

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 7311/2012

MBONGENI THAMSANQA MADLALA

1ST APPLICANT

NTOMBIFIKILE MARRIAM SIBIYA

2ND APPLICANT

RAYMOND MPUMELELO MSOMI

3RD APPLICANT

REGINALD MFEKA

4TH APPLICANT

NOZIPHO BEATRICE ZWANE

5TH APPLICANT

ANGELINE NTOMBIZODWA MZINYANE

6TH APPLICANT

And

SENZO EDWARD MCHUNU, MEC FOR EDUCATION, KZN 1ST RESPONDENT

DEPARTMENT OF EDUCATION KZN

2ND RESPONDENT

Intervening Respondents

**MANGANGENI EMMAUS WESTMEAD RETURNERS
COMMUNITY TRUST**

3rd RESPONDENT

MUNTOZWAYO SOLOMON PHEWA

4TH RESPONDENT

BOBO ATHANASIOS MOBHOZI

5TH RESPONDENT

THEMBI AMMACLETTAJ MBILI

6TH RESPONDENT

HENDRY SANDILE HLENGWA

7TH RESPONDENT

SIZAKELE PAULINA MOLEFE

8TH RESPONDENT

JUDGMENT

DELIVERED ON: 14 DECEMBER 2016

MNGADI AJ:

[1] The six applicants in their capacity as trustees of a trust seek confirmation of a rule nisi initially brought against first and second respondent in the following terms:

- (i) Staying the building of Tshelimnyama Primary School,
- (ii) Directing removal of equipment or other movable items utilised in order to commence the building of the Tshelimnyama Primary School,
- (iii) Interdicting respondents from trespassing on any land belonging Mangangeni Emmaus Westmead Returners Community Trust.

[2] The applicants are the Trustees of Manganeni Emmaus Westmead Returners Community Trust. The first respondent is the MEC for Education in KwaZulu-Natal and the 2nd respondent is the KwaZulu-Natal Department of Education. Westmead Returners' Community Trust.

[3] The 1st applicant in the founding affidavit stated that the applicants were duly appointed Trustees of Mangangeni Emmaus Westmead Returners' Community Trust (the trust). He stated that the trust was formed on or about 4 April 2002 with the object of, inter alia, to acquire land, hold, and developing, improving and managing such land in common for agricultural, commercial and residential purposes for the benefit of its members.

[4] The 1st applicant stated that in violation of the rights of the beneficiaries of the Trust, the 1st and 2nd respondents have arranged to build Tshelimnyama Primary School (the school) on the privately owned land of the trust. Despite objections, the 1st and 2nd respondents have continued with the levelling of the land in question, demarcated the building area and have dug trenches on the land. The land in question was earmarked by the applicants for the construction of a housing project for the beneficiaries of the Trust.

[5] The 1st and 2nd respondents stated that they were initially not aware that the site in question was owned by the Trust not the KwaZulu-Natal Provincial Government. Having appointed a construction company to commence the building of the school, it was brought to their attention that the site was owned by the trust. They later held a meeting in which the trustees for permission to build a primary school on the site, and the necessary permission was granted with an undertaking that a formal written agreement will be concluded as envisaged in Section 14 (1) of the South African Schools Act, 1996, (Act No 84 of 1996) . Later, it transpired that there was a dispute as to who were legitimate trustees of the trust. The building of the school was for the benefit of the beneficiaries of the trust. The applicants in reply stated the persons who granted the permission had been removed as trustees of the trust.

[6] An application to intervene seeking an order to join 3rd, 4th, 5th, 6th, 7th and 8th respondents (joined respondents) as co-respondents in the application was launched. The basis of the joinder as co-respondents was that the persons who sought the joinder were the legitimate trustees of the trust not the applicants. The application to intervene was granted except the part seeking an interdict. The joined respondents stated that applicants were not the legitimate trustees of the trust. They, in their capacities as trustees of the trust, granted consent to the respondents for the building of the school on the site in question. Further, that in their capacities as legitimate trustees of the trust ratified the granting of permission to 1st and 2nd respondents to build the school.

[7] At the commencement of the hearing applicants counsel handed in a document titled "ORDER PRAYED". She stated that she was handing in the document to be the order the applicants were praying in the place of the order prayed for in the notice of motion. Counsel for 1st and 2nd respondents objected to the handing in of the document in that it was not in accordance with the rules of court and that it was referring to payment of compensation as damages and payment of rent for building the school on the land belonging to the trust. Counsel for 3rd to 8th respondents also objected to the handing in of the document. The court ruled that the document could not be handed in that manner which not in accordance with the rules of court relating to amendment of pleadings. I refused to take into consideration the document in any manner.

[8] It was common cause at the hearing between the parties that the 1st and 2nd respondents have built the school to completion. The school was opened in July 2015 and it is currently in operation.

Application to amend

[9] After the intervention of the joined respondents was granted, the joined respondents applied to amend the order prayed in the notice of motion deleting paragraphs 1(b), (c), (d) and 2 and substituting therefor the following:

- 1) The 4th to 8th Respondent (joined applicants) are the lawful trustees,

- 2) The other applicants are interdicted and restrained from dealing with assets of the Trust ,
- 3) (3) Main application be dismissed with costs.

Applicants in the main application as well as 1st and 2nd respondents objected to the proposed amendment. The essence of the amendment is to obtain a relief in the form of a declaratory order of who the lawful trustees of the trust are.

[10] The granting or refusal of an application for the amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in the light of all the facts and circumstances before it. Amendments will always be granted unless if it would cause an injustice to the other side which cannot be compensated by costs or unless the parties cannot be put back, for purposes of justice, in the same position as they were when the pleading which is sought to amend was filed. It must be shown that it is in the interest of justice to amend the pleading.

[11] An amendment, if allowed, which would not facilitate the determination of the real dispute between the parties and would be inconsistent with the declaration cannot be allowed. The primary object of the amendment must be to obtain a proper ventilation of the dispute between the parties. (See *Herdennych v Colonial Mutual Life Assurance Society Ltd* 1920 CPD 67 at 70; *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 637A-641C)

[12] Rule 28 of the Uniform Rules regulates amendments of pleadings. It consolidates the procedure relating to amendment of pleadings. The joined respondents seek to amend the notice of motion. The proposed amendment is opposed by applicants who instituted motion proceedings. The proposed amendment has the effect of replacing relief prayed for in the notice of motion with relief sought by the joined respondents. It causes an embarrassment to the applicants. The new relief results in involving the 1st and 2nd respondents in the dispute between the joined respondents and the applicants which will result in a long drawn litigation. There is no provision in rules for a party to amend a pleading of his opponent.

[13] The point of determining what is the real dispute is before the amendment. The amendment sought must be to properly ventilate the real dispute prior to the amendment. It was found that the intervening respondents be joined as they had a real and substantial interest in the dispute between the applicants and 1st and 2nd respondent in the sense that they claimed to be the lawful trustees of the trust in whose land the school was being built..

[14] The joined respondents have no issue with the 1st and 2nd respondents. They support the 1st and 2nd respondents against the applicants. They aver that in their capacities as trustees of the trust they gave permission to the 1st and 2nd respondents to build the school in the site in question. The sought amendment seeks to place the issue between the joined respondents and the applicants as the real issue in dispute, the resolution of which will facilitate the resolution of the real issue between the applicants and respondents.

[15] The issue between the applicants and the 1st and 2nd respondents, before the joined respondents were joined, was whether the 1st and 2nd respondents were acting lawfully by building a school on a site owned by the trust, if not, whether the applicants were entitled to obtain an interdict interdicting and restraining the 1st and 2nd respondents from building in the site in question.

[16] The intervention of the joined respondents related to protecting their interest in the issue between applicants and 1st and 2nd respondents. It was not meant to seek to resolve the issues of dispute between the applicants and the joined respondents.

[17] The building to completion of the school on the site has caused the issue between the applicants and the 1st and 2nd respondents to fall away. It has been rendered moot. The granting of the amendment will result in a new issue in dispute replacing the issue that has been rendered moot. It will not ventilate the original issue but it will replace the original issue. Consequently, the amendment cannot be allowed. The application for amendment falls to be dismissed with costs. .

[18] The applicants seek an order interdicting the 1st and 2nd respondents. An interdict is appropriate only when future injury is feared. Where the wrongful act causing an injury has already occurred, either it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated. If the infringement is one that *prima facie* appears to have occurred once and for all, then the applicant fails in establishing a reasonable apprehension that the harm is likely to be repeated. (See *Phillip Morris Inc. v Marboro Shirt Co. SA Ltd* 1991 (2) SA 720 (A) at 735B)

[19] The point of whether an injury has occurred, is likely to occur or is continuing to occur is at the time the court is called upon to determine whether to grant an interdict or not. The school was built to completion and opened in July 2015. The litigation commenced in August 2012. The joined respondents were granted leave to intervene in June 2013.

Application to join others as applicants and for an interdict

[20] The joined respondents on 26 March 2016 filed an application in the form of a *rule nisi* as a joinder/interdict application. They sought an order in the following terms:

- 1) Joining **Goodenough Sithembiso Mngadi, Thamsanqa Blessing Khuboni, Jeanete Nomusa Hlongwa and Cabangani Fredoline Mota** as co-applicants in the main application,
- 2) To interdict the said persons and applicants from acting as trustees of the trust,
- 3) Declaring said persons and applicants not trustees of the trust,
- 4) Declaring the join applicants the lawful trustees of the trust.

The joined respondents prayed that 2) and 3) above be ordered to operate an interim order with immediate effect.

[21] The motivation for the application was that the said persons and the applicants in the main application had been issued with letters of authority by the Master as trustees of the trust and were acting as such but in fact they were not the lawful trustees of the trust. The *rule nisi* in earlier proceedings was issued including an order that prayers 2) and 3) operate as an interim interdict.

[22] The object of the joinder/interdict application is apparent from the orders sought. The said persons were sought to be joined not because it was necessary to join them for purposes of the main application. It was for the convenience of the joined respondents to have the joined respondents declared lawful trustees and have applicants and the said persons interdicted from acting as trustees. Where the joinder is sought on the basis of convenience the court has discretion to grant the joinder. It is a prerequisite that the right to relief is dependent upon determination of substantially the same question of law or fact. The relief sought in the main application having become moot, there is no relief dependent on the same question of law or fact that remains to be determined. Even if the issue of the *locus standi* of the applicants has to be determined, once the interdict cannot be granted because the building of the school has rendered the issue moot, it becomes, for purposes of these proceedings, not necessary to make a decision on the issue of *locus standi* of the applicants. It follows that the application for joinder of the said persons and an interdict falls to be dismissed. (See *Vitorakis v Wolf* 1973 (3) SA 928 (W) at 931; Rule 10(1) Uniform Rules)

[23] The school had been built to completion and became operational in July 2015. The application for joinder/ interdict was brought by the joined respondents when they knew that the question of interdicting the building of the school had become moot. It follows; the rule nisi ought to be discharged with costs.

Costs

[24] The 1st and 2nd respondents, despite the pending litigation, proceeded to build the school. There was no interdict against them not to do. An attempt to obtain an interim interdict against them had failed. There is no dispute relating to the need for a school and that it was for the benefit of the community. The intervention of the joined respondents meant that the litigation might be drawn out. The joined respondents supported the building of the school. The issue raised in the main application remains unresolved. The need to resolve it on merit has fallen away due to subsequent events.

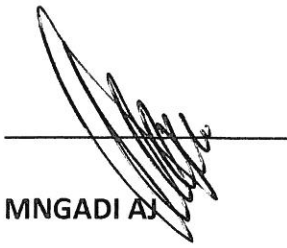
[25] The applicants opposed the building of the school on the land owned by the trust on the basis that it was without the consent of the trust. The 1st and 2nd

respondents did not have any written agreement with the trust relating to the building of a school on land belonging to the trust. The issues for determination fell away due to no fault on the part of the applicants. Although the applicants have not succeeded, it is not on merits. It will be unfair to order them to pay costs of any party. The joined respondents have been found to have substantial interest in the dispute between the applicants and the 1st and 2nd respondents. That dispute on merits remains unresolved. The need to resolve it in these proceedings has been rendered unnecessary due to subsequent events.

[26] The purpose on an award of costs is to indemnify a successful litigant for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation. (See *Fexas Co (SA) v Cape Town Municipality* 1926 AD 469 at 488),

In the result I order as follows:

- a) the application to amend is refused. The 4th to 8th respondents (both inclusive) are ordered to pay costs jointly and severally, the one paying the others to be absolved.
- b) The *rule nisi* to join others as applicants and the interdict relating thereto is discharged with costs. The fourth to eight respondents (both inclusive) are ordered to pay costs jointly and severally, the one paying the others to be absolved.
- c) The *rule nisi* issued in the main application is discharged. No order as to costs.



MNGADI AJ

APPEARANCES

Case Number	:	7311/2012
Applicants	:	M T Madlala + 5 others
Represented by	:	J Gates
Applicant's Attorneys	:	M W Ngcobo
1 st & 2 nd Respondent	:	MEC for Education & Department of Education, KwaZulu-Natal
Represented by	:	M. Nqala
3 rd to 8 th Respondent Community Trust & 5 others	:	Mangangeni Emmaus Westmead Returners
Represented by	:	M. E Mbhele
1 st & 2 nd Respondent's Attorney	:	State Attorney: KwaZulu-Natal
3 rd & 8 th Respondent's Attorney	:	M.E Mbhele & Co. 031 701 0271
Date of Hearing	:	25 November 2016
Date of Judgment	:	14 December 2016