

SOUTH AFRICA / JUDGMENT

Nzimande and Others v Director General of the Department of Rural Development and Land Reform and Others (LCC41/2011) [2022] ZALCC 47 (8 July 2022) [2022] ZALCC 47

COURT

Land Claims Court

BEFORE

MIA

CASE / FILE NUMBER

LCC41/2011

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IN THE LAND CLAIMS COURT OF SOUTH
AFRICA

HELD AT RANDBURG

CASE NUMBER: LCC41/2011

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

08.07.22

In the matter between:

ELTON

NZIMANDE AND 129 OTHERS

Appellant

and

THE DIRECTOR

GENERAL OF THE DEPARTMENT OF RURAL

DEVELOPMENT AND

LAND REFORM

First

Respondent

MS NELISIWE SITHOLE

THE HEAD OF THE

DEPARTMENT, MPUMALANGA PROVINCIAL DEPARTMENT OF AGRICULTURE,

RURAL

DEVELOPMENT AND LAND ADMINISTRATION

Second

Respondent

THE ACTING CHIEF

LAND CLAIMS COMMISSIONER

Third

Respondent

THE ACTING REGIONAL

LAND CLAIMS COMMISSIONER,

PROVINCE OF

MPUMALANGA

Fourth

Respondent

THE MATSAMO

COMMUNAL PROPERTY

ASSOCIATION

CPA/07/1070/1

Fifth

Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 8 July 2022.)

JUDGMENT

MIA J

INTRODUCTION

[1] The appellants seek leave to appeal to the Supreme Court of Appeal against the order and judgment handed down on 18 October 2021 when their application to review the decision of the first, third, and fourth respondents (the respondents) to accept and settle the land claim lodged by the fifth respondents was dismissed with costs. I will refer to the parties as they appeared in the review application.

[2] The applicants raised the following grounds of appeal:

2.1. The Court erred or misdirected itself in fact and in law in finding that there was no decision that stands to be reviewed. The Court erred in finding that there was no decision to be reviewed on the basis that the decision to purchase the land was made under the Restitution of Land Act being different from the Settlement Land Acquisition Grant (SLAG) programme.

2.2. The Court erred in finding that the review was governed by the Promotion of Administrative Justice Act 3 of 2000 (PAJA) when the applicants based their application for review on the principle of legality.

2.3 The Court erred in finding that the applicants were required to furnish good cause for the delay in launching the review application. On this basis, the delay in launching the review application should not have superseded their rights to have the matter adjudicated on its merits.

- [3] The application for leave to appeal was filed on 12 November 2021 and set down at the instance of the respondents and heard on 30 June 2022. The parties were directed to file heads of argument in the matter. The applicants filed very brief heads of argument very late and long after the respondents had filed their heads of argument. No explanation was tendered for the late filing or for the applicants' failure to set the matter down.

THE PRINCIPLE OF LEGALITY VS PAJA

- [4] Counsel for the applicants submitted that the Court erred in finding the matter fell to be determined within the ambit of PAJA. He continued that the applicants did not premise their application on PAJA. It was, he maintained based on the principle of legality as held in *State Information Technology Agency Soc Ltd v Gijima (Pty) Ltd*[1]. He reasoned that the delay in launching the application did not limit the parties when lodging an application for relief on merit. Counsel relied on the dissenting decision in *Gijima* for this submission and submitted that the court erred in finding that the parties did not give a reasonable explanation for the delay in launching the application.
- [5] He submitted that the court was required to consider the application notwithstanding the lengthy delay before the applicants lodged the application. Upon considering the delay, the court was required to exercise its discretion based on the merits of the matter. Counsel continued moreover that the merits of the application before the court were such that the court ought to have been persuaded to consider the matter notwithstanding the delay. Relying on the decision in *Gijima* counsel reasoned that the delay was not a determinative consideration when dealing with the principle of legality. He continued, moreover that the court ought to have considered whether the delay was reasonable and consider whether the delay could be overlooked. He argued that the court did not do this, and submitted that in failing to do so it is evident that the court erred. This was so as once the issue of the principle of legality was raised the issue of the delay and whether the delay had been reasonable or not was less relevant.
- [6] In the present matter he continued, any delay would be of less consequence and the court ought to have decided the issue in favour of the applicants. The applicants relied on the dissenting decision of Bosiello JA in *Gijima* at para [69] where the Court stated:

"In any event, unlike PAJA, an attack based on the principle of legality is not subject to time limits except that it must be done within a reasonable time. What a reasonable time is can only be decided on the facts of each case. This requires the presiding judge to exercise a value judgment"

RESTITUTION ACT VS SLAG PROGRAMME

- [7] Counsel for the applicants submitted that the court misunderstood the submissions and erred in finding there was no decision to be reviewed because the decision to award the land to the applicants initially was not made under the Restitution Act. The applicants were funded to acquire the farms through the Settlement Land Acquisition Grant (SLAG) programme. Their case was never in terms of the Restitution of Land Act. It was always as

reflected in statement of the Minister Of Agriculture to Parliament that the land was to be acquired for the applicants through the SLAG programme. Once this decision was taken in by the Minister to acquire the land for the applicants, the decision had to be set aside before another decision could be taken in respect of the same land even if it was made under the Restitution Act. Thus, the second to fourth respondents were required to consult the applicants before acquiring the land for the fifth respondents.

- [8] Moreover, so it was contended, the Court erred in finding there was no decision to be reviewed as the decision was taken after the liquidation of Inala Farm in the North Gauteng High Court. He submitted that whilst the applicants had an interest in the land when it was published in the government gazette as claimed by the fifth respondent, the applicants were not obliged to lodge an objection to the fifth respondent's claim. This was so, as the claim could have been settled by way of an award of compensation and not by way of restoration of the land. It was only when the land was to be restored that the applicants would be affected. The decision to restore the land to the fifth respondent impacted the applicants' interest in Inala Farm and there was an obligation on the first to fourth respondents to engage and consult with them as their interests were impacted.
- [9] Counsel argued that the applicants' prior acquisition of the farm through the SLAG programme required that they be consulted before the farm was purchased to be restored to the fifth respondent. The first to fourth respondents could consider an award of compensation in the alternative to the restoration of the land. He maintained that if they considered restoration of the land then they were required to consult the applicants. As there was no consultation before the decision was made that the farm be restored to the fifth respondent the applicants were entitled to review the decision.
- [10] Furthermore, he submitted that the same Department was the driver of the SLAG programme and the restitution programme, noting that the Department was *functus officio* in respect of their decision with regard to the land concerned once they made the decision to purchase the land for the applicants through the SLAG programme. They thus could not ignore their own decision as the decision remained effective. He referred to the decision in *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others*[2] to support his contention. The failure to consult the applicants when acquiring the land for the fifth respondent meant they were going back on their previous decision without having it set aside by a court. This was the decision they sought to review. He submitted that the court erred in finding that there was no reason to review the decision as it was taken under different circumstances and under different legislation. The applicants contend it is the same decision maker and the same piece of land. Consequently, counsel concluded that the applicant had reasonable prospects of success on appeal and requested that the applicants be granted leave to appeal to the Supreme Court of Appeal.
- [11] In opposing the application for leave to appeal, Counsel for the first to fourth respondents submitted that the application for the applicants failed to make out a case for review based on the decision taken in 1996 to assist the applicants with the SLAG of R15 000-00(fifteen

thousand rand) to purchase shares in the Inala Operations pursuant to section 10 of the Provision of Land and Assistance Act. The applicants did not submit a claim in terms of the Restitution of Land Act (Restitution Act) and there was no claim to compete with the fifth respondent's claim or an objection to the fifth respondent's claim.

- [12] He submitted that the company Inala Operations in which the applicants invested the funds they received through the SLAG programme was liquidated in the North Gauteng High Court. This liquidation of Inala farm or its assets was not opposed by the applicants. Counsel for the first to fourth respondents furthermore submitted that the first to fourth respondents' consultative process entailed publication through the government gazette. The applicants failed to object to or respond to the publication on 20 June 2008 or the amended publication on 20 August 2008 in terms of section 11A (4) of the Restitution Act. In the absence of any opposition the Chief Land Claims Commissioner approved the submission and recommended the s 42D agreement with the fifth respondent. On 4 February 2009 the liquidators of Inala Operations concluded the s 42D agreement and the applicants did not review the decision since that time.
- [13] Counsel for the first to fourth respondents submitted that the application was correctly dismissed on the basis that the application was not brought timeously and there was no good reason for the delay relying on the decisions in *Opposition to Urban Tolling Alliance v South African National Road Agency Ltd*[3] and *Buffalo City Metropolitan v Asla Construction (Pty) Ltd*[4]. He thus concluded that there was no reasonable prospect that another court would come to a different conclusion.
- [14] Counsel for the fifth respondent agreed with the first to fourth respondents. In addition, he submitted that the applicants were not owners in the traditional sense. They had purchased shares in the company which owned Inala farm but that did not give them the right of ownership. The property was registered in the name of the company, Inala Operations and not in the name of the applicants. The ownership of share certificates, he continued could not be conflated with the ownership of the farm. He submitted furthermore that whilst the applicants argued that the court erred in that it held there was an unreasonable delay and did not go beyond the delay to consider the merits, the fifth respondent disagreed and contended that the court did address the issue beyond

the delay. He concluded therefore that another court would not come to a different conclusion and that the application should be

dismissed.

- [15] The test for leave to appeal is set at a higher standard and the parties in their submissions were clear that the court must be satisfied that another court would come to a different conclusion. This is set out in the decision of Bertelsmann J, in *The Mont Chevaux Trust v Tina Goosen and 18 Others*[5].

[16] On the point raised regarding the delay and the exercise of discretion the SCA, in Gijima expressed at para

[47] referring to its decision in *Khumalo v Member of Executive Council for Education: KwaZulu Natal*[6] as follows:

"[A] court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay."⁵²

(Emphasis added.)"

And at para [49] the Court continues:

"From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here. That should be the end of the matter."

[17] Counsel for the applicant submitted that the Court erred in not exercising a discretion beyond finding that there was an unreasonable delay and that there was no explanation for the delay. This does not take into account that the court considered that the applicants acquired shares in the farm through the SLAG programme and that the farm was liquidated in the North Gauteng High Court. The applicants did not oppose the liquidation or take any action to secure their interest in Inala Operations. Counsel for the applicant submits correctly that the first to fourth respondents were *functus officio* in respect of Inala Farms once they took a decision to assist the applicants through the SLAG programme.

[18] In *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others*[7] the Court stated at [33],

"The application of the delay rule would in a sense "validate" a nullity. This rule evolved because, prior to the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), no statutorily prescribed time limits existed within which review proceedings had to be brought. The rationale was an acknowledgment of prejudice to interested parties that might flow from an unreasonable delay as well as the public interest in the finality of administrative decisions and acts"

[19] The SCA stated further at para [50] and [51] (loose translations inserted):

"[50] The parties were agreed that, in considering the correctness of the decision of the court below, the principles enunciated in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978

(1) SA 13 (AD) at 39C-D had to be applied. The following is the relevant passage:

"Word beweer dat die aansoekdoener nie binne redelike tyd die saak by die Hof aanhangig gemaak het nie moet die Hof beslis

(a) of die verrigtinge wel na verloop van 'n redelike tydperk eers ingestel is en (b), indien wel, of die onredelike vertraging oor die hoof gesien behoort te word. Weereens, soos dit my voorkom, met betrekking tot (b), oefen die hof 'n regterlike diskresie uit, met inagneming van al die relevante

omstandighede" (my emphasis).[8]

[51] In Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie 1986 (2) SA 57 (AD) at 86D-E, with reference to Wolgroeiers, the following was stated:

"Die ondersoek, wat (a) betref, het niks temake met die Hof se diskresie nie; dit behels 'n blote ondersoek na die feite ten einde te bepaal of die tydperk wat verloop het, in die lig van al die omstandighede, redelik of onredelik was." [9]

[20] As stated by Van Reenen J, this entails a value judgment by the court in relation to its view of the reasonableness of the time that has elapsed in the light of all the circumstances. This should not be equated with the exercise of a discretion, which forms the subject of the second leg of the exercise (see in this regard Setsokosane at 86E-F and Associated Institutions Pension Fund at 321G-H)."

[20] In my reasons, I considered that the decision sought to be reviewed was taken in 200 had the opportunity to read my judgment, and the reasons for the order I granted. I have taken into account all the submissions made by all the parties and considered numerous precedents on the issues raised by the applicants; I am not persuaded that there are reasonable prospects another court would come to a different conclusion.

ORDER

[21] For the reasons above I order as follows:

1. The application is for leave to appeal to the Supreme Court of appeal is dismissed with costs.

Mia J

Acting Judge

Land Claims Court

Appearances:

For the Appellants: Adv D Mtsweni and Adv D Mosoma Instructed by Matyeka Attorneys For the Respondents: Adv L Gumbi Instructed by State Attorney For Fifth Respondent Adv BD Hitchings Instructed by Magagagula George Mcetywa Inc

[1] State Information Technology Agency Soc Ltd v Gijima (Pty) Ltd [2016] 4 All SA 842 SCA at para [46] to [70].

[2] Oudekraal Estate (Pty) Ltd v City of Cape Town and Others [2009] JOL 24157 (SCA)

[3] Opposition to Urban Tolling Alliance v South African National Road Agency Ltd [2013] 4 All SA 639 (SCA); 2013 JDR 2297(SCA)

[4] Buffalo City Metropolitan v Asla Construction (Pty) Ltd 2019

(4) 331 (CC)

[5] The Mont Chevaux Trust v Tina Goosen and 18 Others 2014 JDR 2325 LCC para 6

[6] Khumalo v Member of Executive Council for Education: KwaZulu Natal

[2013] ZACC49; 2014 (5) SA 579 (CC); 2014(3) BCLR 333 (CC)

[7] Footnote 2

[8] (TRANSLATION If it is alleged that the applicant has not lodged the case with the Court within a reasonable time, the Court must decide (a) whether the proceedings were only instituted after a reasonable period and (b), if so whether the unreasonable delay should be overlooked. Again, it seems to me, with regard to (b) the court exercises a judicial discretion taking into account all the relevant circumstances.”)

[8] (TRANSLATION

If it is alleged that the applicant has not lodged the case with the Court within a reasonable time, the Court must decide (a) whether the proceedings were only instituted after a reasonable period and (b), if so whether the unreasonable delay should be overlooked. Again, it seems to me, with regard to (b) the court exercises a judicial discretion taking into account all the relevant circumstances.”)

[9](TRANSLATION The investigation, as far as (a) is concerned has nothing to do with the discretion of the Court, it involves a mere examination of the facts in order to determine whether the period which has elapsed, in light of all the circumstances, was reasonable or unreasonable.)

[9](TRANSLATION

The investigation, as far as (a) is concerned has nothing to do with the discretion of the Court, it involves a mere examination of the facts in order to determine whether the period which has elapsed, in light of all the circumstances, was reasonable or unreasonable.)

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