CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 80/12
[2013] ZACC 7

In the matter between:

eTHEKWINI MUNICIPALITY Applicant

and

INGONYAMA TRUST Respondent

Heard on : 12 February 2013

Decided on : 28 March 2013

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JUDGMENT

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JAFTA J (Mogoeng CJ, Moseneke DCJ, Froneman J, Khampepe J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

*Introduction and legislative history*

[1] The policy of separate development, one of the pillars of the apartheid state of the past, was given effect to through legislation[1] that set aside 13% of the country's land for the use and occupation of the African majority. But for a few negligible exceptions, Africans were not permitted to occupy or own land outside the 13% land

[1] The Natives Land Act 27 of 1913 and the Native Trust and Land Act 18 of 1936.

area reserved for them. Within that area they were subjected to rule by proclamation under the hand, originally of the Governor-General and later the State President, who was imposed as "the supreme chief" of all Africans in terms of the Native Administration Act.[2] This Act became a potent tool used to carry out forced removals of Africans from the 87% of land reserved for other races.[3]

[2] The Native Trust and Land Act empowered the apartheid government to place in trust the land reserved for use by Africans. The land forming the subject matter of the present litigation was part of it. It was never transferred into private ownership. Over the years different entities held it in trust for the benefit of Africans.[4]

[3] Later, the areas reserved for Africans were divided into homelands in terms of the Promotion of Bantu Self-government Act.[5] These homelands were established on the basis of language and ethnicity.[6] In furthering so-called self-government, the apartheid state passed the Bantu Homelands Citizenship Act[7] in terms of which every African was stripped of South African citizenship. In its place they were assigned citizenship of a homeland of the ethnic group to which they belonged, irrespective of

[2] 38 of 1927.

[3] *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC).

[4] *Msunduzi Municipality v MEC for Housing, KwaZulu-Natal and Others* 2004 (6) SA 1 (SCA) at para 6.

[5] 46 of 1959.

[6] They were Bophuthatswana, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, QwaQwa, Transkei and Venda.

[7] 26 of 1970.

whether there were any links between them and such homeland. In this way many Africans became "foreigners" in the land of their birth.[8]

[4] The Bantu Homelands Constitution Act[9] established a government with legislative and executive powers in each homeland. The Legislative Assembly of the Government of KwaZulu was established pursuant to this Act. As its name suggests it passed laws, the operation of which was confined to the territorial area of KwaZulu. By means of Proclamation R232 of 1986 the South African Government transferred the land which forms the subject matter of the present dispute to the Government of KwaZulu. The latter was to administer it for the settlement, support, benefit and welfare of the citizens of KwaZulu.

[5] When South Africa attained democracy in April 1994, all homelands, including that of KwaZulu, were abolished. The areas over which they governed were reincorporated into the greater South Africa that became a unitary state.[10] However, the laws passed by defunct homeland parliaments continued in operation until repealed or amended by the democratic Parliament or, where appropriate, by a provincial legislature.[11]

[6] After the interim Constitution was passed and on the eve of it coming into force, the legislature of KwaZulu homeland enacted the KwaZulu Ingonyama Trust

[8] See *Ex parte Moseneke* 1979 (4) SA 884 (TPD).

[9] 21 of 1971.

[10] Schedule 1 of the interim Constitution Act 200 of 1993.

[11] Id section 229.

Act[12] (Trust Act) in terms of which the present respondent, Ingonyama Trust (Trust), was established. The purpose of the Trust Act was to transfer the land that was then administered by the soon to be abolished Government of KwaZulu to the Trust. The sole trustee was the Ingonyama, the Zulu King. The Trust was mandated to administer the transferred land "for the benefit, material welfare and social well-being of the members of the tribes and communities" contemplated in the KwaZulu Amakhosi and Iziphakanyiswa Act.[13]

[7] In 1997 the Trust Act was amended by Parliament which brought about fundamental changes.[14] One of these changes was the creation of a Board of Trustees, comprising the Zulu King and eight members appointed by the Minister for Rural Development and Land Reform, after consulting the King, Premier and Chairperson of the House of Traditional Leaders of KwaZulu-Natal. The function of the Board is to—

> "administer the affairs of the Trust and the trust land and without detracting from the generality of the aforegoing the Board may decide on and implement any encumbrance, pledge, lease, alienation or disposal of any trust land or of any interest or real right in such land."[15]

[12] 3 of 1994 which came into force on 25 April 1994.

[13] 9 of 1990.

[14] KwaZulu-Natal Ingonyama Trust Amendment Act 9 of 1997 (Amendment Act).

[15] Id Section 2.

[8] Due to the fact that our Constitution creates wall-to-wall municipalities, all land in this country falls under a municipality.[16] Consequently, part of the land administered by the Trust falls within the area of jurisdiction of the applicant, the eThekwini Municipality (Municipality).

*Relevant legislation*

[9] The present dispute relates to the rateability of land vested in the Trust and falling within the area of jurisdiction of the Municipality. The Municipality seeks an order declaring the land in question rateable so as to pave the way for it to levy rates for the period starting in May 1996 and ending in June 2005. As from 2 July 2005 the Local Government: Municipal Property Rates Act[17] (MPRA) came into force and brought about a whole new rating regime.

[10] For the period commencing in May 1996 and ending in June 2005 the authority to levy rates was conferred on municipalities in the province of KwaZulu-Natal by the Local Authorities Ordinance.[18] This Ordinance empowered municipalities to assess and levy rates upon immovable property within their areas of jurisdiction, once every financial year.[19] A municipal financial year ends on 30 June every year.

[11] In terms of the Ordinance the assessment and levying of rates was interlinked to estimates of revenue and expenditure made by a municipality for each financial year.

[16] Section 151(1) of the Constitution.

[17] 6 of 2004.

[18] 25 of 1974 (Ordinance).

[19] Id Sections 148-150.

In terms of section 105 of the Ordinance a municipality was obliged, by no later than 30 June of a given financial year, to frame these estimates for the following financial year and to assess the general rate, water rate and sewerage rate payable by the owner of immovable property in a municipal area. The rating was based on an existing valuators roll compiled in terms of the relevant legislation.

[12] The Ordinance laid down a complex procedure with which a municipality was obliged to comply before the assessed rates became due and payable. The first step was to have a notice containing the framed estimates published in a newspaper circulating in the area of a municipality. The notice had to state the amounts at which the rates were assessed and that the estimates would be available for inspection at the municipal office for a period specified in the notice. The notice had to indicate that the inspection would commence no less than seven days after its publication.

[13] Following the expiry of the period for inspection, a municipality was required to publish a further notice in a newspaper, once a week for two consecutive weeks and at intervals of no less than five days. This second notice had to specify the amounts at which the rates had finally been assessed and the last date for their payment in the relevant financial year. In terms of section 167 of the Ordinance, the rates in respect of any financial year became due and payable at least one month after the first publication of the second notice and had to be paid on or before the final date of payment specified in the notice.

[14] In addition, section 172 of the Ordinance required the municipality to give every owner of rateable property a notice stating the amount of rates owing in respect of each property and the final date for payment. This notice had to set out the number and description of the property to which it applied and its value as shown in the valuation roll. Failure to pay the assessed rates after the final date attracted a penalty of 18% annually. The scheme outlined above shows that a municipality was obliged to issue at least four notices before it could claim payment of rates. The scheme also indicates that a valuation roll was crucial to the assessment of rates. Compiling a valuation roll itself was an involved and complex process.[20]

[15] It is not disputed in this case that the Trust was not given a notice showing the amount of the rates owing during each financial year. Nor was it furnished with a notice stating the description of the relevant property and its value which had to be reflected on the valuation roll. It is apparent that the failure to issue the requisite notice was occasioned by, among other factors, the fact that the property which the Municipality seeks to be declared rateable was not valuated and did not form part of the valuation roll. The record does not show why the Municipality and its predecessors have failed to take the necessary steps during each relevant financial year.

[20] Id sections 155-158.

[16] In resisting the declaration that its property was rateable, the Trust invoked the Rating of State Property Act[21] (Rating Act). The Rating Act exempted state property under specified circumstances from the levying of rates by municipalities. It was repealed by the MPRA which is the current legislation regulating municipal rates. However, the Rating Act was in force at the time material to the present dispute.

[17] Section 3(3)(a) of the Rating Act provided:

> "(3) No rates shall by virtue of subsection (1) or otherwise be levied by a local authority on the value of State property—
>
> (a) held by the State in trust for the inhabitants of the area of jurisdiction of a local authority or of a local authority to be established".

[18] The text of the section shows that state property, held by the state in trust for the benefit of the inhabitants of the municipal area, was exempt from rates. "State property" in turn was defined in relevant part as—

> "immovable property within the area of jurisdiction of a local authority the ownership of which vests in the State or a governmental institution and is registered in the name or in favour of the State or the governmental institution".

*Litigation history*

[19] In December 2009 the Municipality instituted an application in the KwaZulu-Natal High Court, Durban (High Court) seeking that the property of the Trust which falls under its area of jurisdiction be declared rateable for the relevant period. The

[21] 79 of 1984.

Trust opposed the application and, as stated earlier, contended that its land was state property which was exempt from rates in terms of section 3(3)(a) of the Rating Act.

[20] Following its interpretation of the relevant provisions, the High Court held that the land in question was not state property and declared that it was rateable, by the predecessors of the Municipality, from May 1996 to October 1998 and, by the Municipality, from October 1998 to July 2005. The Trust appealed against the declaration to the Supreme Court of Appeal.

[21] The Supreme Court of Appeal construed the relevant provisions differently and held that the property in question constituted state property which was exempted from rates. The Supreme Court of Appeal overturned the High Court's declaration with costs.

*In this Court*

[22] The Municipality seeks leave to appeal against the judgment and order of the Supreme Court of Appeal. However, there are two hurdles it must clear before it can be granted leave. The first one is condonation. The Supreme Court of Appeal delivered its judgment on 1 June 2012. The Municipality lodged its application for leave in this Court on 28 August 2012, more than two months after the deadline for it to do so. Consequently, it was obliged to ask for condonation of its late lodging of the application.

[23] The other hurdle is that the Municipality is not only required to show that its case raises a constitutional issue. It must also establish that the interests of justice warrant the granting of leave in present circumstances. The element of the interests of justice is a requirement for both condonation and the granting of leave. Therefore, there is an overlap between the two enquiries, even though there may be factors peculiar to each enquiry. It is because of this overlap that I consider it convenient to undertake a single broad enquiry, encompassing both of them. For the Municipality will be entitled to appeal against the order of the Supreme Court of Appeal only if it obtains condonation and leave from this Court.

[24] Indeed in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*,[22] this Court laid down the standard that applies to the granting of both condonation and leave. In that case the Court said:

> "I now consider the application for condonation. It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if it is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the

[22] [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC).

> effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."[23] (Footnote omitted.)

[25] Among the relevant factors to be considered in this case are the extent and cause of the delay together with the prospects of success assume prominence. But before I consider these factors it is necessary to make a general observation on a disturbing matter relating to non-compliance with the Rules of this Court. In many cases these Rules are not observed and applications for condonation are made as a matter of routine. Sometimes the requests for condonation are made informally, in letters addressed to the Registrar, when the Rules are quite clear on what should happen in the event of non-compliance.

[26] The conduct of litigants in failing to observe Rules of this Court is unfortunate and should be brought to a halt. This term alone, in eight of the 13 matters set down for hearing, litigants failed to comply with the time limits in the Rules and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warning issued by this Court in the past. In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*,[24] this Court warned litigants to stop the trend. The Court said:

> "There is now a growing trend for litigants in this court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put

[23] Id at para 3.

[24] [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC).

> up flimsy explanations. This non-compliance with the time limits or the rules of court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks."[25]

[27] The statistics referred to above illustrate that the caution was not heeded. The Court cannot continue issuing warnings that are disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for the Court to require proper compliance with the Rules and refuse condonation where these requirements are not met. Compliance must be demanded even in relation to Rules regulating applications for condonation.

[28] As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case these factors may tip the scale against the granting of condonation.[26] In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay. Thus in *Van Wyk* this Court said in this regard:

> "An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing."[27]

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[25] Id at para 33.

[26] *S v Mercer* [2003] ZACC 22; 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4.

[27] *Van Wyk* above n 24 at para 22.

[29] The present delay was in excess of two months and the explanation given for it was this. The Municipal Manager thought it was desirable to have the municipal council's approval before an application for leave to appeal could be lodged. But because the council was on recess the approval could not be obtained. This explanation is unsatisfactory for a number of reasons. First, the Municipal Manager decided to seek approval despite legal advice to the effect that he had authority to pursue the appeal on the Municipality's behalf.

[30] Second, his own words in the affidavit filed in support of condonation contradict the reason given for the delay. He said:

> "Although I am advised that my authority probably extends to authorising the lodging of an application for leave to appeal and the prosecution of the appeal thereafter I felt it desirable in the circumstances that the matter should be referred to the executive committee of the Municipality."

[31] This statement illustrates that approval was to be sought from the executive committee and not the council which was then on recess. We are not told why the Municipal Manager did not ask the Mayor to convene a meeting of the executive committee for purposes of obtaining approval. These facts show plainly that council's recess was irrelevant to the question whether approval of the executive committee could be obtained because the committee could still meet even if council was on recess. Moreover, the conduct of the Municipal Manager, upon being advised that prospects of success on the merits were fairly good, is inconsistent with his desire to seek approval. He instructed the Municipality's lawyers to prepare the application for

leave, which was ready two days before the deadline for lodging it expired. If he wanted to, he could have lodged the application on time.

[32] Apart from being unsatisfactory, the explanation furnished did not cover the entire period. Part of the delay was unexplained, particularly after approval had been granted on 8 August 2012. An explanation for this period was necessary since by then the papers were ready for lodging, having been finalised on 20 June 2012. Consequently, the Municipality has failed to establish that its non-compliance with the relevant Rule was pardonable.

*Prospects of success*

[33] The enquiry into prospects of success applies to condonation and an application for leave and both should fail if there are no prospects that an applicant will succeed in the appeal. This enquiry leads us to the interpretation of section 3(3)(a) of the Rating Act. For if the Trust's land constitutes state property contemplated in the section, the declaration sought by the Municipality would fail, unless the other requirements of the section are not met.

[34] The Rating Act defined state property as land that belonged to the state or a governmental institution which was located within a municipal area. The location of the land was then important because not all land in this country had to fall under a municipality. But under the Constitution, this element of the definition has less

importance because all land must fall within a municipal area of one or the other municipality. Furthermore, a "local authority" under the Rating Act was defined as—

> "any institution, council or body contemplated in section 84(1)(f) of the Republic of South Africa Constitution Act, 1961 . . . and any institution, council or body established by or under any law and authorised in terms of any law to levy rates on the value of immovable property within its area of jurisdiction".[28]

[35] This illustrates that the type of municipality envisaged in the Rating Act is different from the current categories of municipalities. This is so because the Rating Act was intended to apply to municipal structures established under the apartheid order, hence the reference to the constitution of the apartheid government. But because the Rating Act continued to operate under the current democratic dispensation until it was repealed, it must be read consistently with the Constitution.[29]

[36] The Constitution is the starting point in an enquiry involving the determination of what the Rating Act means when it refers to state and state property. Of course one has to consider the language employed by the Rating Act to define these concepts and read it in the context of the Constitution. The Rating Act defined the state as an entity that included the Department of Posts and Telecommunications and a provincial administration. The Department referred to is no longer in existence.[30] Under the Constitution both the Department and a provincial administration would constitute organs of state. In other words, by referring to these institutions in defining the state,

[28] Section 1 of the Rating Act.

[29] Items 2-3 of Schedule 6 of the Constitution.

[30] Presently there is the Department of Communications.

the Rating Act contemplated what would be regarded as organs of state under the current Constitution. Accordingly, the object of the present enquiry must be to determine whether the Trust also is an organ of state.

[37] In terms of the Constitution "organ of state" means any department of state or administration in the national, provincial or local sphere of government or any functionary that exercises a power or performs a public function in terms of the Constitution or any legislation.[31] There can be little doubt that the Trust exercises public power and performs functions in terms of legislation. Therefore, it constitutes an organ of state.

[38] But counsel for the Municipality argued that the provision that required the property to be held in trust for the inhabitants of the area of jurisdiction of a municipality was not met. He contended that section 3(3)(a) of the Rating Act required that the property be held in trust on behalf of all of the inhabitants of a municipality. Because section 2(2) of the Trust Act proclaims that the Trust land be administered for the benefit of certain tribes, communities and residents of districts defined in the Schedule to the Trust Act, it was further submitted that the Trust Act

[31] Section 239 of the Constitution states that an organ of state means—

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
> (b) any other functionary or institution—
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation,
> but does not include a court or a judicial officer".

does not refer to all inhabitants of the Municipality. Accordingly, the argument concluded, the two statutes do not refer to the same group of people.

[39] The argument has no merit. When parts of the Trust's land were incorporated into the area of the Municipality, the residents of the incorporated parts became the inhabitants of the Municipality. The fact that the Trust Act does not refer to all the inhabitants of the Municipality does not mean that the land in question is not held in trust for the inhabitants of the Municipality. Section 3(3)(a) of the Rating Act does not require that before it can be invoked the state must hold the property in trust for all the inhabitants of a municipality.

[40] It is clear from the language of its empowering legislation that the Trust administers the land in question for the benefit of members of communities contemplated in the KwaZulu Amakhosi and Iziphakanyiswa Act and the residents of the district within which a municipality falls.[32] There are similarities between section 2 of the Trust Act and section 3(3)(a) of the Rating Act. Both speak of state land, held by an organ of state for the benefit of residents of a municipal area. The fact that the Trust administers the land in question for the benefit of the local residents means that the other requirement of section 3(3)(a) is met. The Supreme Court of Appeal was right in holding that the requirements of section 3(3)(a) of the Rating Act were satisfied and that the Trust land could not be declared rateable. Consequently, there are no prospects of success in the appeal.

[32] Section 2 of the Trust Act.

[41] Furthermore, it would not ordinarily be in the interests of justice for a municipality to be allowed to levy rates on immovable property, dating back eight to 17 years, without any explanation for its failure to do so within the relevant financial years. An underlying principle regarding the levying of rates is that they must be levied within the financial year in respect of which the rates are charged. This is required for good reason. Rates are based on the value of properties in each financial year. This value is fixed by a municipality on properties that must be on a valuation roll. The property owners have a right to dispute the value placed on their properties. The exercise of this right may, in an appropriate case, be undermined if a municipality is allowed to assess rates years after the relevant period. Moreover, the percentage at which the rates were increased was bound up with expenditure and revenue estimates, hence the notices issued had to contain information about both expenditure estimates and the rates to be levied.

[42] In addition, as I see it, it is unlikely that the Municipality could be permitted to unscramble the egg and undertake all preliminary steps it was obliged to take under the Local Authorities Ordinance which was then applicable. But more importantly, it may not be able to compile a supplementary valuation roll, including the Trust's property, as a step leading up to assessing rates. The Ordinance, in terms of which it had the power to compile valuation rolls, was repealed on 2 July 2005 by the MPRA. This Act permitted the continued use of existing valuation rolls and supplementary

valuation rolls until 2 July 2011 on which date its transitional provisions lapsed.[33] Even if the Trust's property was already on the valuation roll, it may not be legally possible for the Municipality to use that valuation roll after 2 July 2011. Accordingly, the rates for the relevant period are unlikely to be made exigible in favour of the Municipality.

[43] For all these reasons the applications for condonation and leave to appeal must fail.

*Costs*

[44] As the litigants in this matter are organs of state, the award of costs is unlikely to have a chilling effect on the pursuit of constitutional issues. There is nothing on the record indicating why the Municipality did not seek to recover the rates on the property in question during the relevant financial years. No explanation is given for this long delay. And there was no reason advanced why the costs should not follow the event. Therefore, it is fair in the present circumstances, to order the Municipality to pay the Trust's costs.

*Order*

[45] The following order is made:

The applications for condonation and leave to appeal are dismissed with costs, including costs of two counsel where two were employed.

[33] Section 89(3) of the MPRA.

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| For the Applicant: | Advocate D J Shaw QC and Advocate H S Gani instructed by Linda Mazibuko & Associates. |
| For the Respondent: | Advocate A J Dickson SC instructed by Mason Incorporated. |