IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER : LCC41/03

Held in **Port Shepstone** on 16 – 18 May 2005
Before Moloto J and Stephenson A (assessor)

Decided on : 26 May 2005

In the matter of :

IMIZIZE TRIBAL AUTHORITY Applicant

Versus

HLOWENI, MFOLOZI AND ETYENI COMMUNITIES Claimants

And

NORTH PONDOLAND SUGAR (PTY) LTD First Respondent

FARMERS ASSOCIATIONS (being IMIZIZE, EYETENI AND MFOLOZI FARMERS ASSOCIATIONS) Second Respondent

MINISTER OF LAND AFFAIRS Third Respondent

Concerning

THE LAND COMMONLY KNOWN AS NORTH PONDOLAND IN THE MAGISTERIAL DISTRICT OF BIZANA, MBIZANA MUNICIPALITY IN THE EASTERN PROVINCE

JUDGEMENT

MOLOTO J:

[1] On 17 May 2005 this Court dismissed with costs, an application by the Imizize Tribal Authority ("the applicant") to intervene in a case brought by the Hlolweni, Mfolozi and Etyeni communities. On 18 May 2005, before reasons for the order of the previous day were given, the applicant launched an application for leave to appeal to the Supreme Court of Appeal against the order of 17 May 2005. The application for leave to appeal was granted. This judgment sets out the reasons for both orders.

The application to intervene

[2] A brief history of the main case is necessary to provide some background to the application. Some members of the Hlolweni, Mfolozi and Etyeni communities ("claimants") lodged claims in terms of the Restitution of Land Rights Act[1] ("the Act") with the Commission on Restitution of Land Rights ("the Commission") for the restitution of a certain piece of land measuring ten thousand (10 000) hectares. The claimed land is in the Hlolweni, Mfolozi and Etyeni areas, in the district of Bizana, Eastern Cape. The claimed land is also in the area of jurisdiction of the applicant. Three separate claims were lodged, by Hlolweni, Mfolozi and Etyeni respectively on 18 August 1995, 16 November 1995 and 28 September 1995. The claims were referred to this Court as one case in 2003, and the case was set down for hearing on 16 May 2005.

[3] The respondents/defendants in the main case are North Pondoland Sugar (Pry) Ltd which leased the claimed land from the former Transkeian Government, the Imizize, Etyeni and Hlolweni farmers' associations representing sugar cane growers on the land and the Minister of Land Affairs. The sugar cane growers, or some of them, are also members of the Hlolweni, Mfolozi and Etyeni communities.

[4] On 10 May 2005 the application to intervene was filed in this Court and set down for hearing on 16 May 2005. It was strenuously opposed.

[5] The following procedural flaws were present in the application :

(a) It was brought on short notice, in contravention of rule 25, thus not allowing respondents sufficient time to answer;

(b) It was set down unilaterally in contravention of Rule 55(1) of the Rules of Court;

(c) The Minister of Land Affairs, who is a party in the main case, was not cited in the application as one of the respondents and was not served with the papers.

---

1 Act 22 of 1994, as amended.

This, notwithstanding the scurrilous and untrue attacks (at paragraph 21 of the founding affidavit) on the Commission, which is linked to the Department of Land Affairs.

(d) There was no accompanying application for condonation of the non-compliance with the rules.

The procedural flaws were, in the view of the Court, sufficient to justify dismissal of the application.

[6] I turn to the merits of the application. Rule 13(1) and (2) of the Rules of Court provides :

> "(1) Any person whose rights may be affected by the relief claimed in a case and who is not a party in the case may, within a reasonable time after he or she became aware of the case, apply to the Court for leave to intervene in the case.
>
> (2) The Court may grant an application under subrule (1) on conditions which the Court considers appropriate, including conditions as to –
>
> (a) the payment of costs; and
> (b) the further procedure in the case."

[7] Subrule (1) above prescribes three requirements for intervention namely that :

(a) the person's rights may be affected by the relief claimed;

(b) the person must not already be a party in the case; and

(c) the application must be brought within a reasonable time of becoming aware of the case.

[8] I proceed to deal with each of the three requirements.

(a) <u>The person's rights may be affected by the relief claimed</u>

Mr Nonkonyana, appearing for the applicant, contended that the applicant regulates the administration of the communal land in its area of jurisdiction, including the claimed land, and as such has a direct and substantial interest in

the matter. In this regard the Court was referred to the Communal Land Rights Act[2]. Without any reference to a specific section of the Communal Land Rights Act, the only portion of that Act which relates to traditional councils which the Court could find is section 21(2). It reads :

> "If a community has a recognized traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council."

Otherwise than the abovementioned section 21(2), the purpose of the Communal Land Rights Act is to provide for legal security of tenure by transferring communal land to communities.

It was also argued that the Imizize Tribal Authority was party to the original negotiations on growing sugar on the claimed land and that the Imizize tribe has occupied the said land even before the annexation of the land by the British Colonial government in or about 1870. Therefore, so the argument went, the Imizize Tribal Authority has a direct and substantial interest in the matter.

Mr Dodson for the respondent (claimants in the main case. I shall refer to them as "claimant") contended that Mr Jongamapondo Dickson Mditshwa (the deponent to the applicant's founding affidavit) is not entitled to exercise the powers of acting chief and head of Imizize Traditional Community or of the applicant. He argued that the person to exercise such powers is a Mr Makhosini Mzize. The basis for this contention was that with the demise of Mahloma Mzize, the previous chief, the successor in terms of tradition and custom should be his eldest son. As Mahloma Mzize did not have a male heir, his nephew, Makhosini Mzize, is entitled to succeed to the position of chief of the Imizize tribal area. Consequently it was denied that Mr Jongamampondo Dickson Mditshwa ("Mr Mditshwa") had the requisite authority to act on behalf of the applicant.

It was not possible to resolve this dispute on the papers. The Court, however, assumed in favour of the applicant that Mr Mditshwa had the requisite authority to act on behalf of the applicant, that the applicant had a direct and

---

[2] No 11 of 2004.

substantial interest in the case, and that such rights may be affected by the relief claimed.

(b) the person must not be a party in the case

It was contended on behalf of the claimant that the applicant fails to satisfy this requirement because it became aware of the case in 2003, when the Commission served the referral document on the applicant. This, it was correctly argued in my view, means that the applicant became a party at that time.

Rule 2 of the Rules of Court define a "party" as :

> "(a) the person who initiates the case in the Court;
>
> (b) every person named, in the process by which the case is initiated, as a party
>
> (i) against whom relief is claimed;
> (ii) whose rights may be affected by the relief claimed; or
> (iii) who may have an interest in the claim;
>
> (c) . . . ;
> (d) . . . ;
> (e) . . . ;
> (f) . . . ;
> (g) . . . ;
>
> and also the legal representative of any of the aforesaid persons, in his or her capacity as such;" (my emphasis)

The Commission recognized that the applicant had an interest in the matter, hence joined it in the proceedings by serving the referral document on the self-same deponent to the founding affidavit in his capacity as the representative of the applicant. Service was effected by registered post[3] and the registered item was not returned. Proof of such service was produced. There was also another service of the referral document that was effected through the Sheriff on 7 August 2003. The person on whom service was effected did not object to receiving it on behalf of the applicant. The return of service is in the file.[4]

Denials of knowledge of the postal address to which the referral documents were sent and of receipt of the papers served by the Sheriff were but

---

3 See Rule 24(4)(b)(iii).

4 See Rule 24(a).

disingenuous posturings, like other insincere statements as will appear later in the judgment. The Court accepted that the applicant did receive the papers served on it.

(c) the application must be brought within a reasonable time of becoming aware of the case

The founding affidavit does not state when the applicant became aware of the case, thus making it impossible to determine whether or not the application was brought within a reasonable time. When confronted with this problem Mr Nonkonyana answered that the applicants became aware of the case on or about 15 March 2005. The delay from 15 March 2005 to 10 May 2005 when the application was launched, was not explained. Almost in the same breath, Mr Nonkonyana informed the Court that he was involved in this case some two years prior (about 2003) on instructions of the applicant. It was therefore disingenuous to say the applicant only got to know of the case on 15 March 2005.

The minutes of a pre-trial conference held on 4 October 2004 record that Miss P Naidu (the junior counsel for the claimants) reported that she had been telephoned by an attorney (whose name she could not remember) who indicated that the applicants wished to intervene in the matter. This was not disputed in the replying affidavit. It turned out that that attorney, Mr Madikizela, is the instructing attorney for the applicants. This fact was confirmed by Mr Madikizela himself on the second day of the hearing of the application, when he argued the matter because Mr Nonkonyana was not available. Mr Madikizela, who had been present in Court the previous day, stated that the telephone discussion took place in September 2004. The delay since September 2004 was not explained.

Mr Vahed, for the third respondent in the main case, but who had not filed an answering affidavit to the application to intervene as his client had not been joined, produced a minute of a meeting of the interested parties held on 7 October 2002. That minute records that the deponent to the founding affidavit attended that meeting in his capacity as a representative of the applicant. The

minute also records that Mr Nonkonyana also attended the meeting as a representative of the applicant, although he went by the title "chief". The delay since 2002 was not explained.

The deponent to the founding affidavit of the applicant is a member of the second respondent in the main case. In that capacity he has been involved in this case from the beginning and has ensured that lawyers are instructed to act on behalf of the second respondent in the main case. In this capacity he received the notice of referral from the Commission and must have seen that it was also addressed to him in his capacity as a representative of the applicant. Yet he did nothing to secure the timeous participation of the applicant in the matter. When confronted with this dilemma, Mr Nonkonyana explained by saying that although Mr Mditshwa in his capacity as a cane grower (hence member of the second respondent in the main case) knew of the case, in his (Mditshwa's) capacity as a representative of the applicant he did not know of the case. So absurd an answer I have not heard before. Another example of insincerity.

The applicant took a resolution on 13 April 2005 to intervene in the case (See annexure to the replying affidavit), yet did not apply to intervene until 10 May 2005. This delay was also not explained.

[9] The application did not deal with the provisions of subrule (2) of rule 13. However, in argument Mr Nonkonyana prayed for costs because, as he argued, the claimant failed to serve the applicant with the papers. Of course this argument lost sight of the fact that in these matters service is effected by the Commission and the Commission served the papers twice, as explained above. In addition, the claimant wrote a letter on 16 September 2003 (annexure "SAM1" to the opposing affidavit) drawing Mr Mditshwa's attention to the notice of referral served on him in his capacity as representative of the applicant and asking him to signify the applicants' intention to participate in the matter, should it wish to. Again on 17 September 2003 the claimant's statement of claim was dispatched to Mr Mditshwa by registered mail. See annexure "SAM2" to the opposing affidavit. The prayer for costs was therefore misplaced. Instead, the applicant should have tendered costs. It was only when Mr Madikizela argued the matter that he made a half-hearted offer of costs for part of the day only because,

as he argued, when the Court had adjourned the case for the parties to attempt to settle the application, they attempted to settle the main case.

[10] As regards rule 13(2)(b), it was only during argument in reply that it was suggested on behalf of the applicant that the applicant be allowed to file a response to the notice of referral and that the other parties could plead overnight. This argument was advanced in the face of its legal representatives being aware that the applicant had in its possession large volumes of documents relevant to the case. It was in fact the contention of Mr Nonkonyana that the claimant would not suffer any prejudice. Obviously this would not be practical as the other parties would need to consult and investigate the allegations in the applicant' s response before pleading.

[11] When he argued the matter on the second day, Mr Madikizela conceded that it was reasonable to assume that Mr Mditshwa must have advised the applicant of the case as early as 2002. The probabilities are that Mr Mditshwa must have given the address to which the notice of referral was sent as his address during his involvement in negotiations with the other parties as long ago as 2002. This would explain why those acting for the claimants also addressed correspondence (annexures "SAM1" and "SAM2") to the same address.

[12] If this Court accepts, as it must on the facts, that the applicant was given notice of the proceedings as long ago as 2003, then the finding is inescapable that, far from being an interested party entitled to intervene, the applicant is in default of filing a notice to participate. That is the real reason why it may not participate in the proceedings[5]. Consequently, the application to intervene was ill-conceived, inappropriate and misplaced. It therefore deserved to be dismissed.

[13] However, even if the Court is wrong in finding that the applicant was given an opportunity to participate, in 2003, which at the time it failed to do and that the applicant was entitled to apply for intervention, the applicants' failure to explain the delay is fatal to such application. This was not a case of the applicant giving a weak explanation; there was just no attempt to give any explanation, no matter how weak. Instead there was an attempt to mislead the Court by saying that the applicant only became aware on 15 March 2005.

---

5 See rule 26(1) and (2) of the Rules of Court.

[14] The Court has a discretion in an application of this nature. See in this regard the case of *Melane v Santam Insurance Co Ltd 1962 (4) 531(A).* In exercising this discretion, the Court weighed the interest which the applicant has in the case, on the one hand, and what the applicant did to protect that interest, on the other. This is a case of a strong, direct and substantial interest on the one hand and a deliberate and complete disregard of such interest on the other. In that case, this Court was of the view that, with such blatant disregard for its interest, the applicant cannot be heard to seek an indulgence from the Court or to ask this Court to come to its rescue. For that reason, this Court dismissed the application with costs, including costs for two counsel.

The application for leave to appeal

[15] The application for leave to appeal was couched in the following terms :

> "A The proposed appeal is directed at the whole of the judgment and order, including the order for costs;
>
> B Leave is sought on the basis that : (i) another court could reasonably come to a different conclusion; (ii) another court could reasonably come to the conclusion that the applicant has a direct and substantial interest in the proceedings and in particular in the orders sought, and should have been joined as a necessary party, alternatively, should have been allowed to join on its own application;
>
> C The proposed appeal is directed against the following findings of fact or law:
>
> 1 The learned Judge erred in finding, if he did so find, that there has been an unreasonable delay in the making of the application to intervene, and that the applicant thus fell outside the ambit of Rule 13(1);
>
> 2 The learned Judge erred in finding, if he did so find, that the letters which are annexures SAM1 and SAM2 to the opposing affidavit of Siyabonga A Mlenzana had been received by the applicant, and should have found that the first respondent had failed to prove (i) that such letters had been posted to the correct address; and (ii) that they had in fact been delivered to and received by the applicant;
>
> 3 The learned Judge erred in finding, if he did so find, that the applicant had not made out a sufficient case to intervene in the proceedings and thus fell outside of the provisions of Rule 13(1);
>
> 4 The learned Judge should have found that it was in the interests of all the parties to allow the applicant to intervene and should, so far as the Court had a discretion, have allowed the applicant to intervene;
>
> 5 The learned Judge erred in not finding ways and means to allow the applicant to intervene without interrupting or delaying the current hearing unduly;
>
> 6 The learned Judge failed to give sufficient weight to the fact that the parties to the current proceedings recognized at the pre-trial conference on 4th October 2004 that the applicant should be joined to the proceedings;

7 The learned Judge erred in not taking account, if he did not do so, that the applicant by virtue of its special position in the communities concerned, its alleged participation in the dispossession relied upon by the claimants, and its special knowledge and experience could be helpful to the Court in providing essential evidence and argument for a proper and just adjudication of the main issues.

TAKE FURTHER NOTICE that, in the event of the application for leave to appeal being granted, the applicant will contend that :

(a) the proper Court for the determination of the appeal is the Supreme Court of Appeal;

(b) the current proceedings should be stayed until the appeal has been finalized.

TAKE FURTHER NOTICE that, in the event of the application for leave to appeal being refused or delayed, the applicant will apply for a stay of the current proceedings until :

(c) in the event that the application for leave to appeal is being delayed, until it has been finalized;

(d) in the event of leave to appeal being refused, until an application for special leave to appeal has been made to and has been determined by the Supreme Court of Appeal."

[16] It is not this Court's intention to deal with the grounds of appeal as it has already expressed itself on those issues in the application to intervene. The Court granted leave to appeal mainly on the grounds of paragraph C(7) of the grounds of appeal. The Court is of the view that another Court might, despite the behaviour of the applicant as demonstrated above, come to the conclusion that because of the factors mentioned in paragraph C(7) of the grounds of appeal, the applicant ought to be allowed to participate in the proceedings

_____

JUDGE J MOLOTO

I agree,

_____

A STEPHENSON – Assessor

For the applicant :
Adv C Marnewick SC and Adv Nonkonyana instructed by Prince Madikizela Attorneys, Bizana.

For the claimants :
Adv A Dodson and Adv P Naidu instructed by the Legal Resource Centre, Durban.

For the first and second respondents:
Adv Dickson SC and Adv A Gabriel instructed by Seethal Attorneys, Port Shepstone.

For the third respondent
Adv R Vahed SC instructed by the State Attorney, Durban