



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 149/2011

In the matter between:

INGONYAMA TRUST

APPELLANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

Neutral citation: *Ingonyama Trust v Ethekwini Municipality*
(149/2011) [2012] ZASCA 104 (1 June 2012)

Bench: Mthiyane DP, Ponnann, Bosielo and Theron JJA and Petse AJA

Heard: 8 November 2011

Delivered: 1 June 2012

Corrected:

Summary: Rating of State Property Act 79 of 1984 - whether property vesting in Ingonyama Trust in the Ethekwini Municipality exempt from rates in terms of s 3(3)(a).

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Gyanda J sitting as court of first instance):

- 1 The appeal is upheld with costs.
 - 2 The order of the court below is set aside to be substituted with:
'The application is dismissed with costs.'
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JUDGMENT

PONNAN JA (Mthiyane DP, Bosielo and Theron JJA and Petse AJA concurring):

[1] This appeal raises the question whether the property of the appellant, the Ingonyama Trust (the Trust), is exempt from rates pursuant to the provisions of s 3(3)(a) of the Rating of State Property Act 79 of 1984 (the Rating Act). The high court (per Gyanda J) held that it was not. It accordingly granted an order in favour of the respondent, the Ethekwini Municipality (the Municipality), declaring that all immovable property owned by the Trust, within the area of the Municipality was rateable by it for certain defined periods.

[2] It appears to be undisputed on the papers that the Trust's property was held by the State (Government of KwaZulu) prior to 1994.¹ The Trust is a statutory Trust. It was established by the KwaZulu Ingonyama Trust Act 3KZ of 1994, an Act of the KwaZulu Legislative Assembly (the KwaZulu Act). The KwaZulu Act established a corporate body

¹ See generally *MEC for Local Government and Finance, KwaZulu-Natal v North Central & South Central Local Councils, Durban & others* [1999] 3 All SA 5 (N); *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 (1) SA 866 (SCA).

to be called the Ingonyama Trust (s 2(1)) with the Ingonyama as the only trustee of the trust (s 2(3)). In due course the KwaZulu Act was extensively amended by the KwaZulu Ingonyama Trust Amendment Act 9 of 1997 (the Amendment Act) - a National Act. In what follows I shall refer to the KwaZulu Act as amended by the Amendment Act as the Trust Act. Section 2A of the Trust Act established a board to be known as the KwaZulu-Natal Ingonyama Trust Board (the Board) to administer the affairs of the Trust and the Trust's land. The Board consists of the Ingonyama or his nominee who shall be the chairperson of the Board and eight members appointed by the Minister for Agriculture and Land Affairs of the National Government (the Minister) after consultation with various stakeholders including the Ingonyama, the Premier of the Province and the Chairperson of the House of Traditional Leaders of KwaZulu-Natal (s 2A(3)).

[3] The Rating Act repealed various laws that formerly exempted State property from rates levied by local authorities. Section 3(1) of the Rating Act provides generally for the rateability of State property by a local authority. And s 3(3)(a), which lies at the heart of this appeal, provides:

'No rates shall by virtue of subsection (1) or otherwise be levied by a local authority on the value of State property—

(a) held by the State in trust for the inhabitants of the area of jurisdiction of a local authority or of a local authority to be established.'

The exemption envisaged in s 3(3)(a) thus applies if the property is held:

- (i) by the State (ie State property); and
- (ii) in trust for the inhabitants of the area of jurisdiction of a local authority.

It may be convenient to dispose of the second issue first in order to clear the way for a consideration of the first, which I consider to be the substantive issue in this appeal. I shall do so briefly.

[4] For the purposes of this enquiry I shall assume (without deciding), in favour of the Municipality, that the Trust's property does indeed fall within the area of jurisdiction of the Municipality. Section 2(2) of the KwaZulu Act provided that: 'The Trust shall ... be administered for the benefit, material welfare and social well-being of the tribes and

communities as [referred to in the Schedule] . . .'. That provision is replicated in the Trust Act (s 2(2)), as are various other provisions including those: directing that the said land be dealt with in accordance with Zulu indigenous law (s 2(4)); restricting the right of the Trust to encumber, alienate, pledge etc. the said land unless the written consent of the traditional authority or community authority has first been obtained (s 2(5)); and exempting the Ingonyama from furnishing any form of security and directing that the Trust Property Control Act 57 of 1988 shall not apply to the Trust (s 2(6)). Section 3 of the Trust Act headed 'Transfer of land to the Ingonyama in trust' provides:

'(1) Notwithstanding the provisions of section 2 of the KwaZulu Land Affairs Act, 1992 (Act No. 11 of 1992), or any other law—

(a) any land or real right therein of which the ownership immediately prior to the date of commencement of this Act vested in or had been acquired by the Government of KwaZulu shall hereby vest in and be transferred to and shall be held in trust by the Ingonyama as trustee of the Ingonyama Trust referred to in section 2(1) for and on behalf of the members of the tribes and communities and the residents referred to in section 2(2).'

In my view the Trust Act, makes it plain that the property of the former Government of KwaZulu was transferred to the Trust to be held by it in trust for the benefit of the 'tribes and communities and the residents' as specified in the Schedule to the Act. I accordingly hold that the second requirement has indeed been satisfied by the Trust.

[5] Turning to the first requirement: State property is defined in the Rating Act as: 'immovable property within the area of jurisdiction of a local authority —

(a) the ownership of which vests in the State or a governmental institution and is registered in the name or in favour of the State or the governmental institution.'

The definition of 'State' is said to include 'the Department of Posts and Telecommunications and . . . a provincial administration'. Although the definition is not particularly helpful, the use of the word 'includes' suggests that it is not a closed list.

[6] In *Holeni v Land and Agricultural Development Bank of South Africa* 2009 (4) SA 437 (SCA) para 11, Navsa JA put it thus:

'The State as a concept does not have a universal meaning. Its precise meaning always depends on the context within which it is used. Courts have consistently refused to accord it any

inherent characteristics and have relied, in any particular case, on practical considerations to determine its scope. In a plethora of legislation, no consistency in meaning has been maintained.'

And in *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 (1) SA 866 (SCA) paras 14 and 15, Melunsky AJA had this to say:

'I turn to consider what is meant by the expression "the State". In " 'The State' and Other Basic Terms in Public Law" (1982) 99 SALJ 212 at 225-6 L G Baxter suggests that, as a rough description, "the State" appears to be used as a collective noun for:

- "(a) the collective wealth ('estate') and liabilities of the sovereign territory known as the 'Republic of South Africa' which are not owned or owed by private individuals or corporations; and
- (b) the conglomeration of organs, instruments and institutions which have as their common purpose the 'management' of the public affairs, in the public interest, of the residents of the Republic of South Africa as well as those of her citizens abroad in their relations with the South African 'Government'."

In *The Shorter Oxford English Dictionary* vol II at 2112 "State" is defined to mean, *inter alia*:

"IV. 1 . . .

- 2. A particular form of government;
- 3. The State: the body politic as organised for supreme civil rule and government; the political organisation which is the basis of civil government; hence the supreme civil power and government vested in a country or nation."

Some of these definitions describe what is meant by "the State" for the purposes of international law. These are irrelevant for the purposes of this appeal. In its ordinary meaning for the purposes of domestic law the word is frequently used to include all institutions which are collectively concerned with the management of public affairs unless the contrary intention appears.'

[7] Our Constitution has no definition of 'State'. Rather, reference is made to 'organ of state', which s 239 of the Constitution, defines as:

- '(a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution—

- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.'

[8] The gist of the submission on behalf of the Trust is that it is the 'State' in one of its guises. Whether that is indeed so is what I now turn my attention to. It is noteworthy that here, eight of the nine Trustees are appointed to their positions by central government through the relevant cabinet Minister albeit in consultation with certain specified stakeholders. Significantly, in terms of s 4 of the Trust Act, the Department of Land Affairs is to bear the cost of the administration of the Board. Moreover, s 2A(7) empowers the Minister to make Regulations as to various matters pertaining to the functioning of the Board of Trustees of the Trust. The Minister has promulgated both Financial and Administrative Regulations.² Amongst the various measures prescribed by the Minister, regulation 20 of the Financial Regulations require the financial statements and records of the Trust to be audited by the Auditor-General, who thereafter must submit a report to amongst others the KwaZulu-Natal Provincial Legislature, National Parliament, the House of Traditional Leaders of KwaZulu-Natal, the Premier of KwaZulu-Natal and the Minister, whilst in terms of regulation 21, the accounting authority of the Trust is required to report annually in writing to the Minister within the period set by the latter on the activities of the Trust during the financial year.

[9] Section 2(7) of the Trust Act provides that any national land reform programme shall apply to the Trust's land. In a similar vein s 2 of the KwaZulu Land Affairs Act 11 of 1992 states that the Premier or the Minister as the case may be, may, subject to the provisions of that Act and the Trust Act, sell, exchange, donate, lease or otherwise dispose of any government land which vests in the provincial or national government respectively. One can hardly imagine the State reserving to itself the right to apply its land reform programme to land that it considers it has truly divested itself of. Similar considerations arise in respect of the KwaZulu Land Affairs Act. Its purpose, as that Act

² GNR 1236 and 1237, 2 October 1998.

itself makes plain, is to provide for the disposal of government land. That being so, why it must be asked, if the Trust's land was not considered to be government land, would mention be made in that Act of the Trust. To those considerations must also be added sections 3(3) and 3(4) of the Trust Act. The former provides that 'all land and real rights' shall be transferred from the Government of KwaZulu to the Trust without the payment of transfer duty, stamp duty or any other fee or charge, and the latter that the Registrar of Deeds shall make the necessary entries in his or her registers and endorsements on the relevant title deed, which shall serve 'as proof of the title of the Ingonyama in trust to the said land'.

[10] One, in addition, finds many pointers in related pieces of legislation that serve as an aid to resolving the present enquiry. Thus s 2(a)(i) of the National Forests Act 84 of 1998 defines 'State land' to mean:

'land which vests in the national or a provincial government—

(a) including—

(i) land held in trust by the Minister of Land Affairs or the Ingonyama referred to in the KwaZulu Ingonyama Trust Act, 1994 (KwaZulu Act 3 of 1994).'

A similar definition is to be found in s 2(a) of the National Veld and Forest Fire Act 101 of 1998, which provides:

"State land" means land which vests in the national or a provincial government—

(a) including land held in trust by the Minister of Land Affairs or the Ingonyama referred to in the KwaZulu Ingonyama Trust Act (KwaZulu Act 3 of 1994).'

And s 13 of the South African Schools Act 84 of 1996 headed 'Public schools on State property' reads in subsection 1:

'In this section, immovable property owned by the State includes immovable property held in trust on behalf of a tribe by a trust created by statute.'

Moreover, the Trust is reflected as a National Public Entity in Schedule 3 of the Public Finance Management Act 1 of 1999. The primary purpose of that Act is to regulate financial management in the national government and provincial governments. The significance of the Trust being reflected as a scheduled public entity for the purposes of that Act is that the financial and asset controls applicable to National and Provincial Governments are applicable to it as well.

[11] It seems to me that although the meaning of the words 'State property' can be ascertained from the section itself and also from the other provisions of the Rating Act, read together with the provisions of the Trust Act, without resort to other statutes, the view that I take of the matter is fortified when regard is had to the related statutes to which I have alluded. Tellingly, the legislature itself, has there defined the 'Trust's land' as 'State land'. As Melunsky AJA put it in *Greater Johannesburg Transitional Metropolitan Council v Eskom* para 20:

'Counsel for the respondent argued that no regard may be had to the way in which a particular word is interpreted or defined in an Act other than the one under consideration. This proposition seems to go too far. In Edgar *Craies on Statute Law* 7th ed it is pointed out that in construing a word in an Act caution is necessary in adopting the meaning ascribed to the same word in other Acts. The reason is obvious but that is not to say that in an appropriate case regard cannot be had to a common construction placed on the same word in other statutes.'

I accordingly conclude that the Trust's property is indeed State property as envisaged in s 3(3) of the Rating Act.

[12] It follows that the appeal must succeed. The following order issues.

- 1 The appeal is upheld with costs.
- 2 The order of the court below is set aside to be substituted with:
'The application is dismissed with costs.'

V PONNAN
JUDGE OF APPEAL

APPEARANCES

For Appellant: AJ Dickson SC
Instructed by: Mason Inc, Pietermaritzburg
Webbers, Bloemfontein

For Respondent: DJ Shaw QC (with him HS Gani)
Instructed by: Linda Mazibuko & Associates, Durban
Matsepes Inc, Bloemfontein