

SOUTH AFRICA / JUDGMENT

Emakhasaneni Community v Minister of Rural Development and Land Reform and Others; Entembeni Community v Minister of Rural Development and Land Reform and Others; Mthonjaneni Community v Minister of Rural Development and Land Reform and Others (LCC03/2009; LCC230/2009; LCC201/2013) [2019] ZALCC 30 (17 May 2019)

[2019] ZALCC 30

COURT

Land Claims Court

BEFORE

MP Canca, EJ Sibeko

CASE / FILE NUMBER

LCC03/2009; LCC230/2009; LCC201/2013

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Source record**IN****THE LAND CLAIMS COURT OF SOUTH AFRICA****HELD****AT DURBAN****BEFORE:**

CANCA AJ & ASSESSOR SIBEKO

CASE

NO.: LCC 03/2009

In

the matter between:

EMAKHASANENI

COMMUNITY Claimant/Plaintiff

and

THE

MINISTER OF RURAL DEVELOPMENT

AND

LAND

REFORM 1st

Defendant

REGIONAL

LAND CLAIMS COMMISSIONER,

KWAZULU-NATAL 2nd

Defendant

VRIENDSCHAP

BOERDERY 3rd
Defendant
SPES
BONA TIMBER ESTATE (PTY)
LTD 4th
Defendant
CENTRAL
TIMBER CO-OPERATIVE
LTD 5th
Defendant
WESSEL
HENDRIK
ELS 6th
Defendant
MAPHOLOBA
FARMING
CC 7th
Defendant
MANZINI
ESTATE (PTY)
LTD 8th
Defendant
WILLEM
VERMAAK 9th
Defendant
WANSBECK
FARMS
CC 10th
Defendant
NICHOLAS
PAUL
ISABELLE 11th
Defendant
WANSBECK
FARMS (PTY)
LTD 12th
Defendant
MERKOR
FARM
TRUST 13th
Defendant
MAHAMBA
HLALA AGRI
CC 14th
Defendant
ED
MARITZ MERINO
TRUST 15th
Defendant
HAYDAN
PERCIVAL FAMILY

TRUST 16th
Defendant
KERRIE
INV (PTY)
LTD 17th
Defendant
SWAAR
BEGIN LANDGOED
CC 18th
Defendant
RUDI
STEPHANUS
SCHNETLER 19th
Defendant
CA
LEITCH & SONS (PTY)
LTD 20th
Defendant
SCHNETLER
TRUST 21st
Defendant
LEON
JOHANNES
BEUKES 22nd
Defendant
ANDREW
JAMES STUART
MCLLRATH 23rd
Defendant
MONDI
LTD 24th
Defendant
PHINDITHEMBA
MPUMELELO MANQELE &
AGNESS
SAMKELISWE
MANQELE 25th
Defendant
MTHONJANENI
MUNICIPALITY 26th
Defendant
ROMAN
CATHOLIC CHURCH, DIOCESE OF ESHOWE 27th
Defendant
PEACH
FARM (PTY)
LTD 28th
Defendant
PETER
JAMES
RIDDEN 29th

Defendant
PROVINCIAL
DIRECTOR, DEPARTMENT OF LAND
REFORM
OFFICE 30th
Defendant
REGISTRAR
OF
DEEDS 31st
Defendant
CASE
NO.: LCC 230/2009
ENTEMBENI
COMMUNITY Claimant/Plaintiff
KWAZULU-NATAL 2nd
Defendant
KBG
ESTATE (PTY)
LTD 3rd
Defendant
VLAKPOORT
ESTATE (PTY)
LTD 4th
Defendant
PETER
JAMES
WALKER 6th
Defendant
SUNSET
TRUST 7th
Defendant
CASE
NO.: LCC 201/2013
MTHONJANENI
COMMUNITY Claimant/Plaintiff
DEFACTO
INV 199 (PTY)
LTD 3rd
Defendant
IAN
TARVIS
MCMURRAY 5th
Defendant
MCMURRAY
TRUST-TRUSTEES 6th
Defendant
NICO
WILLEM
HARRIS 7th
Defendant
ESKOM

HOLDINGS SOC
LIMITED 8th
Defendant
SWEET
HOME
TRUST-TRUSTEES 9th
Defendant
NICO
HARRIS FAMILY
TRUST-TRUSTEES 10th
Defendant
GEORGE
ALBRECHT ALEXANDER
ALBERS 11th
Defendant
RICHARD
WALTER
HORSLEY 12th
Defendant
HLEZANE
SIBIYA 13th
Defendant
AMAFI
AKWAZULU-NATALI 14th
Defendant
DEPARTMENT
OF REGIONAL AND LAND AFFAIRS 15th
Defendant
APOSTOLIC
VICARATE-ESHOWE 16th
Defendant
LANCASTER
QUARRIES FINANCE (PTY)
LTD 17th
Defendant
INGONYAMA
TRUST-TRUSTEES 18th
Defendant
BURLINGTON
GRANGE INV (PTY)
LTD 19th
Defendant
SAPPI
MANUFACTURING 20th
Defendant
CENTRAL
TIMBER COOP
LTD 21st
Defendant
BROMAC
PROP INV (PTY)

LTD 22nd
Defendant
Heard
on: 10 April 2019.

Judgment: 17 May 2019.

JUDGMENT

CANCA AJ

Introduction

- [1] This an application by the 1gth defendant, in case no. LCC 201/2013, the Ingonyama Trust ("the Trust"), for leave to appeal to the Supreme Court of Appeal the whole of my judgment and orders delivered on 28 November 2018. The Trust relies upon some 22 grounds for this application. These grounds are set out in detail in the Notice of Intention to Apply for leave to Appeal ("the Notice") dated 13 December 2018 and are1 for the most part, not repeated individually in this judgment. Those with a common basis have been grouped together as appears later.
- [2] The application is opposed by all the defendants in the previous proceedings save, those defendants who are represented by Cox and Partners. Mr. Van Der Merwe, from the aforesaid law firm, attended Court on a watching Brief.
- [3] The test against which the question of whether leave to appeal should be granted or not is set out in section 17(1) of the Superior Courts Act 10 of 2013 ("the new Act") which reads:

"Leave to Appeal

17(1) Leave to appeal may only be granted 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 judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

- [4] The use of the word "would" in subsection 17(1)(a) of the new Act has modified the test for the grant of a leave to appeal set out in the repealed Supreme Court Act. In that Act, the test was whether the appeal could be granted. The introduction of the word "would" in the new Act has raised the threshold for granting leave to appeal as it indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be

appealed against. See *Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others* [LCC 14R/2014] (3 November 2014).

Grounds of Appeal

- [5] In its first ground of appeal, the Trust contends that the matter could not be dealt with in limine but required evidence. This contention is misconceived.
- [6] Once the Trust was joined as an interested party on 28 July 2018, the issue to be determined was whether, in law, it was entitled to an order that the land to be awarded to the claimants in terms of the prospective settlement agreement be transferred into the name of the Trust. Given that that was a legal point, evidence on it would have been irrelevant. This is so because, even if the evidence of certain parties before Court, who wished that the land to be awarded be transferred into the name of the Trust was led, I would still have to be satisfied that, as a matter of law, I was entitled to make such an order.
- [7] Moreover, the rules of this Court, permit me, on good cause shown, to deviate from those rules and to act in a manner that I consider to be appropriate. See rule 28(4)(a). The complaint that the Court failed to follow customary formality is not a ground that will result in the Supreme Court of Appeal setting aside the judgment appealed against, particularly as the Trust has not alleged that it was prejudiced by the conduct of which it complains.
- [8] The next issue, I refer to as "the Proceedings on 25/26 October 2018", deals with the grounds of appeal set out in paragraphs 2,3,4 and 5 of the Notice.
- [9] The Trust also contends in paragraph 4 of the Notice that I misdirected myself in concluding that it had made application for the land to be awarded to be transferred into its name. This contention is debunked by the contents of paragraph 30 of the judgment which reads:

"The essence of Mr. Moola's submissions, as I understand them, is that the trust does not claim the land as owner but merely contends that it is the correct vehicle to hold the land on the claimant communities' behalf."

It is clear from this quote that I understood the argument advanced on behalf of the Trust.

- [10] The Trust, in paragraph 5 of the Notice, contends that the Court misdirected itself "in adjudicating on the question of the manner in which the rights of the communities are to be held, as this was not an issue to be determined by the Court in the proceedings held on 25 October 2018."
- [11] I do not quite understand the basis of this complaint. The issue of how the land to be awarded was to be held subsequent to its award was clearly an issue that demanded consideration by the Court. A settlement agreement, which identified the land agreed upon, was handed to the Court on 30 August 2018 by the legal representative of the State defendants. Therefore, the assertion by the Trust that this was not an issue to be considered by the Court on those two days is also misconceived.

- [12] The next ground, set out in paragraph 6 of the Notice, states that the Court misdirected itself in adjudicating the question of the manner in which the rights of the communities are to be held without permitting the Trust to lead evidence.
- [13] The trust led evidence when the Court sat in Ulundi from 26- 29 March
2018. When the Court moved back to its seat in Randburg, the Trust failed to call further evidence. Had it wished to do so it could have done so. I agree with Mr. Mossop, for two of the landowner defendants, that the Trust, having elected not to call further evidence at the hearing held in Randburg, cannot now be heard to complain. I find no merit in this contention as well.
- [14] The complaint set out in paragraphs 7, 8 and 9 of the Notice dealing mostly with the Court's alleged misunderstanding of the requirements of section 35 of the Restitution of Land Rights Act 22 of 1994 ("the Restitution Act") traverses an issue that has been dealt with comprehensively in the judgment and need not be discussed further in this judgment. Section 35{2}(c) makes it clear that the question of how land is to be administered arises only where the claimant is a community. The Trust is not an entity which was set up by the claimant communities to administer the claimant land on their behalf.
- [15] I am persuaded by the submissions made on behalf of those resisting this application that it is inconceivable that the Legislature would record in the preamble to the Restitution Act that that Act was designed to assist, inter alia, a community dispossessed of property by unfair discrimination after 19 June 1913 as a result of past racially discriminatory laws or practices in order to achieve equality but would permit that community to again be denied the right to hold and administer such property by awarding its administration to another party or a party which it does not control.
- [16] The Trust did not lodge a claim for the claimed land and is therefore not a "claimant" as defined in the Restitution Act. I agree that the permission to join as a party to these matters did not afford it a right to claim relief that was not in accordance with the statutory requirements that have to be met in order to obtain the relief claimed. In any event, in our system of property ownership, the owner of land is the person or entity reflected in the records of the Deeds Registry Office as being the registered owner. This system makes no provision for one party to hold land on behalf of another. The distinction between a trust or a Communal Property Association on the one hand and the Trust on the other, is that the former entities, when established, are bound by the provisions of the deed or contract constituting them. The Trust is not so bound.
- [17] The grounds set out in paragraphs 10,11 and 12 of the Notice concern the Minutes dated 7 May 2018.
- [18] The Trust's complaint here is, inter a/ia, that I erred in having regard to those Minutes when same were not confirmed or signed or properly before Court. There is no merit in this complaint. There has, until the filing of the Notice, been no dispute as to the accuracy of the

Minutes raised by any party to this matter, including by the Trust. The non-signature of those Minutes is due principally to the geographic location of the parties and the Court. All Minutes were circulated by email and therefore were not signed. Significantly, the Trust does not say that the Minutes are incorrect or record facts with which it does not agree. It is worth noting that the Trust itself relied on Minutes dated 28 July 2018, which are also not signed, to show that it was already suited.

- [19] It was also contended on behalf of the Trust that the Court misinterpreted the 7th May 2018 Minutes in that it incorrectly found that those minutes recorded an unequivocal decision by all the communities to register "CPAs" as the vehicles which would administer the claimed land. This contention is also ill-founded as the Minutes record that "each of the communities" was engaged in the process of registration of CPAs. As that phrase does not require any interpretation, it is inconceivable how the Court could have been misinterpreted same.
- [20] The Trust has clearly misread the judgment when it contends that the Court failed to take into account the matters set out in paragraphs 12 to 19 of its Notice. I agree with Mr. Skinner, with Mr.Tshangana, for the Isizwe Sakwa-Dludla, who contends that paragraphs 20 and 31 of my judgment do not support the Trust's contentions in this regard.
- [21] In paragraph 31 of the judgment, I state that "it might be true that all or some of the members of the claimant communities who currently reside on Trust land recognize the authority of the Ingonyama'. This shows that the Court took into account the factual basis before it of the claimant communities.
- [22] Also, the issues raised in paragraphs 12 to 19 of the Notice do not take into account the fact that all the communities were represented by both attorneys and counsel. Mr. Mossop, correctly in my view, argued that if the Trust believed that those legal representatives lacked the mandate of their clients in pursuing certain relief, then there were other remedies available to challenge their authority to pursue that relief. This, the Trust failed to do.
- [23] The evidence presented by Professor Maphalala and Mr. Zulu was, in respect of the Professor, theoretical and, in respect of Mr. Zulu, hearsay rendering same unpersuasive in the circumstances of this matter.
- [24] Insofar as the complaint relating to the Court having allegedly failed to take into account the wishes of the communities, this also has no legs.
- [25] The communities submitted their claims without reference to the Trust. In addition, they formulated their claims presently before Court, were legally represented, prosecuted their claims and opposed the relief sought by the Trust. Should the Trust's contentions be correct, then nothing prevents it and the communities from concluding some kind of agreement after the award has been finalized.

[26] In conclusion, the flaw running through all of the Trust's contentions is that every party before this Court, including the

Trust, was well aware that the hearing in Randburg was mainly to determine whether the Trust was entitled to seek that the land to be awarded be transferred into its name. It should never have been taken by surprise that the issue of the validity in law of any transfer of land to it was to be decided by this Court.

Costs

[27] It is trite that any award of costs lies within the discretion of the Court. It has not been argued that the Court adopted an incorrect approach or that I failed to apply my mind to this issue. The argument that I granted costs against the Trust 'merely because the Trust objected to the relief sought' is a gross distortion of the order.

[28] Nothing in the submissions presented on behalf of the Trust persuades me to change the costs order granted in the main judgment.

[29] In the light of all of the above, I find that the Trust has failed the test set out in the new Act and that the Supreme Court of Appeal will not arrive at a decision different from mine. The application for leave to appeal is without merit and must, therefore, fail.

[30] In the result, I order as follows:

1. The application for leave to appeal is dismissed with costs.

MP Canca

Acting Judge, Land Claims Court

I agree

EJ Sibeko

Assessor

Appearances:

For the Ingonyama Trust Board: Adv. F Moola SC

Instructed by: Jafta Inc. Attorneys, Durban

For the Emakhasaneni Community: Adv. S Ngwane

Instructed by: MC Ntshalintshali Attorneys, Durban

For the Entembeni Community: Adv. MM Chiti

For the Mthonjaneni Community: Adv. SKD Mdladla

Instructed by: Ngidi & Company Inc. Attorneys, Durban

For the Minister of Rural Development: Adv. C Nqala
and Land reform

Instructed by: State Attorney, Durban

For the Landowner Defendants: Mr. B van der Merwe {Watching brief}

Instructed by: Cox & Partners Attorneys, Vryheid

For Sappi Limited & Mondi Limited: Adv. R Mossop SC

Instructed by: Shepstone & Wylie Attorneys, Durban

For the Isizwe Sakwa Dladla Community: Adv. BL Skinner SC
Adv. S Tshangana

Instructed by: Ntshebe & Associates Attorneys, Durban

For the Royal House: Adv. J Malinga

Instructed by: Ngcaweni Shabalala Inc. Attorneys, Durban

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