IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

Case Number: LCC 121/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

27/2/2020
DATE

SIGNATURE

Heard on: 19 January 2020

Delivered on: 20 January 2020

In the matter between:

LUHLWINI MCHUNU COMMUNITY Applicant

and

LAURENCE HANCOCK First Respondent

PETER GOBLE Second Respondent

BUCKSTONE CC Third Respondent

MICHAEL ROBERTS	Fourth Respondent
HALLIWELL PROPERTY TRUST	Fifth Respondent
ARTHUR JAMES ARATHOON	Sixth Respondent
AMANDA JANE CMPBELL	Seventh Respondent
JOHN NORMAN CAMPBELL	Eight Respondent
WILLEM JAN SCHORTEMEIJER	Ninth Respondent
BETH SUSAN SHAW	Tenth Respondent
BRETT DAVID SHAW	Eleventh Respondent
QONDISA CECIL NGWENYA	Twelfth Respondent
GLR PROPS 005 CC	Thirteenth Respondent
NEWINVEST 136 (PTY) LTD	Fourteenth Respondent
MICHAEL BENSON	Fifteenth Respondent
VENGARITE (PTY) LTD	Sixteenth Respondent
ELPIS TRUST	Seventeenth Respondent
MACKENZIE TRUST	Eighteenth Respondent
SAPPI MANUFACTURING (PTY) LTD	Nineteenth Respondent
MONDI (PTY) LTD	Twentieth Respondent
CHURCH OF PROVINCE OF SOUTHERN AFRICA	Twenty-First Respondent
MINISTER OF RURAL DEVELOPMENT & LAND REFORM	Twenty-Second Respondent
REGIONAL LAND CLAIMS COMMISSIONER, KWAZULU NATAL	Participating Party

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JUDGMENT

Meer AJP

[1] The Applicant applies to amend its statement of claim as set out in the Applicant's notice in terms of Land Claims Court Rule 22 dated 30 September 2019. In essence, the Applicant seeks to amend a claim lodged by the Mchunu Community on 17 April 1998, and referred to this Court by the Regional Land Claims Commissioner, Kwa Zulu Natal as a community claim in terms of section 2(1)(d) of the Restitution of Land Rights Act, No. 22 of 1994 ("the Act"), to a claim in the alternative by individuals in terms of section 2(1)(a) and 2(1)(c) of the Act.

[2] The Applicant sought condonation for the late filing of this application, citing difficulties in arranging consultations over long distances and ill health as reasons for the delay. At the hearing of the application yesterday, I granted condonation albeit that the reasons proffered may not have justified a delay of some 50 days in delivering the application to the Respondents and some 60 days in filing the application at Court, and that, after the opposing Respondents had filed their answering affidavits. Condonation was granted in the interests of expeditiously dealing with this long-standing land claim.

[3] I expressed my displeasure yesterday at the tardy and dilatory manner in which this application was brought. Apart from the delay in bringing the application, the Applicant, while meaning to do so, simply neglected to file a replying affidavit. Once again in the interests of expeditiously dealing with this matter, I granted an indulgence and directed this to be filed via email to the Registrar and parties by 17h00 on 19 February 2020, the evening before the hearing, so that the application could be heard this morning. Astonishingly, the affidavit was emailed to all parties, save the Court. Tardiness of this ilk is disquieting and unbecoming of any legal professional, more so of practitioners fortunate enough to be funded by the Stat to act for land claimants, as lamented time and again by this Court.

[4] The 1st to 21st Respondents ("Landowner Respondents") oppose the claim. The 22nd Respondent and the Participating Party abide the decision of the Court.

[5] The founding affidavit of Zwelihle Mchunu contends that the Landowner Respondents will not suffer any prejudice as a result of the proposed amendments. In this regard, he states *inter alia* that as the individuals sought to be added as claimants are direct descendants of the community, it will not be necessary for them to file individual claims.

[6] The absence of prejudice is emphatically denied in the answering affidavits as is dealt with more fully below. In their answering affidavit, the 1st to 18th and 21st Respondents contend *inter alia* that the proposed amendment and the introduction of the alternative claim and prayer disclose no cause of action.

[7] The 19th and 20th Respondents contend *inter alia* in their answering affidavit:

7.1 The claim has been brought as a community claim supported by a single claim form;

7.2 No claim by individuals has been lodged;

7.3 The identity of the individuals forming part of the Plaintiff have not been disclosed;

7.4 Which portions of land such individuals were allegedly dispossessed of has not been pleaded; and

7.5 The proposed amendment does not sustain a cause of action in respect of the proposed alternative claim, alternatively is vague and embarrassing and if granted will render the statement of claim susceptible to an exception.

[8] The replying affidavit in essence baldly denies the above averments in the answering affidavits.

Discussion

Is the amendment good in law? Can an amendment to a statement of claim in a community claim introduce a claim by individuals?

[8] Mr Chithi, for the Applicant, pointed to paragraphs 3, 4 and 10 of the claim form.

Paragraph 3 records the person who lost the right in land as: "Mchunu Family (Community)".

Paragraph 4 under a heading:
"Full particulars of applicant, if not the person who lost the right in land: Name/Community/Trust", records: "Mchunu Community".

The paragraph goes on to record the persons acting on behalf of a community/trust as Zwelihle Msawenkosi Mchunu and Jabulani Simon Mchunu. Paragraph 10 of the claim form records the signatures of these two persons on "10.09.97".

[9] Mr Chithi submitted that the way the claim form was crafted permitted individuals from that family who are direct descendants of *inter alia* Luhlwini to be let in as claimants. He submitted that section 39 of the Constitution, which calls for interpretations in the spirit of the Constitution, and section 33(c) of the Act, which requires this Court to consider the requirements of equity and justice, permitted the amendment to admit individual claimants.

[10] Mr Chiti also referred me to an extract from *Department of Land Affairs and Others v Goedgelegen Tropical Fruits Pty Ltd* 2007 (6) SA 199 (CC) at paragraphs 53 to 55, where DCJ Moseneke expressed how the purpose of the Restitution Act should be scrutinized in line with the Bill of Rights. He requested that I be guided by this in considering the application.

[11] This Court is a creature of statute that can only operate within the ambit of the Act in respect of land claims. Whilst it is so that it is enjoined to consider section 39 of the Constitution, and section 33(c) of the Act, in doing so, it cannot adjudicate contrary to the Act and the clear letter of the law. This, in relation to entitlement to land restitution, is spelt out at Section 2 of the Act. The entitlement to a claim for restitution arises if one of the four separate causes of action referred to in section 2(1)(a) to 2(1)(d) is proved.

[12] The claim instituted by the Applicant as plaintiff is a community claim as envisaged in section 2(1)(d) of the Act. A community claim is distinct and separate from an individual claim under section 2(1)(a) or 2(1)(c). The latter claims are simply not alternatives to community claims and are separate causes of action thereto.

[13] It is trite that this Court can only entertain claims that have been lodged in terms of section 10 of the Act. The claim form clearly reflects that a community claim was lodged. There is no evidence that this was done in error or that the persons lodging the claim on behalf of the community did not understand the instructions on the form, or that they were not ably assisted by the Commission's officials in filling in the form. On the contrary, the evidence of Mr Zwelihle Mchunu, one of the signatories to the claim form, confirmed that he and Mr Jabulani Mchunu lodged a claim on behalf of the community. Mr Zwelihle Mchunu is an educated and qualified person. He testified that he has a B Tech in Environmental Health and is an Environmental Health Officer. The other signatory to the claim form, Mr Jabulani Mchunu, testified that he is a school principal who holds the degree of BEd Management. He is also an educated and qualified person. There is no evidence that either of them was coerced or tricked by anyone to lodge a community claim or that they made a mistake.

[14] The claim form corroborated by the evidence shows clearly that a community claim was intended to be lodged and was indeed lodged. The situation might have been otherwise if Mr Zwelihle Mchunu and Mr Jabulani Mchunu, were, like claimants in some cases before this Court, illiterate persons who did not understand the contents of

the claim form and had not been properly assisted by the officials of the Commission. Nor can it be said that the claim form though technically deficient was such as to comprise substantial compliance with a section 2 (1) (a) or 2 (1) (c) claim. See *Kusile Land Claims committee* LCC Case No. 21/07 (unreported) at paragraph 26.

[15] Given this and the evidence, the fact that the claim form refers also to the Mchunu family and that the two individual signatories to the claim form may be Luhlwini descendants, does not permit the claim to be construed as a claim in terms of section 2(1)(a) or (c) by individuals as opposed to a community claim. Nor does it support the contention on behalf of the Plaintiff that the way the claim form has been crafted permits individuals to be let in as claimants.

[16] In the case of *In re Macleantown Residents Association: Re Certain Erven and Commonage in Macleantown* 1996 (4) SA 1272 (LCC) this Court said at 1278F:

> "*The claimants must make it clear on what basis they are bringing their claim i.e. as a community or as individuals) and in each case submit the requisite particulars*".

In the current restitution claim, it was made clear at the time of lodging the claim and in oral evidence that the claim was being brought on the basis of a community claim. It is not open to the Plaintiff to try and change the claim through an amendment to a claim on the basis that was never lodged. No separate and distinct individual claims were lodged in this matter by not later than 31 December 1998, the cut-off date for the lodgment of claims as specified at section 2(1)(e) of the Act.

[17] Mr De Wet, for the First to 18th and 21st Respondents, correctly pointed out with reference to *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) that an amendment which introduces a new claim will not be allowed if it has the effect of defeating a statutory limitation as to time. This has application in the instant matter, as the amendment seeks to introduce individual claims that were not lodged by the cut-off date specified in section 2(1)(e).

[18] This Court cannot adjudicate a claim by an individual who never lodged a claim under section 2(1)(a) or 2(1)(c), let alone introduce such claims by way of an amendment. Simply put, there are no individuals who are claimants that have lodged a claim in terms of either section 2(1)(a) or (c) in this matter. See *In re Former Highlands Residents* 2000 (1) SA 489 (LCC) at 495.

[19] Mr De Wet referred me *inter alia* to the following judgments of this Court which are on point. In *Bouvest 2173 CC and others v the Commission* [2007] ZALCC 7 at paragraph 17, this Court held that those who have not lodged timeous claims cannot piggyback onto other claimants. I do not accept that the individual claimants sought to be introduced by the amendment would not be piggybacking simply because the two individuals have lodged the claim on behalf of a community, as contended by Mr Chithi.

[20] In *Minaar N.O. v Regional Land Claims Commissioner for Mpumalanga and Others* [2006] ZALCC 12 this Court held that the RLCC is bound by the claim form that was submitted. It cannot substitute one claim form for another or expand on the form. Nor can this Court, which, as aforementioned, is a creature of statute that operates within the ambit of the Act.

[21] It is so that in *Kusile supra* at paragraph 27, on the facts of that matter, this court held that individual members of a community could obtain a remedy under a claim lodged in the name of a community. The case is however distinguishable as the finding in *Kusile* was made with reference (as indicated at the footnote to paragraph 27), to the fact that those individual community members could still lodge their claims until 30 June 2019. That is not the case here. The cut-off date at section 2(1)(e) has passed. It is also apparent that on the facts of *Kusile* the investigation by the Commission covered individual members' rights in land and, importantly, the landowners consented to the relief sought. There was also no oral evidence confirming that the claim was lodged as a community claim. On the contrary the Commission's evidence as appears from paragraph 11 of the judgment, was that it was doubted whether the meaning of the term

community, was fully understood at the time the claim was lodged. Also, unlike in this application, in *Kusile,* the names of individuals who were dispossessed and the cadastral description of the land from which they were dispossessed, were identified. *Kusile*, as Mr De Wet aptly emphasised, is not authority for the proposition that an individual claim is automatically an alternative to a community claim.

[22] In summary, this Court would be going beyond its ambit as prescribed in the Act if it permitted the introduction of the individual claims sought in the amendment. Neither section 39 of the Constitution, section 33(c) of the Act nor the dicta quoted from the *Goedgelegen* case referred to by Mr Chiti permits it to do so.

[23] In essence the proposed amendment is not the amendment of an existing claim. It is the introduction of brand new claims that have not been lodged. The amendment is bad in law.

Prejudice

[24] On the question of prejudice, were the amendment to be effected, apart from the obvious prejudice to the Respondents of having to defend a case of individuals who have not lodged claims, there is also the prejudice of their having to defend individual claims when they have come prepared to meet a community claim. As Mr De Wet stated, the focus has been on shared rules of a community pertaining to land, very different to individual claims. The Respondents' concerns that the trial would have to be adjourned and witnesses recalled to allow the Respondents sufficient opportunity to prepare to meet the allegations of the individual claimants, are real, and a source of prejudice in my view. It is simply not so, as contended by the Applicant, that the issues being raised by the Respondents are issues for evidence which would inevitably be decided by this Court.

Amendment: vague and embarrassing, excipiable

[25] It is trite that an amendment that will render a pleading excipiable, will not be granted. See *Cross v Ferreira* 1950 (3) SA 443 (C) at 449G-450G. As contended by Mr

Mossop on behalf of the 19th and 20th Respondents, the proposed amendment will be rendered excipiable if contradictory, vague and embarrassing. He aptly points out that the Applicant's response to the referral report expressly states individuals did not submit claims based on labour tenancy. The proposed amendment is directly contradicted by this response. He further aptly points out that the fact that neither the identities of the individuals sought to be introduced as claimants, nor the portions of land they occupied, are pleaded, renders the amendment vague and embarrassing, and it does not sustain a cause of action. For that reason, he submits, it is excipiable and cannot be granted. I agree.

[26] Finally, as stated by Mr Mossop, an amendment is not there for the asking, and a party seeking such must provide the Court with a reasonable explanation for the proposed amendment. See *Jeewan v Transnet Ltd and Another* [2016] ZAGPPHC165 at paras 7 and 11. The application is lacking in this respect. The Applicant has offered no explanation as to why it required the amendment.

[27] In view of all of the above the application cannot succeed. The dilatory and tardy manner in which the application was brought, as alluded to above, are in my view circumstances warranting a deviation from the practice of this Court not to award costs.

I order as follows:

The application is dismissed with costs.

Y S MEER
Acting Judge President
Land Claims Court

Appearances

For the Applicants: Adv. Chithi
Instructed by: Sinama & Associates

For the 1st to 18th Respondents: Adv. de Wet SC
Instructed by: McCarthy & Associates

For the 19th and 20th Respondents: Adv. Mossop SC
Instructed by: Shepstone & Wiley

For the 21st Respondent: Adv. de Wet SC
Instructed by: Tatham Wilkes Inc.

For the 22nd Respondent and Participating Party: Adv. Naidu
Instructed by: State Attorney