

SOUTH AFRICA / JUDGMENT

Xulu v Master of High Court Pietermaritzburg (LCC41/2022) [2024] ZALCC 20 (29 July 2024) [2024] ZALCC 20

COURT

Land Claims Court

BEFORE

SJ Cowen

CASE / FILE NUMBER

LCC41/2022

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Source record**IN THE LAND COURT OF
SOUTH AFRICA****(HELD AT RANDBURG)****CASE NO: LCC41/2022****1.****REPORTABLE: NO****2.****OF INTEREST TO OTHER JUDGES: NO****3.****REVISED.****29****July 2024**

In the matter between:

THEMBA
TIMOTHY XULU
First Applicant
SIPHO
WONDERBOY MASUKU
Second Applicant
JABULISILE
ZODWA HLATSWAYO
Third Applicant
DIANAH
PRINCESS VAN ZUYDAM
Fourth Applicant
EXCELLENT
SONNYBOY XABA

Fifth Applicant
MBONGENI
CAIPHASE KHANYE
Sixth Applicant
KHULULIWE
PRINCESS MAGWAZA
Seventh Applicant
and
THE MASTER OF THE HIGH
COURT
PIETERMARITZBURG
First Respondent
HOWARD
MARTIN FELIX, N.O.
Second Respondent
COMMISSION
ON RESTITUTION OF LAND RIGHTS
Third Respondent
CHIEF
LAND CLAIMS COMMISSIONER
Fourth Respondent
THE
REGIONAL LAND CLAIMS COMMISSIONER
Fifth Respondent
MINISTER OF RURAL
DEVELOPMENT AND
LAND
REFORM
Sixth Respondent
DEPARTMENT
OF RURAL DEVELOPMENT
AND
LAND REFORM
Seventh Respondent
THE PREMIER OF THE
PROVINCE OF
KWAZULU-NATAL
Eighth Respondent

JUDGMENT

COWEN J

1. The applicants instituted proceedings in early 2022 in which they sought relief in two stages, Part A and Part B. In Part A, they sought urgent interdictory relief precluding the second respondent, Mr Howard Martin Felix NO, from performing the functions of trustee of the Nkunzana Communal Property Trust (the Trust). Mr Felix was appointed to serve in that position by the Master of the High Court in Pietermaritzburg (the Master), the first respondent.
2. The applicants are Mr Themba Timothy Xulu, Mr Sipho Wonderboy Masuku, Mr Jabulisile Zodwa Hlatwayo, Ms Dianah Princess van Zuydam, Mr Excellent Sonnyboy Xaba, Mr Mbongeni Caiphase Khanye and Ms Khululiwe Princess Magwaza. The applicants say that they are the duly elected trustees of the Trust, which was established to hold land purchased by the State in settlement of a land claim under the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). Their entitlement to act as trustees is, amongst other things, the subject of Part B of the proceedings, in which the applicants seek to review and set aside the decision of the Master to appoint the second respondent as a so called 'independent' trustee.
3. On 30 March 2022, this Court issued directions in terms of Rule 34(3)(b) of the Rules of the Land Claims Court, in effect, calling for a conference to determine time-frames for the filing of the affidavits and a possible settlement of the application for interim relief. At an early stage, the second respondent gave an undertaking acceptable to the applicants which removed any acute urgency, but the issue of interim relief still required determination.[1] The Court proceeded to case manage the proceedings as required by the parties. Part A was finalized during a conference held on 22 July 2022 and, by agreement, interim relief was granted pending the determination of the application for final relief.[2]
4. Nonetheless, the hearing of Part B was delayed for some time as various interlocutory disputes emerged between the parties. To enable the matter to proceed to final enrolment, the Court continued to case manage the matter. At a point submissions were made on whether the issue of jurisdiction – which was disputed - should be dealt with separately. In circumstances of ongoing delays, Part B was ultimately set down for full hearing on 22 April 2024 but then stood down again until 30 April 2024 to enable parties to deliver further written submissions on the implications of the coming into force of the Land Court Act 6 of 2023 in respect of the issue of jurisdiction. The Land Court Act came into force on 5 April 2024 which preceded the hearing of the matter and none of the parties had considered its import notwithstanding its implications for pending proceedings and differences in its provisions governing jurisdiction.
5. The parties that participated in Part B were the applicants, the first and second respondents and the third to fifth respondents, who together comprise the Commission on the Restitution of Land Rights in its national and provincial offices and the Commissioner (collectively, the Commission). The sixth and seventh respondents, the Minister of Rural Development and Land Reform (the Minister) and the Department of Rural Development and Land Reform (the Department), delivered a notice to abide.

6. Initially, the substantive relief sought in Part B of the notice of motion was in the following terms (the initial relief):
 - 6.1. The first respondent's decision to issue letters of authority certifying that the second respondent is authorized to act as trustee of the Trust is set aside;
 - 6.2. The first and second respondents are interdicted and restrained from taking any steps to implement the first respondent's decision mentioned in paragraph 1 above;
 - 6.3. The matter is remitted to the first respondent who is hereby directed to give effect to the applicants' request of 1 September 2019 to issue letters of authority certifying that the first to seventh applicants are authorised to act as trustees of the Trust.
7. At a point, the applicants amended their notice of motion to include further relief, specifically, an order that:
 - 7.1. The beneficiary list (which was annexed as A) be declared the only correct and valid list of beneficiaries of the Trust; and
 - 7.2. A declaration that the redistribution agreement concluded between the Trust and the ninth to twenty-fourth respondents (to be joined) is valid and binding on the parties.
8. The further relief appeared to necessitate a joinder application. A joinder application was instituted but not persisted with and the Court was informed that there is some debate as to whether a joinder application is indeed necessary as on the applicants' account, they duly represent the beneficiaries of the Trust.
9. During the course of argument however, the applicants' counsel informed the Court that at least at this stage the applicants were not persisting with the further relief. Moreover, counsel informed the Court that provided the issue of trusteeship is resolved, it may well transpire that it is not necessary to persist with the further relief at all, as the underlying issues might be resolved in non-litigious ways. Accordingly, the only issue before me is whether the initial relief should be granted, which amounts to a review of the Master's decision.

Background

10. On 10 December 1998, Mr Tamsanqa Michael Nzuza lodged a claim under the Restitution Act on behalf of the Nkunzana Community. The Commission accepted the claim to be valid and the claim was published in the Government Gazette on 12 August 2005 in terms of section 11(1) of the Restitution Act. The section 11 notice was subsequently amended on more than one occasion.

11. On 30 July 2007, the Minister approved the settlement of the claim in terms of section 42D of the Restitution Act. At that stage, the verification had indicated that there were 472 (four-hundred and seventy-two) heads of households, a number referred to in the memorandum placed before the Minister. The applicants aver that this was, however, only a preliminary verification. The memorandum authorized the Commission to conclude further agreements to settle the claim.
12. The first respondent accepted a Deed of Trust on 28 May 2009. According to the Trust Deed, the beneficiaries of the Trust are the heads of 482 (four-hundred and eighty-two) households. [3] The household heads are meant to be listed in an Annexure A to the Trust Deed but Annexure A is not supplied. The applicants aver that at no stage was the list of 472 submitted to the Master. The State purchased properties which were apparently transferred to the Trust. The Trust Deed itself only refers to two returned properties. However, during or about 2010, the Trust instituted proceedings in this Court for an order to compel the transfer of further properties the State had purchased for it to the Trust, which was granted by Mpshe AJ.
13. According to the applicants, as a result of a subsequent verification process, apparently in 2014, which was supported by the Commission, the Minister and her Department, the number of beneficiary households was reduced to 52 (fifty-two) and the Trust beneficiary list was amended accordingly. According to the applicants, the reduction of the households came about in circumstances where a pointing out and mapping exercise was conducted to determine the cadastral units of land that form part of the Nkunzana Community land claim. Through this exercise it was found that during the initial verification process, claimants in respect of land surrounding the land comprising the Nkunzana land claim included their names and were initially erroneously verified thereunder by the Commission. This included claimants falling under other claims such as the Gumbi, Mathe and Ntshangase claims. These persons' names, as mentioned, were removed from the beneficiary list of the Trust. Thus, according to the applicants, the only beneficiaries of the Trust are the fifty-two households.
14. Thereafter and in 2016, a redistribution agreement was apparently concluded pursuant to which land would be allocated and transferred to communities amongst the Trust beneficiaries. In other words, different parcels of land would be transferred out of the Trust and into the names of other entities, families or individuals. According to the applicants, that beneficiary agreement was also concluded with the full support and approval of the Commission and the Minister.
15. A settlement agreement was apparently concluded in terms of section 14(3) of the Restitution Act but it is not annexed to the papers and if concluded, its date is not pleaded.
16. On 19 November 2014, the first respondent issued letters of authority in terms of section 6(1) of the Trust Property Control Act 1998 to seven trustees which included the first, second, sixth and seventh applicants and three others.

17. According to the applicants, on 1 September 2019, the Trust held an AGM at which the applicants were elected trustees. As mentioned, the applicants aver that by that stage, only the fifty-two households were trust beneficiaries. On 1 October 2019, the applicants' attorneys, Cebisa Attorneys delivered an application to the Master requesting him to issue letters of authority in their favour.
18. However, the Master did not do so in circumstances where the Premier of KwaZulu-Natal, the eighth respondent, addressed correspondence to the Master in which, inter alia, he asserted the interests of a concerned group of persons, who, according to the applicants are not beneficiaries of the Trust nor entitled to benefit. One of the applicants' complaints is that the Master did not afford the applicants a fair hearing in respect of the Premier's correspondence before the second respondent was appointed and bowed to his dictates. There are many issues raised and grounds of review pleaded. Viewed through the lens of land reform, the issues raised are, indeed, important ones.
19. The Commission delivered an explanatory affidavit, which essentially confirms the evidence adduced by the applicants. Pertinently, the Commission confirms that the Trust's beneficiaries were reduced to the fifty-two households and that the redistribution agreement was concluded. The Commission expresses its concern with the absence of what it perceives to be fair process regarding the Master's appointment of the second respondent as trustee and what it perceives to be undue interference with the land

reform process.

Jurisdiction

20. The second respondent, and in turn, the Master, took issue with this Court's jurisdiction to adjudicate the matter. As only the initial relief is before me, I am of the view that the matter must be dealt with by considering whether the Court has jurisdiction to determine that relief. All the more so because there is no clarity whether and if so when the further relief will ever be persisted with.
21. The lawfulness of the Master's appointment of trustees pursuant to the Trust Property Control Act 57 of 1998 and the Trust Deed are not matters that ordinarily lie within the jurisdiction of this Court.[4] In circumstances where a matter does not ordinarily lie within the jurisdiction of this Court, this Court can only assert jurisdiction

in statutorily delineated circumstances. The same applied to the Land Claims Court, which ceased to exist when the Land Court Act came into force on 5 April 2024.

22. Under section 22(2)(c) of the Restitution Act, prior to its amendment by the Land Court Act, the Land Claims Court had 'the power to decide any issue either in terms of [the Restitution Act] or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so.'

23. Under section 24(1)(c) of the Land Court Act, the Land Court has ‘the power to decide any issue in terms of any other law, which is not ordinarily within its jurisdiction but is sufficiently connected to a matter within its jurisdiction, if the Court considers it to be in the interests of justice to do so.’
24. The applicants, in their further submissions, contended that this Court must apply section 24(1)(c) of the Land Court Act by virtue of inter alia the provisions of section 35(1)(b)(i), which provides:
- ‘(b) Any proceedings arising out of the application of this Act or any other law conferring jurisdiction on the Court, pending in the Land Claims Court, at the commencement of this Act must be continued and concluded in terms of this Act in the Court and, for that purpose –
- (i) those proceedings are deemed to have been instituted in terms of this Act in the court; ...’
25. There can be no doubt that these proceedings were pending at the commencement of the Land Court Act. Section 35(1)(c) provides that proceedings for purposes of section 35(1)(b) are deemed to be pending if, at the commencement of the Act, an application has been lodged, but judgment or an order has not been given.
26. However, the second respondent disagreed with the applicants about the effect of section 35(1)(b)(i) and submitted that this Court must apply section 22 of the Restitution Act as it read prior to its repeal. The parties were also in dispute about how both section 22(2)(c) and section 24(1)(b) must be applied to the facts of this case. It is however not necessary for me to decide these issues or to interpret the provisions, because under either approach, the question of jurisdiction can be disposed of by asking whether it is in the interests of justice for this Court to assert jurisdiction over an issue that usually falls within the jurisdiction of the High Court. It is also not desirable for me to decide these issues because argument, for the most part, was addressed only after the hearing on the issues and on limited written submissions, which, if anything, point to the complexity of the debates.
27. I am acutely mindful that what underlies the dispute in this case is a broader dispute about who is ultimately entitled to benefit from a land claim under the Restitution Act, a matter that is frequently raised in proceedings in which this Court’s jurisdiction is directly, and at times incidentally, invoked.[5] I am also mindful that this Court was established as a specialist Court to adjudicate disputes of that sort. Nonetheless, I have

concluded that it would not be in the interests of justice for this Court to assert any incidental jurisdiction it has.

28. First, under the provisions of section 34(2) of the Land Court Act, this Court can order the removal of proceedings from this Court to a Division of the High Court and thereby enable the matter to proceed to finality. This means, for example, that any process of transfer of these proceedings to the High Court should be a simple, expeditious and cost effective matter and in turn, a process is in place if it transpires that this Court must be called upon to deal with further matters arising.
29. Secondly, a careful consideration of the papers in this case reveals that the issues on review are not straightforward and might entail dealing with a range of questions relating to trust law, not all of which have been fully canvassed in argument. In these circumstances, the High Court as the Court ordinarily clothed with jurisdiction, is better placed to adjudicate them including determining what grounds of review should be entertained in this case and what related issues must be dealt with.
30. Thirdly, the legislature has not conferred on this Court primary jurisdiction over trust disputes even where they arise directly from the settlement or finalization of land claims whether by way of court process or without court process. The legislature could have done so when expanding this Court's jurisdiction under the recently enacted Land Court Act, as it did in respect of the Communal Property Associations Act 28 of 1996. Accordingly, this Court must duly respect that it is the High Court that continues to exercise primary jurisdiction over trust disputes and should act cautiously before treading into that terrain. This is a case that warrants caution.
31. Fourthly, none of this means that a High Court can disregard the imperatives of land justice which gave rise to the creation of the Trust in the first place. All Courts are bound to give effect to the Constitution. Thus, when the High Court adjudicates restitution related trust disputes, it will itself give appropriate regard to the purposes of restitution under section 25(7) of the Constitution and the Restitution Act, including the dignity and agency that is profoundly restored when a community or persons dispossessed as a result of racially discriminatory laws and practices of the past, reacquires control over property through the trust instrument.
32. Accordingly, this Court declines to exercise jurisdiction over these proceedings.
33. While this Court has the power to transfer the proceedings to the High Court, such a transfer ensues on application by a party in terms of section 34 of the Land Court Act.
34. This Court does not ordinarily grant costs orders dealing as it does with social legislation. There are no special circumstances that would warrant such an award.
35. The following order is made:
 - 35.1. Leave is granted to any party to apply for an order in terms of section 34 of the Land Court Act transmitting the proceedings to the High Court of KwaZulu Natal in Pietermaritzburg.
 - 35.2. There is no order as to costs.

SJ COWEN

ADJP, LAND COURT

Date reserved: 30 April 2024

Date of judgment: 29 July 2024

Appearances:

Applicants: M Naidoo SC & N Bhagwandeem instructed by Cebisa Attorneys Inc.

First respondent: H Singh instructed by the State Attorney, KwaZulu Natal

Second respondent: C van Reenen instructed by Felix Attorneys

Third, fourth and fifth respondents: PD Nyembe instructed by the State Attorney, KwaZulu Natal

- [1] The undertaking is recorded in paragraph 4 of a minute of a conference held on 11 April 2022 in the following terms: ‘The Second Respondent provided an undertaking that pending the determination of the application for interim relief, he would not perform any acts or exercise any functions as trustee of the Trust. In the event that it becomes necessary for urgent steps to be taken in this period, he shall first approach the applicants’ legal representatives to obtain the applicants’ consent thereto, failing which he will approach the Court for leave to act.’
- [2] The relief is captured in paragraph 3 of the Court’s directives of 22 July 2022 in the following terms: a. The first respondent shall take no steps and perform no acts in respect of the appointment of the second respondent. b. The second respondent undertakes that he will perform no acts and exercise no functions as trustee of the Trust and that in the event that it becomes necessary for urgent steps to be taken in this period, he shall first approach the applicants’ legal representatives to obtain the applicants’ consent thereto, failing which he will approach the Court for leave to act. c. Without any concession of legality by the applicants, the above undertakings do not preclude the second respondent from applying to the first respondent for an extension of his appointment nor does it preclude the first respondent from deciding such application.
- [2] The relief is captured in paragraph 3 of the Court’s directives of 22 July 2022 in the following terms:
- a. The first respondent shall take no steps and perform no acts in respect of the appointment of the second respondent.
- b. The second respondent undertakes that he will perform no acts and exercise no functions as trustee of the Trust and that in the event that it becomes necessary for urgent steps to be taken in this period, he shall first approach the applicants’ legal representatives to obtain the applicants’ consent thereto, failing which he will approach the Court for leave to act.

- c. Without any concession of legality by the applicants, the above undertakings do not preclude the second respondent from applying to the first respondent for an extension of his appointment nor does it preclude the first respondent from deciding such application.
- [3] The inconsistency between the numbering (472 / 482) appears on the documents.
- [4] The applicants' reliance on *Makgahlela v Maboi 6 Community Trust* [2020] ZALCC 29 to ground jurisdiction is misplaced. Jurisdiction was not asserted in that matter.
- [5] Cf *N'wandlamhari Communal Property Association and Another v Director General : Department of Agriculture, Land Reform and Rural Development and Others* : In re: *N'wandlamhari Communal Property Association and Another v Mathebula and Others*; *N'wandlamhari Communal Property Association and Another v Mathebula and Others* [2022] ZALCC 36.

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