

IN THE LAND CLAIMS COURT OF SOUTH AFRICA



HELD IN RANDBURG

Case No.: LCC74/2004

Before: The Honourable Justice Ncube

Heard On: 12 March 2018

Delivered: 09 May 2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED: ~~YES~~ / NO

09/05/2018
DATE

[Signature]
SIGNATURE

In the matter between:

MAKHUVA-MATHEBULA COMMUNITY

Applicant

and

THE REGIONAL LAND CLAIMS COMMISSONER

1st Respondent

THE CHIEF LAND CLAIMS COMMISSIONER

2nd Respondent

In re

THE MAKHUVA-MATHEBULA LAND CLAIM

JUDGMENT - APPLICATION FOR LEAVE TO APPEAL

NCUBE AJ

- [1] This is application for leave to appeal to the Supreme Court of appeal ("SCA") against the whole judgment and order of this court handed down on 10 May 2017, dismissing the Applicant's Review application. The application is opposed.

Background facts

- [2] It is common cause that on 19 December 1997, Fifteen John Makhuva ("Mr Makhuva") in his capacity as the Chairperson of the Royal Council of the Mathebula Tribal Authority, lodged a claim with the office of the First Respondent on behalf of the Applicant. The claim was lodged in a prescribed claim form. Names of the claimed properties were duly reflected on the claim form.
- [3] According to paragraph 1 of the claim form, the Applicant's claim was in respect of Letaba Rest Camp, Lulekani, Zebra, Genoeg and Pompert in the district of Phalaborwa. The First Respondent acknowledged receipt of the Applicant's claim on 21 April 1998. In the Government Gazette dated 08 June 2007 ("the June Gazette"), the First Respondent published the following properties as they appeared in the Applicant's claim form, (a) genoeg 15 LU, (b) Letaba Rest Camp, (c), Pompey 16 LU and (d) Zebra 19-LU. The Gazette also referred to unsurveyed land inside the Kruger National Park. Claims by other communities were published in the same Gazette.
- [4] Although the claim form also made mention of "Lulekani", that property was not included in the June Gazette. The First Respondent was still

seeking clarification from the Applicant if "Lulekani" referred to the land in the Township or the land which formed part of the district of Lulekani under the administration of the erstwhile Government of Gazankulu. On 23 October 2013, officials of the First Respondent held a meeting with the Applicant. The Applicant indicated at the meeting that "Lulekani", in the claim form, referred to the district of Lulekani, which previously formed part of the erstwhile Government of Gazankulu.

- [5] Having received clarification on the issue of Lulekani, First Respondent amended his June Gazette to include those properties, which together, formed the "Lulekani" district. The amendment was effected by way of the General Notice No 472 of 2015, published in Government Gazette 38817 of 22 May 2015. ("the Amendment Gazette"). In total, there were 35 more properties published in the Amendment Gazette as being the expanded description of Lulekani mentioned in the claimform.
- [6] The claim form was accompanied by an Affidavit deposed to by Mr Makhuva. In paragraph 10 of his Affidavit, Mr Makhuva mentions the same properties he mentioned in the claim form but he then adds "Majenje". The Applicant submitted together with the claim form, a map depicting the claimed properties

Grounds of Appeal

- [7] Applicant has stated 16 grounds of appeal. Most of the grounds are couched in general form without being specific. I will specifically deal with four (4) grounds which are 1, 8, 13 and 14 which are repeated hereunder.

“1. The court respectfully erred in failing to consider a purposive reading of the land claim form together with its annexures by only considering the land claimed as that which is depicted on the first page of the claim form.”

“8. The court respectfully erred in holding that the Respondents were correct in stating that Applicant is attempting to claim more properties than those identified in the claim form without due consideration to the Affidavit of Mr Fifteen Makhuva which provides clarity to the geographical areas which historically fell under the Makhuva indunas such as Xakamani, Nkundleni, Molapani and Hoyi Hoyi.”

“13. The court respectfully erred in finding that the farms not gazetted do not form part of the claim form, the court erred in not considering that the burden to identify all land parcels based on the description of the land claim form does not rest on the claimants but rather it is the duty of the Respondents to do.”

“14. The court respectfully erred in failing to interpret the claim form in a manner that advances the constitutional rights of the claimants.¹ The court erred in not considering the extent and nature of its duty to enquire into the justice and equity of the application of Section 11 (3) of the Restitution Act on the grounds the Respondents can dismiss a claim and holding that the gazetting was more than sufficient without considering at all the balance of interest and prejudice between the Applicants and Respondent understanding of the claim lodged.”

- [8] The reading of the grounds of appeal in their totality gives the impression that the Applicant wants the court to give its own interpretation to the claim form. In fact, Poswa-Lerotholi, Counsel for the Applicant, argued that this court failed to adopt the purposive approach when considering the claim and that the court failed to interpret the claim form in a manner that advances the constitutional rights of the claimants.

¹ My own emphasis

- [9] In my view, it is not the duty of the court to interpret the claim form. A land claim form is not a statutory enactment requiring a purposive interpretation by the court. The court may not interpret the claim form and add to it, in the process of interpretation, land which the claimants did not identify. Such land is not known to the court, but to claimant himself.
- [10] The land claim form, as Mr Seneke correctly argued, is the primary source of information which is required to gazette a claim. The court cannot add property or land which is not claimed. Whilst the Regional Land Claims Commissioner has the duty to investigate the claim,² he cannot add to the claim form, land which is not claimed.³ The Regional Land Claims Commissioner performed his investigative duties by seeking clarification from the claimant with regard to land described as Lulekani. Once clarification was given, the Regional Land Claims Commissioner gazetted farms which formed part of the erstwhile district of Gazankulu.
- [11] The claimant mentioned in the claim form and in the Affidavit of Mr Fifteen Makhuva the properties subject to the claim. In addition, a map was submitted. The purpose of the map, was to show on the map, the locality of the land mentioned in the claim form. Applicant could not, by means of the map, claim land which he did not identify in his claim form.

Principles of Leave to Appeal

- [12] The Superior Courts Act⁴ ("the Act") provides the test for the grant or refusal of leave to appeal. Section 17 (1) (a) (i) and (ii) of the Act provides:

"Leave to Appeal may only be given where the Judge or Judges concerned are of the opinion that:-

(i) The appeal would have a reasonable prospect of success; or

² Section 6 of the Restitution Act, Act 22 of 1994

³ *Minaar NO v Regional Land Claims Commissioner for Mpumalanga and Others* 2006 ZALCC 12 Para 27

⁴ Act 10 of 2013

- (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.”*

[13] From the above provisions, it is clear that leave to appeal is granted only where the appeal *would* have a reasonable prospect of success. There must be certainty that another court will come to a different conclusion. A mere possibility will not suffice.⁵

[14] I have considered all the grounds of appeal and argument advanced in support thereof. I come to the conclusion that there is no reasonable prospect of success on appeal.

Costs

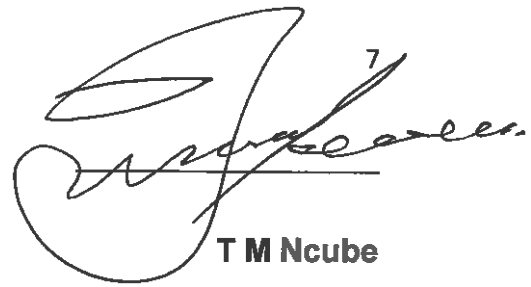
[15] Parties did not ask for costs and no order will be made as to costs.

Order

[16] In the result, I make the following order:

1. Application for Leave to Appeal is refused.
2. There is no order as to costs.

⁵ The Mont Chevaux Trust CIT 2012/28 v Tina Goosen and 18 Others LCC 14R/2014, Nothsokovu v Unreported SCA case No 157/15



T M Ncube

Judge of the Land Claims Court

Appearances

For Applicants: Adv. S Poswa-Lerotholi – *Instructed by Gilfillan Du Plessis Inc.,*

Pretoria

For 1st and 2nd Respondents: Adv. Thabo Seneke – *Instructed by State Attorney,*

Pretoria