

## Rural voices matter – victory in the Constitutional Court

The goal of our Centre is to have and support active rural citizens who are respected, able to hold leaders accountable, and capable of protecting their land. Our main focus area is the former bantustans, and our contribution to this ideal is three-pronged: by conducting research; supporting litigation; and through mobilisation.

As the Constitutional Court of South Africa held in *Doctors for Life International v Speaker of the National Assembly and Others*,<sup>1</sup> the Constitution establishes the founding values of our constitutional democracy, which includes the commitment to principles of accountability, responsiveness and openness. This shows that our constitutional democracy is not only representative but also includes participatory elements. The Court went further to state that “it is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.”

In recent years, we have seen a slew of legislation dealing with rural governance and land rights being hastily passed by Parliament without sufficient public participation. This pattern has emerged where laws are rammed through without due regard to the voices of those it will affect - the 17 million citizens living in the former homelands – and without considering practiced living customary law. It seems Parliament is intent on turning rural areas into localities of dictatorships within South Africa. The Traditional and Khoi-San Leadership Act (TKLA), the Traditional Courts Act (TCA), and the Land Court Act (LCA) have been signed into law, with the TCA and LCA both being assented to on 16 September 2023. This indicates the urgency to pass laws before national elections are held in 2024.

As a research unit, we have needed to continue engaging with the law-making process to ensure that rural people are informed about legislative developments and the substantive content of draft laws. We observe the process, we make submissions, and we facilitate information dissemination – but rural voices are still largely ignored by Parliament. Public participation processes are subpar and fail to comply with Parliamentary guidelines, thereby excluding marginalised people in poorer rural areas. Laws are created in silos that are inconsistent with lived realities. This was evident in the processing of the TKLA. There were late announcements of public hearings; last minute venue changes; hearing venues were far from rural communities; no copies of the Bill were provided at many hearings; and the Bill was advertised as only affecting Khoi-San communities. Submissions made by rural people were not considered or reflected in the final law that was passed.

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<sup>1</sup> CCT 12/05.

In December 2021, a challenge to the constitutionality of the Act on procedural grounds was launched by an alliance of land-rights activists, land-rights organisations and communities directly affected by it.

Constance Mogale, who is National Coordinator of the ARD, was the main applicant in the case, in her individual capacity and on behalf of the ARD. Constance comes from a tradition of strong and resilient families who can trace their history and land rights back on both maternal and paternal sides. Her family were victims of forced removals, and the process of challenging forced removals defined her life. Constance became actively involved in fighting for tenure security from a young age.

The second applicant was the Land Access Movement of South Africa (LAMOSA), in its own right and on behalf of its member communities. LAMOSA is an independent federation of Community Based Organisations advocating for land and agrarian rights, and substantive democracy through facilitating sustainable development. Many of its members are representatives of communities who were forcefully removed from their ancestral land by the apartheid government.

Duduzile Baleni, the third applicant, is the iNkosana (headwoman) of the uMgungundlovu community (often referred to as the Xolobeni community) and was an applicant in her individual capacity and on behalf of the uMgungundlovu community. The iNkosana and her community were deeply concerned that the TKLA will lead to them being deprived of their land, which they defended against colonial and apartheid administrations during the Mpondo revolts. The Act also threatens the hard-fought gains achieved in the *Maledu* and *Baleni* judgments, while failing to address any actual challenges faced by traditional communities such as theirs. The Constitutional Court's judgment in *Maledu and others v Itereleng Bakgatla Mineral Resources*<sup>2</sup> declared that no mining may commence without compensation being determined. It affirmed that the Interim Protection of Informal Land Rights Act (IPILRA) requires the consent of the holders of informal land rights before decisions impacting on their land rights can be taken. In *Duduzile Baleni and others v Minister of Mineral Resources and others*,<sup>3</sup> the Pretoria High Court declared that the obligation in IPILRA to obtain full and informed consent of the community must be complied with before a mining right is granted. The TKLA undermines these judgments.

Victor Modimakwane is a member of the Bakgatla ba Kgafela community and was the fourth applicant in his personal capacity. Victor learned to be concerned about the governance of the community's assets from his father, who was a founding member of the Concerned Bakgatla Anti-Corruption Organisation. Victor has focused his attention on attempts to bring accountability and transparency to the office of the Kgosi (chief) and his council, who have caused the community to lose around R5 billion through untransparent mining deals.

The Constitutional Court agreed with the applicants in its judgment handed down on 30 May 2023 and declared the TKLA invalid.<sup>4</sup> The Act was referred back to Parliament to re-enact the statute in a manner consistent with the Constitution. The judgment confirms the relevant constitutional requirements for how public participation must be conducted by Parliament.

Constance Mogale said in a press statement, "*we are pleased to learn about the judgment and the suspension of TKLA of 2019 today. It brought hope for the rural masses, and courage to scream louder*

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<sup>2</sup> CCT 265/17.

<sup>3</sup> C/N 73768/2016.

<sup>4</sup> *Mogale and Others v Speaker of the National Assembly and Others* [2023] ZACC 14.



*in defence of rural democracy, irrespective of how hard the rural voices are ignored by Parliament. We hope that this victory is a lesson to the current and future policy makers.”*

Our monitoring efforts contributed to the success of the case. Tracking and observing the Parliamentary and provincial processes produced a voluminous evidentiary record that was invaluable to the procedural arguments. LARC and partners are extremely pleased with this victory. However, we remain concerned about what the court victory means in practical terms for rural citizens whose land remains under threat, especially as the court order is suspended for 24 months to enable Parliament to redo public participation. Rural voices must be heard on issues affecting their lives, as well as their constitutional and customary rights. We will continue to support them.



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