

SOUTH AFRICA / JUDGMENT

Ziqula N.O and Others v Nombewu and Others (5038/2009) [2010]

ZAECGHC 116 (25 November 2010)

[2010] ZAECGHC 116

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J E Smith

CASE / FILE NUMBER

5038/2009

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 5038/2009

Date Heard: 25/11/2010

Date Delivered: 2/12/10

In the matter between:

KHOLEKA MAVIS ZIQULA N.O.1ST APPLICANT

NOMBULELO LOVISA DESSIRY MADLAVU2ND APPLICANT

N.O.

FURTHER APPLICANTS LISTED FURTHER APPLICANTS

IN ANNEXURE "A"

Versus

MINYISE GIBSON NOMBWU1ST RESPONDENT

QONDILE EDWARD BILL2ND RESPONDENT

FOLTINI SNAM3RD RESPONDENT

LUMKILE RONNY MADLAVU4TH RESPONDENT

THE MASTER OF THE HIGH COURT,

EASTERN CAPE5TH RESPONDENT

REASONS FOR ORDER GRANTED ON 25 NOVEMBER 2010

SMITH J:

On the 25th of November 2010 I made an order terminating the Amabhoxo Development Trust, no. IT238/2008, and ordered that all its assets shall vest in the Master pending the formation of a suitable alternative community entity. I indicated at the time that the reasons for my decision would follow at a later stage. I now provide those reasons.

- [1] The applicants seek an order terminating the Amabhoxo Development Trust, no. IT238/2008 (“the Trust”), and certain ancillary relief.
- [2] All the applicants, as well as the first to fourth respondents, are trustees of the aforementioned trust. The fifth respondent is the Master of the High Court, Eastern Cape and is cited as an interested party only.
- [3] The Trust was established pursuant to a land claim lodged on behalf of the Salem community in terms of the Restitution of Land Rights Act, no 22 of 1994. The aforesaid land claim was successful and resulted in an agreement between the Land Claims Commissioner and the Salem Community in terms of which certain land parcels would vest in a trust which would own and manage the land for the benefit of the Salem community.
- [4] The primary stated objective of the Trust is to “to acquire and hold the land on behalf of and for the benefit of the community and use such land for the purposes of the trust”. The further objectives stipulated in the trust deed are all merely ancillary to this primary objective. The applicant's founding papers provide details of a litany of problems which have developed between the two groupings of trustees and which, on the version of the applicants, hamper the achievement of the objectives of the Trust. These relate mainly to alleged financial and administrative mismanagement on the part of the respondents, lack of accountability and failure on the part of the chairperson of the Trust, namely first respondent, to call regular and valid trust meetings. I do not intend to go into these allegations in detail suffice it to say that they have remained unchallenged and at the very least establish prima facie proof of a dysfunctional trust that is unable to carry out its main object. No papers have been filed by the respondents despite being granted numerous opportunities to do so.
- [5] The master, in his report which was filed on 30 December 2009, stated the following:

5.1 The procedure stipulated in clause 5.5 of the trust deed has not been followed. This clause stipulates steps that should be taken in the event of a dispute arising within the trust;

5.2 The provisions of s. 16 of the Trust Property Act, Act 57 of 1988, which deals with steps that should be taken to bring any regularities to the notice of the Master, have not been complied with; and

5.3 That no suggestions have been made to the master regarding the procedure, conditions and terms which would regulate the termination of the trust.

[6] Subsequent to the aforesaid report the first applicant filed a further supplementary affidavit which purports to address the concerns expressed by the Master. The said affidavit details attempts made by a representative of the Land Claims Commissioner, who is the founder of the trust, to call a meeting of the trustees where the problems would be discussed. The respondents however refused to attend the meeting. First applicant further states that the recalcitrant attitude of the respondents makes it impossible for the trustees to attempt a resolution of the dispute in terms of the procedures provided for in clause 5.5 of the trust deed. As a result it has become impossible to:

6.1 Call a general meeting in accordance with the provisions of clause 11 of the trust deed;

6.2 Exercise effective control of the assets of the trust and to manage its affairs in accordance with the provisions of clause 12 of the trust deed;

Conduct elections for new trustees and in accordance with the provisions of clause 7.6 of the Trust deed; and

Invoke the provisions of clause 21 which envisages the termination of the trust in accordance with a agreed procedure and conditions.

[7] For these reasons the applicants aver that it has become impossible for the trust to achieve its primary object, which is to acquire and hold the aforesaid land on behalf of and for the benefit of the Salem community.

[8] The Director-General for the Department of Rural Development and Land Reform has submitted a report wherein he states that as a result of the aforesaid disputes between the trustees the said land has not been transferred to the Trust. The current market value of the land is some R12.5 million. There are furthermore two tractors and several houses on the farms. He supports the termination of the Trust and recommends that a Communal Property Association be formed instead.

[8] Although the court does not have powers at common law to vary or terminate a trust deed, the Trust Property Control Act, 57 of 1988 (s. 13 thereof) provides as follows:

“13 Power of court to vary trust provisions

If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-

(a)

hampers the achievement of the objects of the founder; or

(b)

prejudices the interests of beneficiaries; or

(c)

is in conflict with the public interest,

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.”

[9] Our courts have in the past exercised their discretion to take account of changed economic conditions and have allowed variation where the original scheme is practically impossible or utterly unreasonable or simply impossible. See in this regard: *Ex parte the President of the Conference of the Methodist Church of Southern Africa In Re: William Marsh Will Trust* 1993 (2) SA 697 (C). The more recent approach is to seek to serve the fundamental aim of the founder in changed circumstances rather than to adhere to a literal implementation which had clearly been overreached by events. See in this regard *Administrators, Estate Richard V Nichol* 1991 (1) SA 55 SCA at 557H-J.

In the event paragraph 16.3 of the trust deed provides for the termination or liquidation of the trust by the High Court on various grounds including "where it would otherwise be just and equitable in the circumstances".

[10] As I have stated before, the applicants' allegations are unchallenged and on the face of them do paint a rather bleak picture of the Trust's affairs. It seems clear that the Trust has become dysfunctional and despite intervention by the Land Claims Commissioner there are no reasonable prospects of it being able to carry out its fiduciary mandate. Coupled with this is the understandable reluctance on the part of the department to transfer substantially valuable land and assets to an entity which is for all practical purposes dysfunctional and unable to manage its affairs. It is indeed sad that these disputes and the selfish attitude on the part of certain of the trustees have prevented the Salem community from deriving the substantial economic benefits which will no doubt flow from a proper management of the aforesaid assets.

[11] Despite the fact that the master has in his latest report expressed concerns that certain procedures provided for in the trust deed have not yet been complied with, I am of the view that the efficacy of these procedures depend to a large extent on some degree of cooperation on the part of all the trustees. This is unfortunately sadly lacking at the present moment and will remain so for the foreseeable future.

[12] For these reasons I am satisfied that it will not be possible for the Trust to achieve its primary objective under these circumstances and that it would be in the best interest of the Salem community if the Trust is terminated to allow steps to be taken for the establishment of a new entity that would effectively manage the land for the benefit of the Salem community.

[13] It appears that there are some assets in the trust at the moment. According to the master's report the bank statement dated 4 October 2009 states that an amount of R16 936. 15 stands to its credit. In these circumstances it is appropriate that all the assets of the trust including the money standing to its credit in the ABSA Bank account, Grahamstown, should be held in trust by the Master and transferred to the new entity if and when it is properly established.

[14] Insofar as the question of costs is concerned, only the first respondent filed a notice to oppose and should therefore be liable to pay the costs of the application.

[15] It was for these reasons that I have made the following order:

15.1 The Amabhoxo Development Trust, no. IT238/2008, is hereby terminated with immediate effect;

That control all the assets of the said trust shall vest in the Master until such time as an alternative and suitable legal entity is established; and

The first respondent is ordered to pay the costs of this application on the party and party scale.

J. E SMITH

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant : Advocate Brooks

Attorney for the Applicant : Mili Attorneys

110 High Street

Eskom Buiding

GRAHAMSTOWN

(Ref: Mr Mili/ Zandi/Z58)

Counsel for the Respondents : In person

Attorney for the Respondent : No representation

Date Heard : 25 November 2010

Date Delivered : 02 December 2010

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