

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at RANDBURG on 12 November 2001
before **Moloto AJ**

CASE NO: LCC 80/01

Decided on: 16 November 2001

In the matter between:

GUMBU/MUTELE LAND CLAIMANTS

Applicant

and

**THE MEC OF LAND AND AGRICULTURE
NORTHERN PROVINCE**

Respondent

JUDGMENT

MOLOTO AJ:

[1] The applicant brought an urgent application in terms of the Restitution of Land Rights Act¹ (“the Act”) seeking relief as follows:

- “(a) That the Court dispense with any provision of the rules, including those which prescribe the forms, service requirements and time limits for applications.
- (b) That the construction of the electric fence be stopped with an immediate effect.
- (c) That the government be ordered to construct the above said fence along the river.
- (d) Costs of suit.
- (e) Further or alternative relief.”

¹ Act 22 of 1994, as amended. Sections 6(3) and 11(7)(aA) of the Act provide for interdicting certain types of development on land that is the subject of a claim under certain circumstances.

[2] The applicant is a community called the Gumbu/Mutele Land Claimants. The community has a committee that runs its affairs and the chairman of the committee deposed to the founding affidavit. The respondent is the Member of the Executive Council (MEC) for Agriculture in the Northern Province.

[3] The applicant lodged a claim in terms of the Act for the restitution of land rights, relating to an area known as Matshakatini Nature Reserve located in the Madimbo Corridor in the Northern Province. Presumably the land claimed runs for some distance along the southern bank of the Limpopo River. The national Department of Agriculture maintains a fence along the boundaries of South Africa with its neighbouring countries. The fence is maintained in terms of the Animal Diseases Act² to prevent the spread of animal diseases from such countries to South Africa. With the recent outbreak of foot-and-mouth disease in Zimbabwe, the Department has embarked on repairing the fence and re-erecting it where it no longer exists. It is common cause that the fence has been maintained since the 1960s although in different forms and for different purposes. Originally it was a non-electrified sisal barrier. Now it is electrified to prevent elephants trampling it down and is used to prevent animal diseases spreading, amongst its other uses. The applicant launched this application to interdict the government from proceeding with the construction of such fence because, so the argument goes, it will render restoration of the land not feasible or if feasible, the use and enjoyment of the land will be limited, unless the fence is erected close to the banks of the Limpopo River (where the fence runs along the Limpopo River). The argument states also that where the fence is further away from the river bank (it was indicated that it is as far away from the bank as five kilometers in places) the claimants will be denied the use of the land closer to the river which is moist and will have to cultivate the more remote and dry land.

[4] The respondent raised several defences to the application. First, the respondent indicated that the wrong respondent had been cited. The responsible office is the national Department of Agriculture and not the provincial one. Mr Davis, for the respondent, argued that the MEC for Agriculture in the Northern Province has no jurisdiction over the fence. The national department had only requested the provincial office to assist by educating the local population on the need for and purpose of the fence.

2 Act 35 of 1984.

The respondent could not give effect to the order of this Court even if ordered to stop the erection of the fence. This was not disputed. That is reason enough to dismiss the application.

[5] In view of my finding that the wrong respondent was brought to Court, and the possibility that the correct respondent may still be sued and the issues raised herein may still be raised with such respondent, I will not comment on the merits of the case. However, I wish to comment on one aspect, namely the preparation and presentation of cases.

[6] I am concerned about the scant attention to detail in the preparation and presentation of cases in this Court. A look at the order prayed will illustrate the point. Prayer (b) states “that the construction of the electric fence be stopped with an [*sic*] immediate effect.” No identification of the fence is given, hence it is not determinable from the order prayed to which fence it relates. It is also not determinable from the order prayed who must stop the construction. Therefore the sheriff armed with an order as prayed, would not know on whom to serve it. Prayer (c) just says “the government be ordered to construct the above said fence along the river.” A reading of the answering affidavits reveals that the fence referred to commences from Kosi Bay in KwaZulu-Natal, then runs along the boundary with Swaziland, Mozambique, Zimbabwe and Botswana, up to Namibia on the west. The applicant’s cause of action is limited to a small area along the fence in the Northern Province, yet the order prayed apparently seeks to have the fence shifted to the river bank along the entire length of the river where the fence runs parallel to the river. The river is not identified and no map or diagram of the relevant area is attached to the applicants’ papers. Prayer (c) also seeks to be an order against the government, not the respondent. There are other instances of similar poor preparation in the supporting affidavits to the application, but I will not refer to them. I believe the point is made.

[7] I omitted to make an order relating to costs when I gave the order in Court. This Court is disinclined to grant costs³ unless there are compelling circumstances. The reason for this approach is that one deals here with social legislation and that unless one party behaved in a very unacceptable

3 See for example *Skhosana and Others v Roos t/a Roos se Oord and Others* reported as *Skhosana v Roos* 2000 (4) SA 561 (LCC); [1999] 2 All SA 652 (LCC) at para [30]; *Valley Packers Co - Operative Limited v Dietloff and Another* [2001] 2 All SA 30 (LCC) at para [13].

manner, costs are not awarded. I am satisfied that the applicant *bona fide* believed in the righteousness of its cause. Accordingly, no order as to costs is made.

Order

[8] The following order was made in Court:

“The application is dismissed.”

ACTING JUDGE J MOLOTO

For the applicants:

Ms M Maphutha of Nkuzi Land Rights Legal Unit, Pietersburg.

For the respondent:

Adv N Davis instructed by State Attorney, Pretoria.