

SOUTH AFRICA / JUDGMENT

Dombo Community and Others v Tshakhus Community Trust and Another (LCC194/2013) [2024] ZALCC 26 (7 June 2024) [2024] ZALCC 26

COURT
Land Claims Court

BEFORE
Ncube

CASE / FILE NUMBER
LCC194/2013

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IN THE LAND COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC194/2013

Before: Honourable Ncube J

1. REPORTABLE: YES/NO
2. OF INTEREST TO OTHER JUDGES: YES NO
3. REVISED. YES/ NO

In the matter between : THE DOMBO COMMUNITY MARTIN JOHN DOMBO RATSHILUMELA JOHN DOMBO N.O and TSHAKHUA COMMUNITY TRUST MUKANDANGALWO WILBERT MADZIVHANDILA In Re REGIONAL LAND CLAIMS COMMISSIONER FOR THE LIMPOPO PROVINCE CHIEF LAND CLAIMS COMMISSIONER MINISTER OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND AFFAIRS THE DOMBO COMMUNITY MARTIN JOHN DOMBO N.O RATSHILUMELA JOHN DOMBO First Applicant Second Applicant Third Applicant First Respondent Second Respondent First Respondent Second Respondent Third Respondent Fourth Respondent Fifth Respondent Sixth Respondent Heard: Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via E-mail. The date and time for hand-down is deemed to 07 June 2024 at 13h00.

JUDGMENT:

LEAVE TO APPEAL

Ncube J

Introduction

- [1] This is an application for leave to appeal against the whole of my Judgement and order handed down electronically on 11 July 2023 upholding the application for a review and setting aside the decision of the Regional Land Claims Commissioner, Limpopo (“RLCC”) to revive, investigate and accept a land claim of the Dombo Community which had been settled by agreement between the parties. As the application for leave to appeal is made outside the time period allowed by the Rules, the applicant has simultaneously filed application for condonation.

Application For Condonation

- [2] The judgement in this case was handed down on 11 July 2023. The application for leave to appeal was filed on 27 September 2023. In terms of Rule 69(1)(b)(ii), the application for leave to appeal must be filed within fifteen (15) days after the reasons for the order were given if such reasons were not given on the date on which the order was granted. Therefore, the present application was filed outside the period allowed by the Rules hence the application for condonation
- [3] In an application for condonation, a party seeking condonation must make out a case entitling it to the court’s indulgence. The party must show sufficient cause why the late filing of the application should be condoned. The party seeking condonation must give a full detailed and accurate account of the causes of the delay. In *Malane v Santam Insurance Co.* [1] Holmes JA expressed himself in the following terms;

“ In deciding whether sufficient cause has been shown, the basic principles is that the court has discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Amongst the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these

facts interrelated; they are not individually decisive for that would be a piece-meal approach incompatible with a true discretion “.

- [4] In *Professional Staff Association v Pretorius NO and Another*[2] the court held:

“ The factors which the court takes into consideration in assessing whether or not to grant condonation are:

- (a) the degree of lateness, or non-compliance with the prescribed time frame;
- (b) the explanation for the lateness or the failure to comply with the time frame;
- (c) prospects of success or bonafide defence in the main case;
- (d) the importance of the case
- (e) the respondent’s interest in the finality of Judgement

- (f) the convenience of the court; and
- (g) avoidance of unnecessary delay in the administration of justice

It is trite law that these factors are not individually decisive but are, interrelated and must be weighed against each other. In weighing these factors for instance a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay”

- [5] In casu, the explanation tendered for the delay is that the Counsel for the applicant, Mr Whittington was not available as he was acting as a Judge in the High Court. As the matter involved a long and complicated litigation, the applicant was adamant to wait for Mr

Whittington as Counsel who was involved in the matter from the inception. The case has long history, it has gone as far as the

Supreme Court of Appeal on application for rescission. Indeed another Counsel would have found it extremely difficult to take this case. For that reason, in my view, the applicant has given a reasonable explanation for the delay, and I would grant the application for condonation.

Application for Leave to Appeal

- [6] The application for leave to appeal will be granted only in those instances where there is a reasonable prospect of success on appeal

or where there is some other compelling reason, why the appeal should be heard. To that end, section 17(1) of the Superior Court’s

Act[3] (“the Act”) provides:

“ 17

- (1) Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that;-

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard including conflicting judgements on the matter under consideration.”

- [7] In MEC Health Eastern Cape v Mkhitha[4] Schippers AJA, as he then was, expressed himself in the following terms:

“ An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal”

- [8] In Smith v S[5] Plasket AJA said:

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding.”

Facts

[9] As stated in my original judgement, on 06 January 1998, Paramount Chief Andries Mashungu Madzivhandila lodged a claim for the restitution of land rights with the Regional Land Claims Commissioner- Limpopo (“RLCC”) on behalf of the Tshakuma Community (“the Tshakuma Community”). The Tshakuma Community Claim was investigated and found to be compliant in terms of the Restitution of Land Rights Act[6] (“the Restitution Act”). The same land claimed by Tshakuma Community was also claimed by the Dombo Community. As the RLCC was of the opinion that the Dombo Community Claim did not have merit, he facilitated a settlement agreement between the two communities. The two land claims were merged into a single claim. The claimed land was restored to the claimants of the two merged land claims. The claimants out of their own free will created a Trust known as Tshukuma Community Trust (“the Trust”). The Trust was going to acquire and administer the restored land for the benefit of all the claimants including Dombo Community claimants. The trustees were the

representatives of both the Tshakuma and the Dombo Communities.

[10] In 2008 the Trust suspended two trustees Messes Stephan Dombo and Mbangiseni Masaga for allegedly misappropriating the Trust money. Consequently, other Dombo Community trustees, Martin Dombo and John Dombo, aggrieved by the suspension of the first two trustees, resigned their position and joined forces with the suspended trustees and they revived the Dombo Community land claims which had been merged with the Tshakuma land claim and settled and land restored. The land was purchased from the then land owners and restored to the Trust for the benefit of both the Tshakuma and Dombo Communities.

[11] The RLCC re-opened, investigated, accepted approved and Gazetted the already merged and settled Dombo land claim. In so doing, the RLCC relied on the recommendation by its project co-ordinator, Miss Gloria Ratshitanga, contained in her report of 14 September

2012. Aggrieved by the decision of the RLCC, the Trust took the matter on review, where the decision of the RLCC to accept and approve the recommendations of Miss Ratshitanga and to cause publication of the Dombo claim in the Government Gazette was reviewed and set aside.

Grounds of Appeal

[12] The applicant’s grounds of appeal can be summarised as follows:

- (a) The settlement agreement is invalid and unenforceable as it was not reduced to writing and certified by the RLCC
- (b) Not all the properties claimed by the Dombo Community were included in the settlement agreement
- (c) The court erred in making a finding that Ms Gloria Ratshitanga's Rule 5 report was adjudicative and not investigative

Settlement Agreement

- [13] The applicant contends that the settlement agreement is not enforceable because it was not certified by the RLCC in terms of section 14(3) of the Restitution Act. As I pointed out in paragraph 15 of my original judgement, the Dombo Community representatives freely and voluntarily entered into a settlement agreement to merge their land claim with that of the Tshukuma Community. The Dombo Community may not approbate and reprobate. The Pacta Sunt Servanda is the fundamental principle of our law which stipulates that parties who enter into agreement with the relevant intention are obliged to honour the agreement. The agreement was freely and consciously entered into. Now that the shoe pinches, the Dombo Combo Community representatives want to buy out of the agreement after they have benefited from it. The agreement is valid, it was facilitated by the RLCC himself. The Dombo representatives did not question the fact that the agreement was not reduced to writing, as to why they now have a problem with that agreement, is a mystery.
- [14] It is also telling that no one has seen it fit to challenge this agreement in a court of law. As the agreement has not been set aside by the competent court of law, it remains valid and binding on the parties.

Not all properties claimed by the Dombo Community were included in the settlement agreement.

- [15] This was not the argument during the hearing of the review application. The applicants did not raise this issue in their

answering affidavit and in argument in court. In fact the applicants in their answering affidavit averred that the RLCC persuaded them to accept that their land claim be merged with the claim of Tshukuma Community on the basis that the Trust was going to be established to acquire and manage the land. It is not mentioned anywhere in the answering affidavit that there are properties which did not form part of the settlement agreement. Therefore this ground also has no merit.

The court erred in making a finding that Ms Gloria Ratshitanga's Rule 5 report is adjudicative and not investigative and therefore

falls to be reviewed and set aside.

- [16] This ground is not correct. I never made such a finding. It does not appear from the judgement and I could never have made such a finding. Paragraph 19 of my order reads:

“1. The decision of the Regional Land Claims Commissioner Limpopo to accept and approve the recommendation of Miss Ratishanga , contained in her report dated 14 September 2012 is reviewed and set aside.

2. “

There is no finding that Miss Ratitshanga’s report is adjudicative and not investigative. There are no reasonable prospects of success on appeal in this case.

Costs

[17] The practice in this court is not to award costs in the absence of special circumstances. In this case there are no special

circumstances which warrant an award of costs.

Order

[18] In the result, I make the following order:

1. The application for Leave to Appeal to the Supreme Court of appeal is refused.
2. There is no order as to costs

M.T Ncube

Judge of the Land Court

Date of hearing: 21 May 2024

Date of judgment: 07 June 2024

Appearances

For the Appellants: Adv Whittington Instructed by Bhayat Attorney Inc For the 1st & 2nd

Respondent: Tambani Matumba Attorneys

[1] 1962 (4), SA 532 (A) C-F

[2] (2008) 29 ILJ 318 LC Para 17-18

[3] Act 10 of 2013

[4] (1221/15)

[2016] ZASCA 176 (25 November 2016) para 17

[5] 2012

(1) SACR 567 (SCA) para 7

[6] Act 22 of 1994

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Prepared on 14 October 2026 · Esheria