



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 655/2010

In the matter between:

EMFULENI RESORTS (PTY) LTD

FIRST APPELLANT

**SUN INTERNATIONAL (CISKEI)
LIMITED**

SECOND APPELLANT

and

MAZIZINI COMMUNITY

FIRST RESPONDENT

**MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM**

SECOND RESPONDENT

**REGIONAL LAND CLAIMS
COMMISSIONER, EASTERN CAPE**

THIRD RESPONDENT

and

PRUDHOE COMMUNITY

INTERVENING APPLICANT

Neutral citation: *Emfuleni Resorts v Mazizini Community* (655/2010)
[2011] ZASCA 139 (23 September 2011)

Coram: Harms AP, Mthiyane, Snyders, Bosielo JJA and Petse
AJA

Heard: 31 August 2011

Delivered: 23 September 2011

Summary: Application for postponement of an Appeal – Governing principles discussed and application refused.

Competing land claim not brought to attention of the Land Claims Court – Order granted by it rescinded and matter remitted for consideration of competing claim.

Regional Land Claims Commissioner ordered to pay costs.

ORDER

On appeal from: Land Claims Court, Randburg (Bam JP sitting as court of first instance):

1. The third respondent's (the RLCC) application for postponement of the appeal is dismissed with costs.
2. The application by the Prudhoe Community for the rescission of the judgment under case no LCC 23/07 is upheld with costs.
- 3
 - (a) The appeal is struck from the roll.
 - (b) The costs of the appeal are to be paid by the third respondent (the RLCC).
4. The third respondent is directed to pay the costs relating to the proceedings in the LCC in case 23/07.

JUDGMENT

MTHIYANE JA (HARMS AP, SNYDERS, BOSIEO JJA and PETSE AJA CONCURRING)

Introduction

[1] The appeal arose from the decision of the Land Claims Court (Bam JP) in which Mazizini Community (the first respondent) was, in terms of s 35(1) of the Restitution of Land Rights Act 22 of 1994 (the Act), awarded land comprising the Fish River Sun Hotel Complex. The court made an order in the following terms:

- '1. The Mazizini Community is entitled to the restoration of the land which comprises the Fish River Sun Complex being presently a hotel and golf resort which

borders the Eastern Bank of the Fish River in the Eastern Cape and the Indian Ocean in terms of 'the Act' in settlement of the claim.

2. The claimant community is hereby granted leave through its representatives to obtain transfer of ownership of the above property to itself or to such other entity as its constitution allows.

3. The third respondent is to include the claimant community as a beneficiary of a State support programme for development.

4. There is no order as to costs.'

[2] The current owners of the land, the first and second appellants, were granted leave by the court a quo to appeal to this court. Their attack on the court's judgment was confined to the question of whether the order granted was appropriate. In their appeal the appellants contend for a compensatory award. The appeal was set down for hearing on 31 August 2011.

[3] Prior to the hearing of the appeal another community, the Prudhoe Community, who were not involved in the proceedings in the court a quo, lodged an application to this court on 19 May 2011 seeking an order in the following terms:

'1. Rescinding the order of the Land Claims Court made by the Honourable Mr Justice Bam under case number LCC 23/07 on 12 March 2010 awarding restoration of Farm 242, Farm 243 and Farm 235 in the Peddie district to the first respondent;

2. Directing the third respondent within 3 months of the date of this order, to refer the applicant's land claim along with any other competing land claims in respect of the land claimed by the applicant, to the Land Claims Court for adjudication;

3. Remitting the land claim of the Mazizini Community to the Land Claims Court for adjudication simultaneously with, or taking into account, competing claims in respect of the land claimed by the Mazizini Community;

4. Granting further or alternative relief;

5. Directing that the second and third respondents pay the costs of the application.'

The application for a postponement of the appeal and the rescission application.

[4] Before the commencement of argument on the application for rescission and remittal lodged by the Prudhoe Community, an application for a postponement of the appeal and the rescission application were made by the third respondent. The reason given for the indulgence sought was that the third respondent needed time to determine the validity of the claim by the Prudhoe Community. Mr Gladman Tom (Mr Tom), a representative who deposed to an affidavit on behalf of the Prudhoe Community, lodged a claim with the office of the third respondent on 10 December 1998, before the deadline which was set at 31 December 1998. The Mazizini Community's land claim was lodged at more or less the same time. The third respondent proceeded to investigate and pursue the claim of the Mazizini Community, the first respondent, and did nothing about the claim of the Prudhoe Community apart from publishing a notice in the Government Gazette in terms of s11 of the Act.

[5] The office of the Regional Land Claims Commissioner has now changed hands. The previous commissioner was Ms Linda Faleni. Her successor is Mr Sanjay Singh, the deponent for the third respondent. Neither of them are able to proffer any explanation why nothing was done about the claim of the Prudhoe Community. What Mr Singh says in his affidavit in support of the application for a postponement is that he needs time 'to enable [him] to verify the information in the file, interview the relevant officials previously involved in processing the matter and [to] determine the status of the claim lodged by Mr Tom in December 1998 and how it impacts on the land that is the subject of the appeal.' He is therefore in no position to explain why the claim of the Prudhoe Community (for a period of some twelve or thirteen years) was not

processed or the failure of that office to respond to the ongoing correspondence which it had received from the Legal Resources Centre. Nor is he in a position to explain why the court a quo and the other interested parties were not appraised of the existence or potential of a competing claim.

[6] Instead of explaining the delay the third respondent devoted much of his time in argument before us, attempting to impugn the validity of the Prudhoe Community's claim. The primary attack was premised on the assertion that the Community's claim was not validly lodged, in that Mr Tom, had submitted an incomplete claim form. Counsel for the third respondent was hard pressed to explain why this point was not raised at the time when the form was handed over to the third respondent in 1998 — why only now — some 13 years later.

[7] When counsel was pressed on why Mr Tom was not assisted with the completion of the blank form, if this was considered to be a problem, no explanation was forthcoming. In terms of the Act the third respondent is obliged to assist claimant communities. In terms of s 6(1)(b) of the Act the third respondent is required to 'take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims'. The third respondent was unable to say what steps, if any, were taken to assist Mr Tom with the lodgement of the claim as required by s 6(1)(b) of the Act. Having failed to render such assistance, I do not think it lies in the mouth of the third respondent to argue that the Prudhoe Community claim was not validly lodged. It is clear from the preamble to the Restitution of Land Rights Act that it is national legislation which was designed to give effect to the Constitutional obligation to provide 'for restitution of property or equitable redress to a person or community

dispossessed of property . . . as a result of past racially discriminatory laws or practices.’ The third respondent’s reliance on the incomplete form is an opportunistic and futile attempt to cover up for the dereliction of duty by the officials concerned, as the claim in respect of one farm, 203, was accepted and published in the Government Gazette.

[8] The application for a postponement was opposed by the appellants and the Prudhoe community. They submit that it was based upon an incorrect premise. They argued further that it is not for this court to, at this stage, debate the validity or otherwise of the Prudhoe Community’s claim. Nor is it the function of the Regional Land Claims Commissioner to adjudicate upon the merits of claims for restitution. According to the appellants what is required, is for a claimant to put up an arguable case.¹ This, they submit, the Prudhoe Community has done and are therefore entitled to have their claim considered by the Land Claims Court. I agree.

[9] It has also not been shown what purpose the postponement of the application would serve other than to delay the finalisation of the matter that has dragged on for more than a decade. Public interest requires that there should be an end to litigation.² More importantly the third respondent has failed to show that there is any justification for the postponement. The principles governing the granting or refusal of a postponement were summarized by the Constitutional Court in *National Police Service Union & others v Minister of Safety and Security & others* 2000 (4) SA 1110 (CC) para 4 where it was said:

‘The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in

¹*Mahlangu NO v Minister of Land Affairs & others* 2005 (1) SA 451 (SCA) para 13.

²*McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) para 28.

the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to) : whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.’ (Emphasis added.)

[10] The threshold requirement that an applicant for a postponement has to meet was put even more strongly in *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA) para 28 where Schutz JA said:

‘. . . [I]n order for an applicant for a postponement to succeed, he [or she] must show a “good and strong reason” for the grant of such relief.’

[11] In my view the third respondent has not made out a case for the granting of a postponement and has failed to meet any of the threshold requirements laid down for the granting of such relief.

Application for rescission and remittal

[12] Turning to the Prudhoe Community’s application for the rescission and remittal of the matter, the application is not opposed by the appellants. They consider the relief sought as being the most appropriate in the circumstances. The appellants argue that had the third respondent properly investigated the matter from the outset, the parties would not be in the position in which they find themselves now – a fact which has a bearing on the question of costs.

[13] As expected the Prudhoe Community's rescission and remittal application is opposed by the third respondent. The third respondent's primary submission is that the Prudhoe Community failed to show that a valid claim was lodged. It was submitted that validity or otherwise of the claim is a necessary pre-condition for the granting of the rescission application. I disagree. It is not for this court at this stage to determine the validity of the Prudhoe Community's claim. Disputes as to the validity of claims is a matter ultimately for the Land Claims Court to decide.³ On the papers before us it is clear that the Prudhoe Community has at the very least a potential claim on the very land in respect of which the court a quo granted a restoration order.

[14] An application for rescission may be brought under either s 11(5) and (5A) or s 35(11), although the application form ex facie complies with s 11, it is not necessary to decide the issue because it clearly satisfies the provisions of s 35(11). The relevant portion of which reads as follows:

‘(11) The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it

(a) . . .

(b) which was void from its inception or was obtained by fraud or mistake common to the parties;

. . .

. . .

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.’

[15] On the facts it is clear that neither the judge a quo nor the parties involved in the matter in the Land Claims Court were appraised of the

³*Afriblaze Leisure (Pty) Ltd and others v Commission on Restitution of Land Rights* [2010] 3 All SA 559 (LCC) at 560.

Prudhoe Community's competing claim or their potential claim. It is the third respondent who should have done that. As a result of this non-disclosure all the other interested parties including the court a quo laboured under the mistaken belief that the Mazizini Community were the sole claimants of the land in question. There can be no doubt that the Prudhoe Community have shown that they are 'affected' by the order made by the Land Claims Court as provided for in s 35(11) of the Act.

Conclusion

[16] In sum it is not in the interests of justice to postpone the appeal. On the contrary it would be in the interests of all the parties concerned in this matter if the order of the court a quo were set aside and to have the matter remitted to the court a quo for reconsideration.

Costs

[17] I turn briefly to the question of costs. It is clear that had the RLCC performed its statutory duties properly the appeal would have proceeded and the matter would not have had to be remitted to the LCC. Therefore the RLCC itself would not be seeking a postponement of the appeal. The blame for the striking off of the appeal from the roll, the rescission and remittal of the matter and the costs incurred as a result of all of this must inevitably fall squarely on the shoulders of the RLCC. So also is its failure to bring the competing or potential claim to the attention of Judge President Bam, the presiding officer in the court below. It follows that all the costs incurred in this matter should be borne by the RLCC.

Order

[18] In the result the following order is made:

1. The third respondent's (the RLCC) application for postponement of the appeal is dismissed with costs.
2. The application by the Prudhoe Community for the rescission of the judgment under case no LCC 23/07 is upheld with costs.
- 3 (a) The appeal is struck from the roll.
(b) The costs of the appeal are to be paid by the third respondent (the RLCC).
4. The third respondent is directed to pay the costs relating to the proceedings in the LCC in case 23/07.

K K MTHIYANE
JUDGE OF APPEAL

APPEARANCES

For Appellant: RG Buchanan SC

AD Dodson (for Prudhoe Community)

JR Brickhill

Instructed by:

Boqwana Loon & Connellan, Port Elizabeth

Webbers, Bloemfontein

For 1st Respondent:

XS Nyangiwe

Instructed by:

Makhanya Inc, East London

Matsepes Inc, Bloemfontein

For 3rd Respondent:

SM Mbenenge SC

Instructed by:

The Office of the State Attorney, Mthatha

The Office of the State Attorney, Bloemfontein