

SOUTH AFRICA / JUDGMENT

Nongoma Commonage Community and Another v Regional Land Claims Commissioner, KwaZulu-Natal and Others (LCC52/2016) [2017] ZALCC 2 (28 March 2017) [2017] ZALCC 2

COURT

Land Claims Court

BEFORE

Ncube AJ

CASE / FILE NUMBER

LCC52/2016

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IN

THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD

AT DURBAN

CASE

NO: LCC52/2016

Before:

The Honourable Ncube AJ

Heard

on: 15 December 2016

Delivered

on: 28 March

2017

In

the matter between:

NONGOMA
COMMONAGE COMMUNITY
FIRST APPLICANT
MNXUSWA
COMMUNITY TRUST
SECOND APPLICANT
And
REGIONAL
LAND CLAIMS
COMMISSIONER,
KWA-ZULU NATAL
FIRST RESPONDENT
THE
MINISTER OF RURAL
DEVELOPMENT
AND LAND REFORM
SECOND RESPONDENT

JUDGMENT

NCUBE A J

INTRODUCTION

[1] This is opposed application in which Applicants seek the following relief:

- (a) An order directing the First Respondent to hand over to the Applicants' Attorney Messrs Cox & Partners Vryheid, copies

of the entire file and its contents pertaining to the restitution claim lodged on behalf of the First Applicant on 19 November 1997.

- (b) An order directing the First Respondent to take necessary steps to appoint a valuer within 14 days from date of order mentioned in (a) above to value all properties comprising the property claimed by the First Applicant and submit a valuation report to the First Respondent within 60 days from the date of the order mentioned in (a) above.
- (c) An order directing the First Respondent to provide copies of the valuation report to the Applicants' Attorney within 10 days from date of submission of the valuation report to the First Respondent by the valuer.
- (d) An order directing the First and Second Respondents jointly and / or severally to prepare and file a report to the Registrar of this Court and deliver the copy to the Applicants' Attorneys, in which report the Respondents will specify further steps with time frames which they intend taking in order to manage and finalise the First Applicants' claim.

- (e) An order granting the Applicants leave to approach the Court on the same papers in the event of circumstances arising justifying the granting of further orders.

PARTIES

- [2] The First Applicant is the Nongoma Commonage Community, a Community which has lodged a claim with the First Respondent for a restitution of rights in land. The Claimant Community was represented in the lodgement of its restitution claim by Thamsanqa Michael Nzuza. (Mr Nzuza) The Second Applicant is Mnxuswa Community Trust. The Trust was created with the assistance of the First Respondent for purposes of receiving the benefits of the restitution claim of the First Applicant.
- [3] The First Respondent is the Regional Land Claims Commissioner, KwaZulu-Natal, a functionary appointed by the Commission on Restitution of Land Rights which is responsible for the actions of staff appointed by the Commission to execute the functions of

Commission in the Province of KwaZulu-Natal. The Second Respondent is the Minister of Rural Development and Land Reform.

BACKGROUND

FACTS

- [4] It is common cause that on 19 November 1997, the First Applicant, represented by Mr Nzuza lodged a restitution claim with the First Respondent. The claim was gazetted on 21 December 2001 and published in Government Notice 2383 of 2001. According to the said Government Notice, the claim related to the Nongoma Town Commonage which had been given reference KRN6/2/2/E/34/0/0/5, by the First Respondent.
- [5] On 21 January 2002 and in a letter addressed to Mr Nzuza, the First Respondent acknowledged the receipts of the claim and advised Mr Nzuza, that he (First Respondent) was satisfied that the claim met the criteria in terms of the Restitution of Land Rights Act, Act 22 of 1994 (“the Act”) and that steps had been taken to publish notice of the said claim in the gazette. Despite the fact that the land in question had been valued, the claim has, to date not been finalised. The Applicants have submitted several complaints to the First Respondent to no avail.
- [6] In 2010, Applicants lodged a complaint through the Presidential Hotline, Complaining about the delay caused by the First Respondent

in the finalisation of their Land Claim. On 02 February 2010 the Second Respondent (the Minister) addressed a meeting attended by representatives of the Applicant in Richards bay. The Minister ensured the representatives of the Applicants that everything was going well with their Land Claim and furthermore that the memorandum had been prepared and forwarded to him in order for him to acquire land for the Applicants. After that assurance by the Minister, nothing has happened, six years after the Minister’s assurance and twenty years after the lodgement of the

restitution claim.

- [7] On 15 November 2012, the Deputy Land Claims Commissioner Mr Mdontswa and Mr Silaule attended a meeting with the Applicants' Attorney Mr Van der Merwe at Nongoma. The meeting was chaired by Mr Mdontswa who ensured the Applicant that their land claim was valid and that the Commission was going to appoint a valuer before the end of January 2013 to do the valuation of properties claimed. At the same meeting Applicants were informed that their file was missing at the office of the First Respondent but Mr Silaule undertook to locate the same and provide the Applicants' Attorney with copies of the land claim form, the research and validation report. At the same meeting the involvement of the Usuthu Traditional Council was discussed but the Applicants were given assurance that it was not going to affect the Applicants' claim.
- [8] Copies of documents which Applicants' Attorneys required from the file were never made available to them. Applicants'

Attorney needed those copies in order to directly approach this Court concerning the Applicants' land claim.

The head of the First Respondent's legal unit, Mr Maake informed Mr Van der Merwe that the Applicants' file had been located and Mr Van der Merwe could then fetch the documents he required. On 04 June 2015 Mr Van der Merwe went to the First Respondent's offices to fetch the copy of the file and documents. On 05 June 2015 Mr Van der Merwe perused the file which consisted of 193 pages.

- [9] Out of 193 pages only 2 pages related to the Applicants' claim. The rest of the documents had nothing to do with the claim. Documents in the file dealt with a variety of irrelevant matters like the construction of a low causeway bridge in Ward 84 Ezimbokodweni, correspondence relating to the appointment of new Regional Land Claims Commissioner, the determination on the introduction of an employee-initiated severance package for the Public Service, Katema settlement, Ntombela and Mnqobokazi claims. The file cover reflected the name of the Applicants but contained totally different documents. [10] In its Answering Affidavit dated 5 May 2016 the First Respondent admitted that it had received the claim in question however the claim was dealt with as if it was consolidated with another claim, the Nkunuzana Community Claim (Nkunuzana Claim) which was all filed by Mr Nzuza. It was only after the complaints about that consolidation from Mr Nzuza that the First Respondent realised that those were separate matters.

DISCUSSION

- [10] In his Answering Affidavit dated 05 May 2016, the First Respondent admitted that he had received the claim in question, however it was dealt with as if it was consolidated with another claim, the Nkunuzana Community Claim (Nkunuzana Claim), which was also lodged by Mr Nzuza. It was only after Mr Nzuza had complained about that consolidation that the First Respondent realised that those were two separate claims.

- [11] Whilst the First Respondent admitted in his Answering Affidavit that Mr Nzuza lodged the claim on 05 December 1997, he denied it was lodged on behalf of Nongoma Commonage Community. He averred that the claim was lodged on behalf of the Usuthu Tribal Authority. In his Answering Affidavit, the First Respondent states that he is only now , twenty years later, going to start investigating the Applicants' claim. The Service Provider was only appointed in February 2016.
- [12] Applicants need copies of filed documents relating to their claim. They need those documents in order to directly approach this Court to adjudicate their land claim. Applicants have a Constitutional right of access to the Courts[1]. They also have a right to have their case dealt with and finalized expeditiously and without undue and unreasonable delay.

Applicants also have a right to an administrative action which is lawful, reasonable and procedurally fair[2]. It is one of the First Respondent's constitutional duties to manage and process the Applicants' claim. In terms of the Constitution, this duty must be performed diligently and without delay.[3]

- [13] The Applicants' restitution claim has been outstanding for almost 20 years. The conduct of the First Respondent must be condemned in the strongest term possible. Such conduct by an organ of State can only be described as appalling and manifestly horrendous. In *Nyathi v MEC, Department of Health, Gauteng and Another* (Centre for Constitutional Right as amicus curiae),[4] Madala J expressed himself in the following terms:

"In a State that has pledged itself to redeem the dignity of its citizens, it should not be the State itself that tramples on the

rights of its citizens. On the contrary, everyone should be working tirelessly to protect and promote that dignity, it being

accepted that we are dealing with a majority of previously disadvantaged persons"

- [14] In the same vein with regard to the State's obligation to protect the rights of its citizens, in *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Land Reform and Others*[5]; Meer AJP stated as follows:

"The same principles are applicable to the State's duty to comply with its contractual and statutory obligations. In Van der Merwe and Another v Taylor NO and Other 2008 (1) SA 1 (CC) at 27 it was acknowledged that the constitutional principles are basic values for achieving a public service envisaged by the Constitution, which required the State to lead by example. As in that case, the State has failed to lead in the present case: In the earlier case of Mohammed and Another v President of the RSA and Others 20 01 (3) SA 893 (CC) at 921 para 68, the Court endorsed the celebrated words of Justice Brandeis in Olmstead et al v United States:

'In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously.....

Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by examples.....If the government

becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invite anarchy'

[15] Mr Nqala, Counsel for the Respondents, argued that the Applicant's claim was consolidated with Nkunzana Community Claim and it was only later when Mr Nzuza complained that the First Respondent realised that those were two separate Claims. This argument does not hold water and it does not tally with the assurance given by the Minister at the meeting at Richardsbay that the Applicants' claim was valid and the memorandum had been prepared for the Minister to acquire the Land. The Government Gazette also did not make reference to the Nkunzana Community Claim. In the memorandum from the First Respondent to the His Majesty the King of the Zulus it clearly stated that that Mr Nzuza with the permission of the King, lodged two separate claims, one for Nongoma Commonage and one for Nkunzana area.

[16] On the schedule of areas claimed, attached to the Memorandum to the King, Nkunzana and Nongoma Commonage Claims are given different

reference numbers. That is clear indication that Nkunzana and Nongoma Commonage are two different claims registered under different

reference numbers. Therefore it cannot be true that the claims were consolidated into one claim. If the claims were consolidated as it is argued, it was clearly wrong to do so.

[17] Mr Nqala argued further that according to the claim form in respect of Nongoma Commonage Claim, Mr Nzuza indicated that the claimant was the Usuthu Tribal Authority. The Respondent cannot at this stage raise this hopeless and unjustified defence. At the meeting held at Nongoma on 15 November 2012 attended by the Attorney for the Applicants and Messrs Mdontswa and Silaule, from the Department, Mr Mdontswa assured the Applicants' Attorney that the issue of Usuthu Tribal Council would be dealt with separately from the Applicants' claim at a political level. That assurance was confirmed by Mr Van der Merwe in a letter TH9 to the First Respondent dated 19 November 2012.

[18] The other problem with the allegation concerning the Usuthu Traditional Council is that all correspondence relating to Nongoma

Commonage claim was address to the Applicants for the attention of Mr Nzuza. No correspondence was addressed to Usuthu Traditional Council.

[19] Mr Van der Walt, Counsel for the Applicants, argued that the Respondents seem to be hiding the file relating to Applicants'

claim. That is a credible and sound argument. The outside cover of the copy of the file given to Mr Van de Merwe reflected the correct name and the reference number relating to the Applicants' restitution claim. At least two documents in the file related to the Applicants' claim. Therefore the Respondent cannot be heard now to say the file is missing. Whoever was making copies for Mr Van der Merwe might have copied wrong documents from the wrong file. If that was done by mistake, the Respondents must correct it.

[20] Respondents aver that the Applicants' claim is still being investigated and researched. That cannot be true. It flies in the face of the assurance given by the Minister at a meeting in Richards Bay that the Applicants' claim had been analysed and the memorandum for the acquisition of land for the settlement of the Applicant Community was already on his table for his approval.

Paragraph 1 of the memorandum TH19, address to the King by the First Respondent states:

"After a thorough research which was conducted by the Regional Land Claims Commissioner it was discovered that the areas under claim falls (sic) within the jurisdiction of his Majesty....The Regional Land Claims Commission has completed a research on those different land claims lodged within the cut-off date of 31 December 1998"

That was another indication that research and investigations relating to the Applicants' claim had been completed.

[21] In paragraph 2.2 of the memorandum TN17, dated 05 August 2013 to the Chief Land Claims Commissioner, asking funding for Applicants'

Legal representation, Mr Bheki Mbili, the Chief Land Claims Commissioner states:

"The Claim was researched and accepted by the Regional Land Claims Commissioner and published in the Government Gazette. The claimed

land was valued and preparations were in place to establish a legal entity when Usuthu Traditional Authority intervened claiming

entitlement to the land in the matter resulting to delays in the processing of the claim."

In light of the above statement, it simply cannot be correct that the Applicants' claim is still under investigation.

[22] Applicants cannot be expected to wait for the outcome of their restitution claim for 20 years and only be told now that the claim is still being investigated. That will be clear indication that the Respondents have failed in their constitutional duty to respect and redeem the dignity of the Applicants who have a constitutional right to a restitution of their land.

COSTS

[23] Applicants have asked for punitive costs against the Respondents. They have also asked for costs de bonis propriis against Lebjane Harry Maphutha who deposed to the Respondents Answering Affidavit. They have also asked for costs de bonis propriis against Mr Silaule a Deputy Land Claims Commissioner. Respondents argued that each party should pay its own costs. It

is not the practice of this Court to make cost orders, unless there are good reasons to do so. Considering the manner in which

Respondents handled the Applicants' restitution claim, I am of the view that a cost order against the Respondents is justifiable in these circumstances, however, I disagree with the submission that a punitive cost order should be made. Although Mr Maphutha deposed to an affidavit stating facts contrary to assurances given to Applicants by the Minister, there is no good reason to order cost de bonis propriis against him. Same applies to Mr Silaule.

[24] The Applicants furnished me with a comprehensive draft order which was very helpful. .

ORDER

[25] In the results, I make the following order:

1. The First Respondent (Mr HL Maphutha) in his official capacity is ordered to cause to be handed over to the Applicants' Attorneys Messrs Cox and Partners Vryheid, copies of the entire file and its contents comprising all documents and correspondence in possession of the Commission on Restitution of Land Rights pertaining to the restitution claim lodged on behalf of the First Applicant on 19 November 1997 under reference number KRH6/2/2/E34/0/0/5. Those documents are to include, but not limited to all documents specified

by the Respondents in paragraph 36.1 of their opposing affidavit, all memorandum pertaining to the appointment of consultants to

investigate the claim and all reports pursuant to the said investigations, including the provisional and final report prepared

by Mayecon Consulting by no later than the 26th of May 2017.

2. The First Respondent is ordered to take all necessary steps to appoint a valuer by no later than the 26th May 2017 to value all properties comprising the property claimed by the First Applicant described in Notice 2383 of 2001 published in Government Gazette 22941 of 21 December 2001 as Reserve No 12 No 15832 commonly known as Nongoma Commonage and to instruct the said valuer to conduct and complete the valuation of all such properties and furnish the First Applicant within sixty

(60) days or such other period as the Court may determine from the date of the order.

3. The First Respondent is ordered to provide copies of the valuation reports referred to in paragraph 2 above to the Applicants'

Attorneys Messrs Cox and Partners Vryheid within ten (10) calendar days from the date upon which the valuation reports will be submitted by the valuer to the First Respondent in compliance with paragraph two above.

4. The First and Second Respondents are ordered jointly and / or severally to prepare and file a report to the Court with the Registrar and to deliver a copy of such report to the Attorneys of the Applicant, Messrs Cox and Partners Vryheid within thirty (30) calendar days from the date upon which the valuation report mentioned in paragraph 2 above will be submitted by the valuer to the First Respondent. The First Respondent shall specify in such a report in chronological order all further steps which the First Respondent intends to take in order to manage the claims of the First Applicant to finality and further to include in the said report the time frame within which the First Respondent and or the Second Respondent intends to take all such steps as will be necessary to ensure that no further undue delays will occur in the process of finalizing the claim of the First Applicant.
5. The Applicants are granted leave to approach this Court on the same papers supplemented where necessary, for further relief in the event of circumstances arising justifying the granting of a further order /s for further relief to ensure that no further undue delays will occur in the process of finalization of the First Applicants' claim.
6. The First and Second Respondents jointly and severally, the one paying the other to be absolved are ordered to pay the Applicants'

costs, taxed as between party and party.

APPEARANCES

For Applicants: Adv. C J Van der Walt, instructed by Cox & Partners, Vryheid

For Respondents: Adv. C Nqala, instructed by State Attorney, Durban

LAND CLAIMS COURT

RANDBURG

[1] Section 34 of the Constitution of the Republic of South Africa Act, Act, 108 of 1996

[2] Section 33 (1) of the Constitution - Supra

[3] Section 327 of the Constitution

[4] 2008 (5) SA 94 (cc) at 89

[5]

[2010] All SA 331 (LCC para 36

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