IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT DURBAN

LCC 03/2009

Heard on 9 June 2014
Judgment delivered on 23 July 2014

In the matter between:

EMAKHASANENI COMMUNITY	Plaintiff
ISIZWE SAKWA DLUDLA (DLUDLA TRIBE)	Intervening Party

and

THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	First Defendant
REGIONAL LAND CLAIMS COMMISSIONER, KWAZULU-NATAL	Second Defendant
VRIENDSCHAP BOERDERY	Third Defendant
SPES BONA TIMBER ESTATE (PTY) LTD	Fourth Defendant
CENTRAL TIMBER CO-OPERATIVE LTD	Fifth Defendant
WESSEL HENDRIK ELS	Sixth Defendant
MAPHOLOBA FARMING CC	Seventh Defendant
MANZINI ESTATE (PTY) LTD	Eighth Defendant
WILLEM VERMAAK	Ninth Defendant
WANSBECK FARMS CC	Tenth Defendant
VLAKPOORT TRUST	Eleventh Defendant
JJS MARITZ MERINO TRUST	Twelfth Defendant

MERKOR FARM TRUST	Thirteenth Defendant
E D MARITZ MERINO TRUST	Fourteenth Defendant
RAYMOND JAMES MCMURRAY	Fifteenth Defendant
HAYDN PERCIVAL FAMILY TRUST	Sixteenth Defendant
KERRIE INV (PTY) LTD	Seventeenth Defendant
SWAAR BEGIN LANDGOED CC	Eighteenth Defendant
RUDIE STEPHANUS SCHNETLER	Nineteenth Defendant
C A LEITCH & SONS (PTY) LTD	Twentieth Defendant
SCHNETLER TRUST	Twenty-First Defendant
LEON JOHANNES BEUKES	Twenty-Second Defendant
ANDREW JAMES STUART MCLLRATH	Twenty-Third Defendant
MONDI LTD	Twenty-Fourth Defendant
PHINDITHEMBA MPUMELELO MANQELE & AGNESS SAMKELISWE MANQELE	Twenty-Fifth Defendant
MTHONJANENI MUNICIPALITY	Twenty-Sixth Defendant
ROMAN CATHOLIC CHURCH	Twenty-Seventh Defendant
PEACH FARM (PTY) LTD	Twenty-Eighth Defendant
PETER JAMES RIDDEN	Twenty-Ninth Defendant
PROVINCIAL DIRECTOR: DEPARTMENT OF LAND REFORM OFFICE	Thirtieth Defendant
REGISTRAR OF DEEDS	Thirty-First Defendant

JUDGMENT

INTRODUCTION

[1] This is an application for wasted costs brought by the third to the sixth and the eighth to the twenty third defendants (the "land owner defendants") against the plaintiff, the intervening party and the first and second defendants, arising from the postponement of a trial.

[2] The postponement was, in the first instance, necessitated by the intervening party who had applied to intervene and for the trial to be postponed in order for it to bring an application to intervene and thereafter apply to review the manner in which the claim was gazetted, some 10 days before commencement of the trial.

[3] The applications to intervene and for the trial to be postponed were filed on 2 June 2014. These applications were unopposed and orders to that effect were granted at the commencement of the hearing of this application on 9 June 2014. The postponement was, in the second instance, brought about by the plaintiff ("the claimant community") seeking the withdrawal of certain admissions made by its legal representative at a telephonic conference held on or about 4 June 2014 and the conversion of their community claim into one that accommodated the individual claims of its members. The withdrawal of the admission and the pursuit of allegedly individual claims are vigorously opposed and will necessitate the filing of further papers and, in all probability,

the leading of oral evidence. Orders to postpone the trial to allow the parties to take the necessary steps were also granted on 9 June 2014.

[4] It now remains for me to consider the issue of wasted costs occasioned by the postponement.

THE PARTIES

[5] The plaintiff is the Emakhasaneni Community which claims in its capacity as an entity representing the interests of its members.

[6] The intervening party is the Isizwe Sakwa Dludla, (which loosely translated, means the Dludla Tribe).

[7] The first and second defendants, the Minister of Rural Development and Land Reform and the Regional Land Claims Commissioner, KwaZulu-Natal are cited in their capacities as (a) the official representing the State against whom claims for land restitution are brought and (b), the official representing the Commission on Restitution of Land Rights in KwaZulu-Natal which is tasked, under the Restitution of Land Rights Act No. 22 of 1994 (the RLRA), to investigate claims for the restitution of rights in land, and the feasibility of settling such claims. The third to sixth and eight to twenty third defendants are owners of some of the land which forms part of the subject matter of the land claim.

BACKGROUND FACTS

[8] A claim for the restitution of rights in land in respect of property, located in the area surrounding the town of Melmoth in KwaZulu-Natal, was lodged on 8 December 1995. The claimed land consists mostly of commercial farms located within the district of Melmoth. The second defendant, after investigating the land claim, accepted it as being valid and caused the claim to be published in Government Gazette Notice 520 of 2006 dated 13 April 2006 as a claim lodged by the claimant community. Following failure to settle the claim through mediation and negotiation, the claim was referred to this court on 2 January 2009 for adjudication in terms of section 14(1)(b) of the RLRA. It must be underlined that the claim as gazetted does not include the town of Melmoth itself, although the intervening party contends that it was always part of the claim. The intended review by the intervening party is aimed at including the town in this claimant community's claim.

[9] On 3 June 2009, the representative of the intervening party in these proceedings, Dumisani Dludla (Dludla), who alleges that he is the brother of the person who signed the land claim form, the late Cleophas Dludla, addressed a letter to the second defendant requesting an urgent status report on their land claim application as the claimant community. Then on 16 July 2009, Dludla, again wrote to the second defendant and recommended*, inter alia*, that the claim be proceeded with by way of arbitration rather than via the courts as that would be cheaper. The court, in his view, should be resorted to only when the negotiations and arbitration had failed. He also expressed general unhappiness with the manner in which the second defendant was processing the application.

[10] At a telephonic conference held on 26 October 2010, involving all the parties, including Dludla, the late Judge President Bam directed the second defendant to, *inter alia*, examine whether the claim form correctly identified the claimant community or not, ascertain who the claimants and their representatives were and to arrange a meeting with Dludla and the claimant community in order to resolve the issues amongst them so as to enable him to ascertain whether or not the matter had been brought to court pre-maturely.

[11] Various conferences were held thereafter. At a telephonic conference held on 3 February 2011, the late Judge President Bam expressed the opinion that the community was divided and that, until the second defendant had advised that it was unable to resolve the issue of the division in the community, the matter could not proceed. The referral to this court was, according to him, premature. The second defendant was once more directed to facilitate a meeting with the communities in order to resolve their internal disputes and thereafter to furnish the parties with a report. A meeting was then arranged with the communities but Dludla failed to attend it.

[12] The next telephonic conference was held on 19 April 2011 and during this conference, Dludla again expressed unhappiness with the State Attorney and the manner in which its representative and the second defendant were handling the claim. The court then directed the second defendant to secure legal representation for the claimant community albeit that there was more than one faction.

[13] At a face to face conference held on 22 September 2011, presided over by Judge Sardiwalla, the parties were advised that second defendant had

appointed a legal representative for the claimant community. The fracture in the claimant community became stark during this conference. It was clear that were two factions one of which was led by Dludla. Discussion of matters of substance then, in the view of the presiding Judge, became pointless and he directed the community to meet once more and attempt to resolve their dispute regarding representation.

[14] In a letter dated 11 October 2011, Dludla advised the State Attorney, Judge Sardiwalla and the first defendant that the claimants had resolved on 8 October2011 that the matter should be negotiated by themselves, the land owners and the Mthonjaneni Municipality (which includes the town of Melmoth). He also advised that they had appointed Don Kali & Company (Kali) as their legal representatives.

[15] The next face to face conference took place on 27 February 2012 wherein Kali, on behalf of the intervening party, also participated. However, approximately a month later, Kali withdrew from the case.

[16] The claimant community, having now obtained legal representation, responded to the referred claim in April 2012. The land owner defendants replied to the second defendant's report and the claimant community's response and statement of claim in September 2012.

[17] The claimant community responded to the land owner defendants' reply and thereafter the pleadings closed. The matter was then set down for a 5 day trial starting on 9 June 2014. The trial had to be postponed indefinitely due to the problems set out above.

[18] This court has a wide discretion in dealing with costs. (See *Van Zuydam v Zulu* 1999(1) SA 776(LCC) at 751C-D) and it is trite that the court will not order costs in land claim cases in the absence of special circumstances. This is because litigation for the restitution of land rights is constitutional in nature and involves public interest. (See *In re Former Highlands Residents* 2000 (1) SA 489 (LCC) at 498B and *Haakdoornbult Boerdery CC and Others v Mpahela & Others* 2007 (5) SA 596 (SCA) at 618.) The landowner defendants have nonetheless insisted on a costs order against both the intervening party, the claimant community and the second defendant on the grounds that the intervening party unreasonably delayed until the very last moment before deciding to launch an application to intervene; the claimant community had not objected to the claim as gazetted and needed to withdraw an admission against strenuous opposition; and against the second defendant on the grounds that the second defendant is to blame for failing to resolve the disputes in the claimant community before the trial date.

THE CLAIM AGAINST THE INTERVENING PARTY

[19] It is common cause that Dludla has been aware of the existence of this claim since at least 3 June 2009 when he penned the letter calling for a status report on the claim from the second defendant. It is also not disputed that, although having had what can only be called a stormy relationship with the second defendant, Dludla was part of the conferences where the dispute amongst the claimant community and the intervening party, the issue of their representation and Dludla's dissatisfaction with the second defendant was

discussed. Consequently, he was privy to the issues he now raises for approximately 5 years before this intervention.

[20] Mr Naidoo, for the intervening party, although unable to offer any explanation as to why Dludla had taken so long to intervene in the matter and why a review application is set to be launched approximately 9 years after the claim was gazetted, argued that a costs order against the intervening party would be a form of punishment against it for the persistence of Dludla in having the intervening party made a party in this matter. He strongly opposed the costs order prayed for by the land owner defendants.

[21] I am not persuaded that the circumstances under which the intervening party has sought to interpose itself in this matter does not warrant it to be mulcted in costs as prayed for by the land owner defendants. The evidence clearly shows that Dludla was for a number of years aware of the fact that the intervening party was not cited as a party to the matter. In addition, he was aware, or ought, reasonably, to have been aware, of the fact that the town of Melmoth was not included in the claim that was referred to this Court despite it having been part of the land claimed in the claim form submitted by his late brother, Cleopas Dludla, the then headman of the intervening party.

[22] Dludla, as can be gleaned from his correspondence and contributions at the various conferences, is obviously a literate man and it cannot be said that he was unaware of his rights and the recourse to secure those rights. Indeed, the intervening party had an opportunity to bring the applications it now seeks during the period between October 2011 and March 2012, when it had the services of its own attorney, Kali.

[23] It ill-behoved the intervening party, in the circumstances, to launch the application to intervene and for the trial to be postponed at the eleventh hour, as it were. It had legal representation, knew that it was not party to the land claim submitted to this Court and ought to have launched an application to intervene and review the second defendant's decisions much earlier than now. I consequently find that the intervening party's failure to do so timeously constitutes a special circumstance which warrants a costs order against it.

[24] For the reasons preceding, a case has, in my view, been established for the departure from the general rule of this Court not to award costs. Dludla has not adduced any evidence to show that he is authorised to bring these applications on behalf of the intervening party. As a result, I find that Dludla, in his personal capacity, and any other members of the intervening party who are later found to have mandated him, jointly and severally, the one paying the other to be absolved, should bear the wasted costs prayed for by the land owner defendants.

THE CASE AGAINST THE CLAIMANT COMMUNITY

[25] Mr Moosa, for the claimant community, strenuously opposed the inclusion of the claimant community in an order for the wasted costs. He contended that such inclusion amounted to a shotgun approach by the land owner defendants and that such an order would be inappropriate at this stage of the proceedings. According to Mr Moosa, the intervening party was in exactly the same position as the land owner defendants and therefore he

submitted that the more appropriate course for the Court to adopt was for the costs to be costs in the cause.

[26] However, when we put it to him that the claimant community's intention to amend its claim and to retract admissions made by him at a pre-trial conference would have necessitated a postponement, Mr Moosa could not convincingly argue against that proposition. This is so because the application for the withdrawal of the admissions would require a substantial explanation and might even require him to give evidence. Mr Moosa conceded that he would have to present a substantial explanation and advised that he intended to do so. The stance of the claimant community, in the circumstances, would also not have permitted the trial to commence and, in my view, the claimant community's actions constitute special circumstances and should attract a costs order against it as well.

[27] In view of the above, I find that a costs order must also follow the claimant community.

THE CLAIM AGAINST THE SECOND DEFENDANT

[28] Mr Roberts, on behalf of the land owner defendants, contended that a costs order should also be granted against the second defendant because, in the land owner defendants' view, it had failed to comply with the provisions of section 10(4) of the RLRA. Section 10(4) of the RLRA reads as follows:

> "If there is any dispute as to who legitimately represents the community, for purposes of any claim under this Act, the regional land claims commissioner having jurisdiction may in the manner prescribed in the rules made by the Chief Land Claims Commissioner in terms of section 16, in order to have a person or persons elected to represent the community-
>
> (a) Take steps for drawing up a list of names of the members of the community;
>
> (b) Direct that a meeting of such community be convened and an election be held at that meeting;
>
> (c) Take such other steps as may be reasonably necessary for the election."

[29] According to Mr Roberts, the second defendant was aware of the dispute between the claimant community and the intervening party regarding representation as far back as 2010 and despite the dispute manifesting itself several times since then and the late Judge President Bam finding that there were competing claims, failed to resolve the issue.

[30] Ms Norman, for the second defendant, denied that there were competing claims. Ms Norman also submitted that the second defendant attempted on several occasions to have meetings with Dludla but that he had failed to attend those meetings given his lack of confidence in the second defendant, the State Attorney and the legal representative appointed for the claimant community.

[31] Whether or not the second defendant was truly remiss in not establishing the correctness of the merits of Dludla's claims cannot be

established on the papers. The issue will have to be dealt with in evidence. If the second defendant was wrong in not ascertaining the validity of Dludla's claims, it may well be mulcted in costs. For that reason, the issue of whether the costs order against the claimant community, Dludla, and any other member of the intervening party who is later found to have mandated him, should be expanded to include an order that the second defendant should pay costs, jointly and severally, with the other parties, shall be deferred for determination at the trial.

[32] In the light of the findings set out in this judgment, I make the following order:

> The plaintiff claimant community, Dumisani Dludla and those members of the intervening party who are later found to have mandated Dumisani Dludla, shall pay the wasted costs of the third, fourth, fifth, sixth, eight, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second and twenty-third defendants, jointly and severally, the one paying the other to be absolved. Such costs shall be on a party and party scale and shall include the costs of 2 counsel for 5 days.

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M. P. CANCA

Acting Judge in the Land Claims Court

I agree

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E. BERTELSMANN
Judge of the Land Claims Court