interrelationship between the Constitution and PAJA. The other is whether the impugned provisions involve administrative action. The High Court found that these provisions violated the right to administrative justice guaranteed by section 33 of the Constitution read with section 3(1) of PAJA. Implicit in this finding is the proposition that the impugned provisions involve administrative action.

(a) Interaction between section 33 of the Constitution and PAJA

[99] Section 33 of the Constitution guarantees to everyone "the right to administrative action that is lawful, reasonable and procedurally fair." As its preamble makes clear, PAJA was enacted to give effect to section 33 of the Constitution. However, PAJA cannot be used to evaluate a constitutional challenge. A constitutional challenge must be evaluated under section 33 of the Constitution. Generally, PAJA only comes into the picture when it is sought to review administrative action. Ordinarily anyone who wishes to review any administrative action must now base the cause of action on PAJA. This is so because "[t]he cause of action for judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past."[101]

[100] In *Bato Star* we had occasion to consider the place of PAJA in the context of our Constitution. On that occasion we said:

> "The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters."[102]

[101] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25.

[102] Id

[101] That said, however, it does not mean that PAJA has no role when a statute is challenged on the grounds that it violates section 33. PAJA was enacted pursuant to the provisions of section 33,[103] which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA.[104]

[102] Thus, where there is a constitutional challenge to the provisions of a statute on the ground that they are inconsistent with the provisions of section 33 of the Constitution, the proper approach is first to consider whether the provisions in question can be read in a manner that is consistent with the Constitution. If they are capable, they will ordinarily pass constitutional muster. This approach to the construction of a statute is consistent with the approach to constitutional interpretation which has been developed by this Court that, where possible, legislation must be

[103] Id

[104] Here we are not concerned with the constitutionality of PAJA and nothing said in this judgment must be taken as a pronouncement on its constitutionality.

construed consistently with the Constitution.[105] And this approach to constitutional interpretation is consistent with section 39(2) of the Constitution.[106]

[103] It is in this context that the interaction between section 33 of the Constitution and PAJA must be understood. The next question to determine is whether the impugned provisions contemplate administrative action as contemplated in section 33 of the Constitution.

(b) Do the impugned provisions involve administrative action?

[104] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[107] this Court held that in order to determine whether a particular act constitutes administrative action, the inquiry should focus on the nature of the power exercised and not the identity of the actor.[108] It said:

> "In s 33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes 'administrative

[105] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 4 BCLR 449 (CC) at para 59; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85; *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 37(a); *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-26; and *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 35. See also *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA); 2001 (8) BCLR 779 (SCA) at para 20.

[106] Section 39(2) of the Constitution provides that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[107] 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

[108] Id at para 141; see also *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) at para 18.

action' is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute 'administrative action'. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising."[109] (Footnotes omitted.)

And then said:

"Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."[110] (Footnotes omitted.)

[105] The impugned provisions involve the exercise of a public power derived from the Ordinance. Sections 8 (the decision to impound animals) and 12 (making

[109] Above n 107 at para 141.

[110] Id at para 143.

decisions in relation to the disposal of injured or dead animals and the destruction of animals) involve the performance of a public duty. Similarly, the magistrate, in issuing instructions in regard to the destruction or the disposal of vicious animals (section 10(2)), or re-offer for sale or destruction of animals that remain unsold after an auction (section 37), performs a public duty. So too does the police officer in issuing instructions in regard to destruction or disposal of animals that are too vicious to be driven to the pound (section 41(4)). It follows therefore that the exercise of the powers conferred by the impugned provisions constitutes administrative action.

[106] But do the impugned provisions limit the rights guaranteed in section 33 of the Constitution? It will be convenient to distinguish between those provisions that do not make provision for notice at all and those that require notice only where the identity of the livestock owner is known.

(c) Sections 12 and 37

[107] Section 12 of the Ordinance provides:

> "Death or injury to impounded animals. –If any impounded animal dies or is destroyed or is injured, the poundkeeper shall enter in his pound book a description of such animal and the cause of its death or injury or, if it was destroyed on instructions, particulars of such instructions."

And section 37:

> "Animals unsuccessfully offered for sale. –If no offer is made for any animal put up for sale the poundkeeper shall report to the magistrate accordingly and state the estimated value of the animal and the fees, charges and other expenses incurred in

> respect thereof, and the magistrate may give the poundkeeper such instructions as he may deem proper whether the animal is to be re-offered for sale or is to be destroyed or otherwise disposed of: Provided that whenever any donkey or pig has been unsuccessfully offered for sale the poundkeeper may destroy the same at anytime after the conclusion of the sale."[111]

[108] Both sections 12 and 37 are silent on whether notice should be given to the stockowner. The question whether, by their silence, they exclude a notice and a hearing, is a matter of construction. As this Court held in *Transvaal Agricultural Union v Minister of Land Affairs and Another*:[112]

> "The mere fact that the legislation does not specifically make provision for such a hearing does not mean that there is indeed no such right. It is well established that
>
> > '. . . when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter—see *Cabinet for the Territory of South West Africa v Chikane and Another* 1989 (1) SA 349 (A) at 379G), unless the statute expressly or by implication indicates the contrary'. (Footnote omitted.)
>
> The question whether such right has been excluded by the Act in the present case depends, therefore, upon the proper interpretation of the statute."[113]

[109] Sections 12 and 37 are capable of being read so as to require prior notice where the stockowner is known or where, with the exercise of reasonable diligence, the

[111] Section 37 substituted by section 20 of the Ordinance 16 of 1978.

[112] 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC).

[113] Id at paras 25-26.

stockowner could be ascertained. Such a construction is not inconsistent with their language. Thus construed, these provisions are constitutional. The High Court was enjoined to construe these provisions in a manner that is consistent with section 33 of the Constitution, as required by section 39(2) of the Constitution. The High Court therefore erred in failing to do so. It follows therefore that sections 12 and 37 of the Ordinance are not inconsistent with section 33 of the Constitution. The order of invalidity in this regard cannot therefore be upheld.

(d) Sections 8, 10(2) and 41(4)

[110] Section 8 of the Ordinance provides:

> "Notice to owners of impounded animals. – Whenever the name of the owner of any impounded animal is known to the poundkeeper he shall forthwith send through the post or otherwise a written notice addressed to such owner at his place of residence, informing him of the fact that such animal has been impounded."

Section 10(2):

> "If any impounded animal shall prove to be dangerously vicious or shall appear to be worthless owing to any serious and incurable defect, disablement or disease, the poundkeeper shall submit a report in writing to the magistrate who shall have authority to issue such instructions in regard to its destruction or other disposal as he may see fit, but only upon notice to the owner of the animal if he is known."

And section 41(4):

> "If the police officer is satisfied that the animal is too vicious, intractable or wild to be driven to the pound, he shall have authority to issue instructions in regard to its destruction or other disposal as he may see fit, but only upon notice to the owner if he is known."

[111] These sections make provision for notice to the owner but only in the event of the owner being known. The High Court held that sections 8, 10(2) and 41(4) were constitutionally invalid because they made no provision for tracing the livestock owner, and if the livestock owner cannot be traced, for seeking directions from the court as to what further steps can be taken to establish the identity of the owner. The High Court reasoned that these steps were necessary if the livestock owner is to be given a reasonable opportunity to make representations. But does section 33 of the Constitution require this?

[112] The right to notice before an adverse decision is made is a fundamental requirement of fairness. Notice provides a person affected with the opportunity to make representations as to why an adverse decision should not be made. It is a fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations. A hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explained. The reasonable opportunity to make representations can generally be given by ensuring that reasonable steps are taken to bring the fact of the decision-making to the attention of the person to be affected by the decision.[114]

[114] Compare *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC).

[113] As a general matter, having regard to the consequences that an administrative decision might have on the individual, the decision-maker ought to take some steps to ascertain the identity of the individual to be affected by the decision for the purposes of notice and the opportunity to be heard. Procedural fairness, by its very nature, imports the element of fairness. And fairness is a relative concept which is informed by the circumstances of each particular case. In each case the question is whether fairness demands that steps be taken to trace the identity of the person against whom a decision is to be made. It is therefore neither possible nor desirable to attempt to define the circumstances where the dictates of fairness will require the decision-maker to take steps to ascertain the identity of the livestock owner.

[114] The question whether fairness requires the decision-maker to take some steps to ascertain the identity of the person against whom the decision is to be made must be determined with due regard to the circumstances of each case. The overriding consideration will always be what does fairness demand in the circumstances of a particular case. The availability of information which, with the exercise of reasonable diligence, renders it possible to ascertain the identity of a person is a relevant consideration. So is the urgency required in making the decision.

[115] The question is whether the impugned provisions can be read so as to require steps to be taken to ascertain the identity of the stockowner where this can be done with the exercise of reasonable diligence. Section 18 of the Ordinance permits the landowner to destroy a trespassing donkey or pig, unless it is distinctively branded or

marked or unless he knows or can, with reasonable diligence, ascertain to whom it belongs. Implicit in this provision is the requirement that the landowner must take reasonably diligent steps to ascertain the stockowner of the animals that are distinctively branded or marked, or where the owner could easily be traced. The question is whether by inclusion, this provision intended to exclude this reasonable diligence requirement in relation to other provisions. This is a matter of construction.

[116] There is nothing in the language of these provisions that suggests that by failing to require steps to ascertain the identity of the owner, where this can be done with the exercise of reasonable diligence, it was intended to exclude such steps from being taken. The impugned provisions are capable of being construed consistently with the Constitution to require notice to the stockowner where the stockowner can, with the exercise of reasonable diligence, be established.[115] Thus construed, sections 8, 10(2) and 41(4) of the Ordinance are consistent with the Constitution. It follows therefore that the order of invalidity in this regard cannot be upheld either.

The other constitutional challenges

[117] Inasmuch as the access to courts challenge has been successful, it is unnecessary to decide on the other constitutional challenges. Even if the applicant was to succeed on any of these challenges, no additional substantive relief could be

[115] It is worth noting the provisions of the Animal Identification Act 6 of 2002, which came into effect in November 2003. This statute, broadly speaking, requires that animals have identification marks. Section 14 of this Act, read with regulation 8 promulgated under that Act, require the poundkeeper to notify the owner of the impounded animals of impoundment where the owner can be established from identification marks on the impounded animals.

granted to her. Under these circumstances, it is unnecessary to consider these additional constitutional challenges.

Summary

[118] To sum up, the combined effect of sections 16(1), 29(1), 33, 34 and 37 of the Ordinance is to put in place an impounding scheme that is inconsistent with the Constitution. The scheme is triggered by section 16(1), which authorises the landowner to seize and impound trespassing livestock. The scheme permits the sale of impounded livestock to recover impoundment fees and other charges by the poundkeeper, who, in his or her sole discretion, determines the conditions upon which the sale is to be conducted. From start to finish it does not involve the judicial process. Furthermore, it discriminates against black people, in particular, African people, and it excludes them from being appointed as assessors of damages for trespass. This scheme violates the right of access to courts guaranteed by section 34 of the Constitution and the right to equality guaranteed in section 9(3) of the Constitution.

[119] Accordingly, sections 16(1), 29(1), 33, 34 and 37 are inconsistent with section 34 of the Constitution. In addition, section 29(1) is inconsistent with section 9(3) of the Constitution.

[120] Sections 8, 10(2), 12, and 41(4) are, however, capable of being read in a manner that is consistent with the Constitution and are therefore not inconsistent with the Constitution.

Remedy

[121] Certain of the impugned provisions have been found to be inconsistent with the Constitution. It now remains to consider what the appropriate remedy should be. As a general matter, there are three possible remedies for a breach of a constitutional right, namely, severing words from a provision, reading words into a provision and striking down the provision. Ordinarily, the severance of words from a statutory provision and reading words into a provision are to be preferred because they interfere less with the legislative scheme. However, they are not always the appropriate remedies.

[122] This Court has previously delineated the principles that should guide it in deciding whether words should be severed from a provision or read into one.[116] In the first place, there are two primary considerations to be kept in mind: the need to afford appropriate relief to successful litigants, on the one hand, and the need to respect separation of powers and, in particular, the role of the legislature as the institution that is entrusted with the task of enacting legislation, on the other. In the second place, the

[116] *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at paras 15-17; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 74-76; and *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 62.

provision which results from severance or reading words into the statute should interfere with the laws adopted by the legislature as little as possible.[117] What is required therefore is for a court to endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution.

[123] A court should be reluctant to read-in or sever words from a provision if to do so would require the court to engage in the details of law-making, a constitutional activity that is assigned to legislatures. Similarly, where curing a defect in the provision would require policy decisions to be made, reading-in or severance may not be appropriate. So too where there are a range of options open to the legislature to cure a defect. This Court should be slow to make choices that are primarily to be made by the legislature.[118] Finally, it must be borne in mind that whatever remedy a court chooses, it is always open to the legislature, within constitutional limits, to amend the remedy granted by the court.

[124] With those principles in mind, I now turn to consider what the appropriate remedy is in this case.

[125] A review of the Ordinance discloses an orchestrated scheme for: seizure of trespassing animals and their subsequent impoundment; a process of assessment of damages for trespass from which landless black people are excluded; the sale of

[117] *National Coalition* id at para 74.

[118] *Dawood* above n 116 at para 64.

impounded animals if the owner is unable to pay the impoundment damages, fees and other expenses; and the destruction of unsold animals. At the heart of the scheme is the immediate seizure of animals without notice to livestock owners and without a court order, followed by an execution process to recover fees or damages for trespass and other impoundment expenses and fees in which there is no judicial intervention. The offending provisions are part of this scheme. The scheme is unconstitutional as it violates both the right of access to courts and the right to equality.

[126] The impounding scheme is put in place by sections 16(1), 29(1), 33, 34, and 37 of the Ordinance which have been found to be inconsistent with section 34 of the Constitution and, in the case of section 29(1), to be inconsistent with section 9(3) of the Constitution. But, as found earlier, these provisions are an integral part of the impounding scheme of the Ordinance. If any one of them is excised, the impounding scheme will become unworkable. And if these provisions are severed from the Ordinance, the remaining provisions of the Ordinance will not give effect to the main objects of the Ordinance. The main objects are the immediate impoundment of trespassing animals, assessment of damage caused by the trespassing animals and the sale by public auction of such animals to recover impounding fees and expenses. Without these provisions, therefore, the objects of the Ordinance cannot be carried out.

[127] In these circumstances, either reading-in or severance would require extensive interference with the impounding scheme of the Ordinance as put in place

by the impugned provisions. Indeed, to remedy the inconsistency would require this Court to engage in the details of law-making, a constitutional activity assigned to legislatures.

[128] It would indeed be inappropriate for this Court to seek to remedy the inconsistency in the Ordinance. The task of determining what impounding scheme must be put in place is primarily the task of the legislature and should be undertaken by it. In the process of determining the appropriate impounding scheme, the legislature will have to make certain policy decisions. For example, the legislature will have to decide when and how there should be judicial intervention, who may assess damages for trespass, and how and when notification of trespass is to be communicated to stockowners. There is a range of options in this regard. A factor which cannot be ignored is the fact that the Department of Traditional and Local Government Affairs is in the process of drafting a provincial Act which will repeal the Ordinance. In these circumstances, it is not desirable that this Court should attempt to revise the Ordinance.

[129] It follows therefore that neither reading-in nor severance is appropriate and that the only appropriate remedy is to strike down the impounding scheme and the offending provisions which are an integral part of that scheme. But the legislature must be given time to attend to the matter. There is a Bill, presently pending, which is aimed at revising the pound legislation. Counsel for the MEC was unable to indicate how long the process will take. However, given the fact that there is a Bill, it should

not take more than 12 months to enact such legislation. But what is to happen in the interim? The infringement of constitutional rights cannot be allowed to continue in the interim. On the other hand, there is a need to protect landowners against trespassing animals.

[130] The question is what is a just and equitable order to make in terms of section 172(1)(b) of the Constitution which will protect constitutional rights pending the revision of the pound legislation. Such relief should ensure that there is at least notice of trespass to stockowners and that there is judicial supervision of the process of execution. Such relief should protect both the rights of stockowners and landowners. But what is that relief?

[131] Section 16(1) of the Ordinance only requires notice of trespass to a stockowner who happens to be the owner of land that is immediately adjacent to that of the landowner, and whose animals bear some form of identification mark. Notice should be given to all stockowners who are known or who, with the exercise of reasonable diligence, can be ascertained. There is no need to save section 29(1) in the interim. If a landowner has suffered damages that are more than the trespass fees, such landowner would have to institute an action for the recovery of such damages in an appropriate court. After all, damages are an alternative to trespass fees. Finally, once the trespassing animals have been impounded, there is no longer any reason for by-passing the judicial process. The execution process must therefore be conducted under judicial supervision so as to protect stockowners.

Costs

[132] The High Court did not order costs in relation to the proceedings before it. There is no reason to interfere with that costs order. The applicant did not appeal against this order. In this Court the applicant sought an order for costs. On the other hand the MEC submitted that there should be no order for costs.

[133] The award of costs is a matter which is within the discretion of a court. In the circumstances of this case, we do not consider it desirable to make an order for costs in relation to the interlocutory applications. Both parties made unsuccessful applications. However, in relation to the appeal, the applicant was substantially successful. The MEC should therefore pay the costs of the appeal.

Conclusion

[134] We hold that:

(a) Sections 16(1), 29(1), 33, 34 and 37 of the Ordinance put in place an impounding scheme which violates both the right of access to courts guaranteed by section 34 and the right to equality guaranteed by section 9(3) of the Constitution. These provisions are accordingly declared to be inconsistent with the Constitution and therefore invalid. However, we suspend the order of invalidity in respect of all the provisions except section 29(1) for a period of twelve (12) months to afford the provincial government of KwaZulu-Natal the

opportunity to correct the inconsistency. In order to prevent the violation of the Constitution to continue in the meantime, we put in place a temporary measure. All sales pursuant to the provision of section 34 of the Ordinance must be authorised by the magistrate's court having jurisdiction over the area where the relevant pound is situated. Pending the enactment of the relevant legislation, the notice contemplated in section 16(1) of the Ordinance must be given to stockowners who are known or who, with the exercise of reasonable diligence, can be found. Section 29(1) is struck down with immediate effect.

(b) Sections 8, 10(2) and 41(4) of the Ordinance must be construed consistently with the Constitution to require notice to stockowners where the stockowners can, with the exercise of reasonable diligence, be ascertained. They are therefore not inconsistent with section 33 of the Constitution.

(c) Sections 12 and 37 of the Ordinance must be construed as requiring prior notice to stockowners, where the stockowners are known or where, with the exercise of reasonable diligence, the stockowners can be ascertained. Construed in this manner they are therefore not inconsistent with section 33 of the Constitution.

(d) All persons who are required to implement the provisions of sections 8, 10(2), 12, 37 and 41(4) must now do so in a manner consistent with paragraphs (b) and (c) above.

The order

[135] In the result the following order is made:

(a) The MEC's non-compliance with the rules of this Court is condoned.

(b) The application for leave to appeal is granted.

(c) The appeal is upheld in part and dismissed in part.

(d) The application for leave to lead further evidence is refused and there is no order for costs.

(e) Paragraph 1 of the order of the High Court is set aside and is replaced by the following:

(1) Sections 16(1), 29(1), 33, 34 and 37 of the Ordinance are declared to be inconsistent with the Constitution and therefore invalid;

(2) The declaration of invalidity made in sub-paragraph (e)(1) above is suspended for a period of twelve (12) months from the date of this order to enable the provincial legislature of KwaZulu-Natal to correct the inconsistency that has resulted in the declaration of invalidity; and

(3) Pending the enactment of legislation contemplated in sub-paragraph (e)(2) above:

(i) The notice contemplated in section 16(1) of the Ordinance shall be given to stockowners who are known or who, with the exercise of reasonable diligence, could be ascertained.

(ii) All sales pursuant to the provisions of section 34 of the Ordinance shall be authorised by the magistrate's court having jurisdiction over the area where the relevant pound is situated.

(iii) No sale pursuant to section 34 shall be authorised unless:

(aa) the poundkeeper, on notice to the stockowner, who is known or who, with the exercise of reasonable diligence can be ascertained, lodges with a magistrate's court having jurisdiction over the area where the relevant pound is situated, a statement setting forth all the amounts due under the Ordinance;

(bb) the amounts set forth in the statement by the poundkeeper are not disputed by the stockowner within seven (7) days of such notice; and

(cc) the magistrate is satisfied that notice had been given to the stockowner, or that, with the exercise of reasonable diligence, the stockowner cannot be ascertained.

(iv) Where the amounts set forth in the statement of the poundkeeper are disputed, the magistrate shall summarily enquire into the matter, following such procedure as seems fair to the parties, and make such order as the magistrate considers just, including the order for costs.

(f) The orders in paragraph (e) above shall come into effect on the date of this judgment.

(g) Should the provincial legislature of KwaZulu-Natal fail to remedy the unconstitutionality in the sections declared to be inconsistent with the Constitution in terms of sub-paragraph (e)(1) above within the period referred in sub-paragraph

(e)(2), any interested person or organisation may, before the expiry of that period, apply to this Court for a further suspension of the declaration of invalidity and/or any other appropriate further relief.

(h) Mrs Zondi is awarded costs of the appeal.

(i) There will be no order for costs in relation to the application for direct access which was dismissed by the Court on 9 March 2004.

Chaskalson CJ, Langa DCJ, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Ngcobo J.

For the applicant:	A M Stewart and R J Purshotam instructed by the Legal Resources Centre (Durban).
For the first respondent:	A J Dickson SC and A A Gabriel instructed by the State Attorney (Durban).