

IN THE SOUTH LAND CLAIMS COURT

RANDBURG

CASE NO: LCC45/2010

DURBAN

Before: Mpshe AJ

Decided: 16 February 2011

In the matter between:

THE NKUNZANA COMMUNAL PROPERTY TRUST

Applicant

and

**THE MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM**

First Respondent

THE CHIEF LAND CLAIMS COMMISSIONER

Second Respondent

**THE REGIONAL LAND CLAIMS COMMISSIONER -
KWAZULU-NATAL**

Third Respondent

JUDGEMENT

MPSHE AJ:

This is an application for an order in the following terms:

1. That the Third Respondent alternatively Second Respondent alternatively First, Second and Third Respondent be ordered to pass transfer of ownership of immovable properties to the Applicant within a period of 90 days (ninety) from date of order.

2. That the Respondents, jointly and severally, pay the cost of this application.

In support hereof an affidavit of Themba Timothy Xulu is used

BACKGROUND

1. The Applicant lodged a land claim on the 10 December 1998 in compliance with 2 of the Restitution of Land Rights Act 22 of 1994 as amended. Mr T.M Nzuza lodged the said claim on behalf of the NKUNZANA Community.
2. The properties sought to be transferred are as follows:
 1. RS & A Van Heerden / Dept of Land Affairs
Remainder of Portion 8 of the farm Doringbos No. 753;
Portion 9 of the farm Doringbos No. 753
Registered on 27/10/2010
 2. Van Heerden Family Trust / Dept of Land Affairs
Portion 23 of the farm Doringbos No. 753
Registered on 09/04/2009
 3. Coetzee Family Trust / Dept Land Affairs
The farm Nooitverwacht no. 648
Registered on 20/03/2008
 4. Violetshelf Trading CC / Dept Land Affairs
Portion 13 of the farm Naauwkloof No. 612
Registered 04/04/2008
 5. Hoon Trust / Dept Land Affairs
Remainder of the farm Kortier No. 821
The farm Silverhout No. 668
Registered 11/04/2008
 6. Rawanki Trading CC / Dept Land Affairs
Portion 18 (of 6) of the farm Doringbos No. 753
Registered 03/04/2008

7. R.H.A.F Stock / Dept Land Affairs
Remainder of Portion 6 of the farm Doringbos No. 753
Registered on 17/04/2009
8. M.E. Stock / Dept Land Affairs
Remainder of Portion 1 of the farm Naauwkloof No. 612
Registered on 08/04/2009
9. Msilembe Citrus & Cotton (Pty) Ltd / Dept Land Affairs
Portion 1 of the farm Rietboklaagte No. 642
Portion 2 of the farm Rietboklaagte No. 642
Registered on 21/04/2009
10. J J Marias / Dept Land Affairs
Remainder of Portion 13 (of 4) of the farm Doringbos No. 753
Registered on 17/04/2008
11. M Jansen van Vuuren / Dept Land Affairs
Portion 66 (of 21) of the farm Magut No. 818
Portion 68 (of 21) of the farm Magut No. 818
Registered on 12/06/2008
12. E du Toit / Dept Land Affairs
Remainder of the farm Uitschot No. 650
Portion 2 of the farm Uitschot No. 650
Registered on 19/05/2008
13. H S Erlank / Dept Land Affairs
Portion 11 of the farm Doringbos No. 753
Registered on 07/10/2008
14. Jacques Erlank Familie Trust / Dept Land Affairs
Remainder of Portion 4 of the farm Doringbos No. 753
Registered on 20/04/2009
15. Andre Erlank Familie Trust / Dept Land Affairs
Portion 1 of the farm Conference 811
Portion 3 of the farm Conference 811
Portion 4 of the farm Conference 811
Registered on 20/04/2009

3. The deed search revealed that the property has been subdivided into eight (8) farms.
4. The said claim was then subsequently gazetted on the 12 August 2005 under gazette # 27883 Notice 1364 of 2005.

5. On the 18 April 2007 the RLCC KZN submitted a memorandum in terms of Section 42D of the Restitution of Land Rights Act 22 of 1997 (the Act). The same was supported by the CLCC on the 31 May 2007 and finally approved by the First Respondent on the 30 July 2007.
6. The award by the First Respondent refers to land in extent of 12725.6022 hectares to the value of R182 459 000.00 to benefit of four hundred and seventy two (472) households.
7. The said properties have since been transferred to the Department of Rural Development and Land Reform (then Department of Land Affairs).
8. On the 14 July 2008 a so-called handover ceremony was held at the **KWALINDUZULU NONGOMA**. It is alleged that at this ceremony the claimed properties *inter-alia* those of Nkunzana Community were formally handed over and celebrated.
9. On the 14 July 2009 the manager of the legal unit Mr Sandile Mxolisi Ngobese in the office of the **RLCC KZN** dispatched a letter to the Applicant's representative. I deem it necessary to quote the said letter as a whole.

“RE: REGISTRATION OF TRANSFER OF PROPERTIES LISTED HEREUNDER FROM
NATIONAL DEPARTMENT OF LAND AFFAIRS TO THE NKUNZANA COMMUNAL
PROPERTY TRUST IT 521/2009/PMB

In settlement of the claim by Nkunzana Community, the Minister of Land Reform and Rural Development or his delegate awarded properties described hereunder to the State. Subsequently, a legal

entity known as Nkunzana Communal Property Trust IT529/2008/PMB (a legal entity formed by the Nkunzana Community) was formed to hold and manage the properties.

Kindly be informed that the Office of the Regional Land Claims Commissioner for Kwazulu Natal is in a process of appointing a conveyancer to undertake transfer of the property described hereunder from the State to the Nkunzana Communal Property Trust IT 529/200/PMB, subject to conditions set out in the Sale Agreements and Settlement Agreement which were signed by the relevant Parties and full purchase prices paid to respective sellers.”

10. Despite the letter in 9 above nothing happened to date. This is then the crux of this application.

11. The said claimed properties have since been transferred to the state in terms of Section 42A of the Act.

12. The defence of the Respondent is to the effect that there is a competing claim. This dispute is said to be between the Applicant and the Usuthu Tribal Authority. This is then regarded an obstacle to the transfer of ownership to the Applicant.

13. It is not in dispute that Applicant has lodged a valid claim. That the claim has been validated and accepted to the point of an award by the First Respondent.

14. In substantiating the defence and the fact that there is a competing claim Mr Mthembu referred the court to Annexure **MJM1**. This is a claim form dated 10.12.1998 allegedly lodged by T.M Nzuza.

15. It has to be noted that the claim is alleged to have been lodged on behalf of his “**HIS**

MAJESTY THE KING” (USUTHU TRIBAL AUTHORITY). The name of the Applicant i.e. **INKUZANA COMMUNAL PROPERTY TRUST or INKUZANA COMMUNITY** as it then was appears nowhere on this claim form MJM1.

16. However, Micheal Thamsang Wa Mzuza in his confirmatory affidavit states:

3. I have been shown a claim from which purports to have my signature on it. I am given to understand that this claim from was marked annexure “MJM1” to the Respondents’ application for condonation in this matter. This claim form seems to bear my signature. I however take issue with the rest of the document.
4. Since the claim was lodged on behalf of the Nkunuzana Community in 1998, I can unfortunately no longer recall the exact detail reflected on the claim form. What I do however clearly recall is that I never lodged a claim on behalf of the Usuthu Tribal Authority or intended a claim to be lodged on behalf of his Majesty King Zwelithini.

I refer further to the Applicants’ replying affidavit deposed to by T.T. Xulu at paragraph 10.2 on page 78 of the record:

10.2 The individual members of the Nkunuzana Claimant Community who resided on White owned farm land and occupied such land individually as labour tenants from 1913 onwards, and who were dispossessed, were all subjects of the Usuthu Traditional Authority in other words they were and are subjects of His Majesty King Zwelithini. Their occupation of the aforesaid farms were not however occupation on behalf of His Majesty King Zwelithini or on behalf of the Usuthu Traditional Authority. They occupied the land in their own right as labour tenants. All the farms were White owned and the only jurisdiction which the Usuthu Traditional Authority had over the individual members of the Nkunuzana Claimant Community pertained to the usual authority which His Majesty the King has over his subjects”.

This evidence is not disputed.

17. I then enquired of Mr Mthembu counsel for respondents as to progress made so far regarding the alleged claim of Usuthu Tribal Authority. Counsel could not tell as to progress or otherwise save that a claim was lodged on the 31 December 1998. Of concern herein is the content of paragraph 33.2 of opposing affidavit. This is untrue. I further called upon counsel for the Respondents to tell me as to steps taken by the Commissions with regard to this claim. Mr Mthembu correctly stated that there was none. However, in the same breath he, Mr Mthembu, stated that the very Inkunzana Community claim is the Usuthu Tribal Authority claim. This cannot be true. If it were true the issue of competing claim would not have arisen. There is no evidence before me from the Usuthu Tribal Authority confirming that they have indeed lodged a claim as alleged.

18. It is further a defence that the alleged dispute is being mediated upon by First Respondent. I refer to Respondents' opposing affidavit deposed to by M.J Maake the Senior Legal Administration Officer at paragraph 29.3 page 66:

“29.3 in any event, the Minister of Rural Development and Land Reform is doing everything in his power to speedily resolve the disputes and has and is putting systems in place to deal with land until transfer can take place.

19. Again herein I asked counsel for the Respondents' as to progress made by the First Respondent in an attempt to settle the dispute. No progress could be reported.

20. In conclusion I came to a finding that there is no competing claim. The reasons advanced by Respondents' in defence are devoid of merit.

COSTS

Applicant argued for costs on Attorney and Client scale. The Applicant made up of a Community had no option but to approach the court to enforce their constitutional rights. In February 2009 the Applicant directed a letter to Respondent's seeking finalization of the matter. The Respondent's reacted thereto a year later in February 2010 instructed Applicant not to approach the Court. No steps were taken by Respondent's to settle the matter until this application was launched on the 16 November 2010.

Having regard to the Bio Watch Trust v Registrar Genetic Resources & Others 2009 (6) SA 232 CC and the Quimella Trading 2010 (4) SA 308 (LCC) paragraphs 33 to 36. After discussing the case law, the learned Judge remarked:

“it should not be necessary to force the state through a court order to comply with its contractual obligations and an Applicant who is forced to seek such an order should not be out of pocket I am satisfied that the Respondent's conduct attracts the punitive cost order sought.”

I consequently make the following order:

- a) Application is granted
- b) Respondents jointly and severally to pay costs of this application on attorney and client scale.
- c) Respondent's to pay costs occasioned by the appearances on 10 September 2010 on party to party scale.

PRESIDING JUDGE:
Mpshe AJ