IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD IN RANDBURG

Case No: LCC204/2010B

Before: **Molefe J, Barnes AJ, Magwaza (Assessor)**

Heard On: 15 June 2017

Judgment delivered on: 22 June 2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

MOLOTO COMMUNITY LAND CLAIMS BENEFICIARIES ASSOCIATION Applicant

In re:

MOLOTO COMMUNITY Plaintiff

Concerning: Portions 5,7,10,12,13,15,16,17,18,19, 35, 36, 37, 44, 45, 49, 63, 73, 75 and 81 of the farm Jakkalsdans 243, registration division J R Mpumalanga Province

and

THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM First Defendant

LUMO BELEGGINGS TUST & 17 OTHERS Second to Further Defendants

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JUDGMENT

BARNES AJ

Introduction

1. This is an application for leave to intervene brought by the applicant, the Moloto Community Land Claims Beneficiaries Association.

2. The application was brought in terms of Rule 13 of the Rules of this Court. It was launched on an urgent basis on Friday, 2 June 2017. The trial in the main action in this matter was set down for a period of two weeks from Monday, 5 June 2017 to Thursday, 15 June 2017. The applicant's urgent application was therefore launched on the eve of the commencement of the trial.

3. The plaintiff in the main action, the Moloto Community, opposed the

intervention application. The defendants in the main action did not. For convenience, I will refer to the plaintiff in the main action as the respondent in this application.

4. Given the respondent's opposition to the intervention application, the Court was obliged to issue directives making provision for the filing of answering and replying affidavits as well as heads of argument. The Court issued these directives on Monday, 5 June 2017 and set the intervention application down to be heard on Thursday,15 June 2017.

5. As a consequence, the trial in the main action had to be postponed.

6. This was unfortunate because, as will become apparent below, the intervention application is replete with glaring defects, which compels the conclusion that it was prepared without the requisite standard of care. Further, despite these defects being drawn to the attention of Mr Moloto, the applicant's attorney and the deponent to the founding affidavit, the applicant persisted with it unchanged. This conduct, as will be seen below, has implications for the appropriate costs order to be made.

7. Because of this, it is necessary to deal with all the defects in the intervention application, although strictly speaking it stands to be dismissed on the basis of any one of them.

The Relief sought is Moot

8. The central relief sought by the applicant is expressed in prayer 2 of its notice of motion in the following terms:

> "Allowing the Applicant to be joined as 2nd Plaintiff in terms of Rule 13, for purposes of Rule 31 offer of settlement." (emphasis added)

9. It is however not in dispute that this offer culminated, on 5 June 2017, in the conclusion of a settlement agreement between the first defendant on the one hand and the second to further defendants on the other ("the settlement agreement"). In terms of the settlement agreement, the first defendant undertook to purchase the farms belonging to the second to further defendants. The settlement agreement resolved the dispute between the first defendant and the second to further defendants and brought to an end the participation of the second to further defendants in the action. The settlement agreement, however, had no impact on the dispute between the first defendant and the respondent (the plaintiff in the action).

10. On 5 June 2017, this Court made the settlement agreement an Order of Court. Mr Moloto, who as stated above, is the applicant's attorney and the deponent to its founding affidavit, was present in Court on 5 June 2017 and confirmed that he had no objection to the settlement agreement being made an Order of Court.

11. Given that, by 5 June 2017, what had begun as a settlement offer had been transformed into a settlement agreement and made an Order of Court, the relief sought by the applicant in its notice of motion was no longer capable of practical effect. The respondent took this point in its answering affidavit, submitting that the relief sought by the applicant was both moot and academic. This is undoubtedly correct. Yet despite the clear logic of the respondent's submission and despite the fact that it was pertinently drawn to the applicant's attention, the applicant did not seek to amend its notice of motion. Instead it persisted both in its papers and in argument on 15 June 2017 with the relief sought in prayer 2 of its notice of motion.

12. Clearly, on the basis of the facts set out above, the relief sought by the applicant in its notice of motion is of no practical relevance and is therefore, moot. The intervention application stands to be dismissed for this reason alone.

Application not Urgent, nor brought within a Reasonable Time

13. Rule 13(1) of the Rules of this Court provides that:

> "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 court for leave to intervene in the case."

14. In this case, the applicant needed to show not only that it launched its application within a reasonable time after becoming aware of the main action but also that it was justified in bringing its application as a matter of extreme urgency, on the eve of the commencement of the trial.

15. The basis of the applicant's claim of urgency is the following:

> "I have only come across the existence of the offer by the 1st Defendant / Respondent on the 30th May 2017 when I was at the Land Claims Court for other matters …"

16. Later in its founding affidavit, the applicant states:

> "The communication indicated above is hereby attached and marked '**MCBA10**.'"

17. The communication is however not referred to elsewhere in the applicant's founding affidavit and, importantly, there are no averments as to when or in what circumstances it was received.

18. The communication is attached to the applicant's founding affidavit. It is a letter dated 19 May 2017 from the State Attorney to Cox and Partners, the attorneys of record for the second to further defendants. The letter records an undertaking by the first defendant to purchase the farms owned by the second to further defendants. The letter is not addressed to the applicant, nor to Mr

Moloto and, as stated above, there is no explanation as to how, when or in what circumstances it was received by them.

19. This is in itself problematic. Matters become even more problematic, however, when it is appreciated that the applicant was previously involved in this action. While there is no clear rendition of these events in the papers, one is able to piece together the following. The applicant was previously granted leave to intervene in the action in terms of an Order of this Court dated 27 November 2014. It appears, however, that applicant's application for leave to intervene may not have been properly served on the parties to the main action. This and other matters were discussed at a pre-trial conference held on 3 March 2015 which was attended by Mr Moloto on behalf of the applicant. The respondent (the plaintiff in the main action) indicated at that pre-trial conference that it intended to apply for the rescission of the Order granting the applicant leave to intervene. Thereafter, for reasons which are not clear, the applicant withdrew from the action, effectively abandoing the Order.

20. The applicant's papers contain no clear explanation of these prior events and, in particular, the circumstances in which the applicant previously intervened in the action, why the applicant subsequently withdrew from the action, why having withdrawn the applicant was again seeking leave to intervene and how it was, given the extent of the applicant's prior involvement in the action, that it only became aware of the trial at the eleventh hour.

21. In my view, the applicant failed to establish that it brought its application within a reasonable time after becoming aware of the action as required by Rule 13, let alone that there was urgency sufficient to justify bringing its application at the eleventh hour, as it did.

22. The intervention application stands to be dismissed for this reason alone.

No Standing or Interest

23. As stated above, Rule 13(1) of the Rules of this Court requires an applicant for intervention to demonstrate that its rights may be affected by the relief claimed in the case in which it seeks leave to intervene.

24. In the founding affidavit, Mr Moloto states that he lodged a land claim on behalf of the Moloto Community. In support of this he attaches a portion of a Government Gazette dated 27 August 2004 which records that *"a claim has been lodged by Mr T P Moloto ID No [4....] acting in his capacity as a representative of Moloto Community…."* The claim on the portion of the Government Gazette attached to the papers pertains to certain portions of the farm Jakkalsdans 243 JR.[1] These are not the portions of the farm Jakkalsdans which form the subject matter of this action.[2]

[1] These are the remaining extent of the farm Jakkalsdans as well as portions 1, 2, 3 and 4 thereof.
[2] These are set out on the cover page of this judgment.

25. The claim lodged by Mr Moloto therefore does not appear to overlap with the claim that forms the subject matter of this action and indeed Mr Moloto conceded in argument that he does not contend that the applicant has a land claim in competition with that of the respondent.

26. But in any event, it is the applicant which seeks leave to intervene in this matter and it is the applicant which must demonstrate that its rights may be affected by the relief claimed in the action. Yet, the founding papers do not explain the origin or purpose of the applicant, nor do they give an indication of who the applicant's members are. Mr Moloto's connection to the applicant is also not explained in the founding papers. Nor is there evidence that Mr Moloto has a mandate to act on behalf of the applicant or its members, whoever they may be.

27. Again, despite these shortcomings being raised pertinently by the respondent in its answering affidavit, the applicant made no effort to remedy them.

28. During questioning from the Court at the hearing of the application it became apparent that Mr Moloto may be representing a group of persons who were, during the course of a verification exercise, found not to be members of the Moloto Community (the respondent) and who are disgruntled as a result. If this is the case, then the applicant's interest in this action is a matter of serious dispute and Mr Moloto, by not disclosing this in his founding affidavit, has been less than candid with this Court. Nevertheless, given that these facts were not

deposed to in the affidavits filed by the parties, I will make no finding in this regard.

29. The respondent submitted that on the papers as they stand, the applicant has failed to make the necessary averments to establish either that it has *locus standi* to bring the intervention application or that its rights will be affected by the relief sought in the action. I agree. For these reasons too, the application stands to be dismissed.

Costs

30. Counsel for the respondent urged us to make a punitive costs order against Mr Moloto *de bonis propriis.*

31. In *Multi Links Telecommunications Limited v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and Another v Blue Label Telecoms Limited and Others* [2013] 4 AllSA 346 (GNP) the principles relating to costs orders *de bonis propriis* against legal practitioners were re-stated and explained as follows:

> "Costs are ordinarily ordered on a party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercised is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal practitioner be ordered to pay costs out of his own pocket. The obvious policy consideration underlying the court's reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their

> client's rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent, or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner.
>
> It is true that legal practitioners sometimes make errors of law, omit to comply fully with the rules of court, or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standards expected from the legal practitioner, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court and gross incompetence and a lack of care."[3]

32. In this case before us, Mr Moloto, an established and experienced attorney, brought an urgent application for intervention in which he:

32.1 failed to make averments necessary to establish urgency;

32.2 failed to make the averments necessary to establish either that the applicant has *locus standi* to bring the application or that its rights may

[3] At paras 34 and 35. This dictum was quoted with approval by the Supreme Court of Appeal in the recent case of *Adendorfs Boerderye v Shabalala and Others* [2017] ZASCA 37.

be affected by the relief claimed in the action;

32.3 persisted in seeking relief that had clearly become moot.

33. Even when these serious defects were drawn to Mr Moloto's attention by the respondent, he made no effort to remedy them.

34. As a consequence of Mr Moloto's defective application, a trial set down for two weeks, had to be postponed.

35. In my view, Mr Moloto's conduct deviated substantially and materially from the standard expected of a reasonable legal practitioner. The application itself demonstrated gross negligence and a lack of care and Mr Moloto's persistence with the application even after its defects were drawn to his attention, and despite the consequences for the trial, was irresponsible and reckless.

36. For these reasons, I am of the view that a costs order against Mr Moloto *de bonis propriis* is warranted.

37. I therefore make the following order:

1. The application for intervention is dismissed.

2. The costs of the application are to be paid on the party and party scale by Mr Moloto *de bonis propriis.*

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BARNES AJ

Acting Judge of the Land Claims Court

I agree

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MOLEFE J

Judge of the Land Claims Court

I agree

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S MAGWAZA

Assessor