



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
DATE 27 March 2018
STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Fesi v Ndabeni Communal Property Trust (411/2017 & 412/2017) [2018] ZASCA 33 (27 March 2018).

Today the Supreme Court of Appeal (SCA) upheld an appeal against a decision of the Western Cape Division, Cape Town (high court). At the heart of the appeal was the issue of land restitution to a community (the Ndabeni Community) that was dispossessed of land as a result of past racially discriminatory laws.

At the outset the SCA said the following:

‘Land restitution and access to land by scores of our people, or rather the lack of it, has recently received increasing public attention. There is a growing sense that unless and until we as a nation deal decisively with the unequal ownership of land that is the legacy of our historically racially divided society, there will be no enduring peace and the Constitution will be reduced to a mere written document. The grand apartheid design was such that prime land in South Africa was reserved for the white populace and black people were consigned to housing in backwaters, mostly without freehold title, from which they principally served the needs of white society.’

The primary question raised by the appeal was whether, on the evidence before the high court, the six respondents were entitled to an order directing the Master of the Western Cape High Court, Cape Town (the Master) to issue letters of authority to enable them to act as trustees of the Ndabeni Communal Property Trust IT 1056/98 (the trust).

Briefly, the facts of the matter were: During 1997 a land claim was lodged with the Land Claims Commission in terms of the Restitution Act, seeking restoration of erf 24176 Maitland, in the district of Goodwood, Cape Town, Western Cape on behalf of the Ndabeni Community. This was land that had been occupied by the community before they were forcefully removed and relocated to Langa, under apartheid legislation. On 13 October 2001 the Government of the Republic settled the community's land claim and concluded a settlement agreement with the trust, established to serve the interests of the claimant community and in contemplation of a successful land claim.

The SCA noted that due to the value of the property awarded to the Ndabeni Community – located fairly close to the Cape Town City Centre – the trust has a long and troubled history. A significant challenge encountered in advancing the objects of the trust in favour of the community was to identify and verify members of the trust who had an interest in and were entitled to vote on issues related to the trust. In terms of the settlement agreement, it was incumbent on the trust to ensure that all members entitled to the benefits of the land were afforded the opportunity to participate in the affairs of the trust and to vote on matters in relation thereto.

The six respondents were first appointed trustees in August 2015, after the failure of a prior board of trustees to convene an annual general meeting to enable a new board to be elected. Within days of the issue of letters of authority by the Master, the six respondents concluded the first of a series of written agreements which provided for the sale of the property to a joint venture company of which Abacus Asset Management Proprietary Limited (Abacus) and the trust would hold shares. The property was sold at a much lower price than a previous valuation. It was common course that at the time of the approach to the high court, the six respondents were receiving various forms of financial assistance from Abacus, including the payment of a monthly stipend of R5000.

If regard is had to the letters of authority issued by the Master in August 2015, the respondents' prior term of office, in accordance with the trust deed, would have expired during August 2016. By that time there were still ongoing discussions concerning the verification of community members. That notwithstanding, the respondents scheduled a meeting for the election of a new board of trustees, who were elected at a meeting held on 7 August 2016. On 16 September 2016 the respondents held another meeting, purportedly to authorise the disposal of the property to the joint venture company. This was akin to a ratification.

The Minister of Rural Development and Land Reform (the Minister) called on the Master to suspend the issuing of letters of authority pending the resolution of the problems related to the verification of community members. A call which the Master heeded. On 3 October 2016, Ms Fesi caused a summons to be issued in terms of which she contested the validity of the

appointment of the respondents – not only in 2016 but also in 2015 – and made serious allegations concerning the manner in which they had conducted the affairs of the trust and about the disposal of the property. Faced with the summons, the Master took the view that the dispute should be adjudicated by a court of law and declined to issue the letters of authority. The high court made an order directing the Master to issue letters of authority to the respondents. The appeal to the SCA was directed against that order.

Before the SCA, both Ms Fesi and the Master submitted that the respondents were not entitled to approach the court for an order compelling the Master to issue letters of authority. The SCA held that the respondents were entitled to approach the court for relief in terms of s 23 of the Trust Property Control Act 57 of 1988 (the Act). Taking into account the requirements for proper accession to the office of trustee and the supervisory powers and obligations of the Master in terms of the Act, the SCA criticised the approach of the high court. It held that the issues related to the trust were factually complex and of public importance. As such, the history of the matter had to be pieced together and consultations had to take place as a matter of necessity. The SCA further held that the high court erred in being too readily dismissive of the Master's concerns regarding the conduct of the trustees in relation to the disposal of the property. The SCA added that the court below ought to have been more attuned to the interests of all the members of the community.

In respect of the election of the respondents, the SCA found that the verification process outlined in the trust deed had not been followed through to an acceptable conclusion. Absent a verified list, an annual general meeting could not be properly convened and a quorum to elect trustees could certainly not rightly be determined. The SCA further held that the Master was rightly apprehensive about Ms Fesi's concerns regarding the propriety of the election of the six respondents, the legality of the disposal of the property, and whether the respondents conducted themselves in a fiduciary manner. It concluded that the election of the respondents was not in accordance with the trust deed and that the Master's refusal to issue letters of authority was justified.

With regards to the conduct of the parties, the SCA commended the Master, the Minister and the Commissioner for acting in a manner it deemed laudable. It said that these public officials were intent on ensuring that the objectives of the trust were met and that constitutional objectives regarding land restitution were promoted and protected. Conversely, the SCA criticised the conduct of the attorney for the respondents. In particular the court noted that although the attorney agreed on behalf of the respondents to follow a process to verify membership of the community, he nonetheless rushed to court before the verification process was finalised. The SCA held that the compelling conclusion was that the urgent approach to court was meant to expedite and finalise the sale of the property in question. It therefore said

that the respondents and their attorney conducted themselves in a manner that, at the very least, was questionable.

The appeal was upheld with costs.