

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, MTHATHA**

CASE NO: 1256/13
Date Heard: 6 June 2013
Date Delivered: 13 June 2013

In the matter between:

MBIZANA DEVELOPMENT FORUM

Applicant

and

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

1st Respondent

**MASTER OF THE HIGH COURT
PIETERMARITZBURG**

2nd Respondent

**EASTERN CAPE GAMBLING AND
BETTING BOARD**

3rd Respondent

NOOKUGCINA NGCANE MADIKIZELA-RENENE

4th Respondent

ZAMILE DAVID QUNYA

5th Respondent

MARY MONICA XOLOKAZI MACOBA

6th Respondent

ELIAS ELTON OGLE

7th Respondent

LUBABALO VINCENT BULALA

8th Respondent

EUGENIA ZODWA LANGAZANA

9th Respondent

SANDISO WILTON MVUNDLA

10th Respondent

TRANSKEI SUN INTERNATIONAL (PTY) LTD

11th Respondent

MBIZANA COMMUNITY SPV (PTY) LTD

12th Respondent

STANDARD BANK OF SOUTH AFRICA

13th Respondent

JUDGMENT

GOOSEN, J:

- [1] This is an application brought on an urgent basis in which the applicant seeks to review and set aside the decision of the second respondent to appoint fourth to tenth Respondents as trustees of the Wild Coast Mbizana Development Trust. The applicant also seeks to interdict the fourth to tenth respondents from performing any functions of the said Trust or as directors of Transkei Sun International Limited or Mbizana Community SPV (Pty) Ltd. The applicant also seeks an order directing the third respondent to account to it and to the Trust for the management of the financial affairs of the Trust for the period when there were no appointed Trustees of the Trust. The application is opposed by the third, fourth, fifth, seventh, ninth, tenth and twelfth respondents. The remaining respondents abide the decision of the court.
- [2] In opposing the application the third respondent has filed an affidavit dealing only with the question of urgency. The fourth, fifth, seventh, ninth, tenth and twelfth respondents have filed substantive affidavits in opposition in which a number of defences are raised, including points taken in respect of the lack of urgency in the application; the failure to join the Trust; the court's lack of jurisdiction and the applicants alleged lack of standing.

- [3] It is in my view unnecessary to set out in any detail the background giving rise to this application. It suffices to state that as a condition to the granting of a casino licence to Transkei Sun International Ltd (Transsun), it was required that a trust be established to benefit the community residing in the area where the casino was to be operated. Transsun accordingly established the Wild Coast Sun Mbizana Development Trust (the Trust) in or about 2004. The operation of this Trust occasioned some controversy. In August 2009 Dawood J granted an order interdicting the then Trustees from carrying on their duties as trustees and authorised the chief executive officer of the third respondent to manage and administer the affairs of the trust. That order was made final in May 2010 by Notshe AJ. The learned judge directed that “within six” weeks of the issue of this order, new trustees be appointed from among nominees submitted by the community of the Mbizana magisterial district in terms of clause 6.2 of the trust deed.
- [4] It appears that the third respondent appointed an independent party to facilitate the appointment of trustees to the Trust. As a result an advertisement was placed in the Daily Despatch newspaper on 17 January 2012 calling for nominations. The lengthy delay between the issue Notshe AJ’s order and this advertisement is not explained. No issue was however taken with this. The appointment process continued thereafter and culminated in the third respondent approving the names of nominees and submitting them to the second respondent at the end of May 2012. What followed was a process of acceptance

by the nominated persons. The third respondent requested second respondent to appoint fourth to tenth respondents in October 2012. On January 2013 the second respondent issued letters of authority to 4th to 10th respondents to act as trustees. It is this decision which the applicant now seeks to challenge and set aside.

- [5] As indicated the respondents deny that the application is urgent and seek on that basis to have it either dismissed or struck off the roll. In addition it is contended that there is a material non-joinder of the Trust which is not cited in these proceedings on the basis that the interim relief sought by the applicant will have a material effect on the operation of the Trust. Accordingly the Trust has a direct and substantial interest in these proceedings and ought to have been joined. Counsel for the applicant argued that the court was free to grant interim relief and order that the Trust be joined thereafter.

It is, however, unnecessary to deal with the alleged non-joinder or the challenge to the jurisdiction of this court. That is so because, for the reasons I shall set out below, the applicant has failed to establish any grounds for the urgent adjudication of this matter.

- [6] It is common cause that second respondent issued letters of authority to the 4th to 10th respondents to act as trustees on 11 January 2013. No action appears to have been taken by the applicant until 25 March 2013 when a letter was addressed to each of the second and third respondents in which the applicant noted its objection to the

appointment of the 4th to 10th respondents as trustees. Significantly the letter stated that unless the applicant received a response to the letter within three days the applicant would approach the High Court for appropriate relief and a costs order. No response was in fact received. On 9 April 2013 the applicant's attorney again noted its objection to the appointment of the 4th to 10th respondents.

[7] The appointment of the 4th to 10th respondents as trustees was confirmed by publication in the Daily Dispatch newspaper on 20 May 2013. This application was launched on 30 May 2013. No explanation is given for the apparently supine attitude of the applicant between 11 January 2013 and 30 May 2013 when this application was launched. Nor is there any explanation offered as to why this application, seeking as it does interim relief in the form of interdicts against the 4th to 10th respondents pending the review and setting aside of the letters of authority issued on 11 January 2013, could not have been initiated at an earlier stage. No explanation is given as to why the applicant did not carry through on its threat to launch proceedings in March 2013.

[8] An applicant who seeks to have its non-compliance with the ordinary rules relating to notice periods, forms and service of court process condoned is required to set out a reasonable and satisfactory explanation for such non-compliance. In addition where it is contended that the matter warrants urgent enrolment and adjudication other than in the ordinary course of proceedings, the applicant must allege facts

which establish that a hearing in due course will not meet the exigencies of the matter and that it will suffer prejudice. These grounds of urgency must be set out in the applicant's founding affidavit as required by Rule 6(12)(b), as well as in a certificate of urgency certified by the legal practitioner appearing for the applicant, in accordance with the Joint Rules of Practice of this court.

[9] In this instance the applicant has failed to make out any case for the urgent adjudication of the matter. The allegations upon which it relies consist of broadly stated allegations of alleged mismanagement of the trust which relate to a period which extends back to the period during which the third respondent was managing the trust pending the appointment of trustees. The lapse of time between the issue of the letters of authority which it seeks to have set aside and the launch of these proceedings is not addressed. In addition, no time periods for the filing of a notice of opposition and opposing affidavits are stipulated in the notice of motion. This departure from the ordinary form of notice of motion is not justified by any allegations set out in the applicant's papers.

[10] It was submitted on behalf of the applicant that it must be accepted that the matter is urgent enough to warrant interim relief because a certificate of urgency had been filed pursuant to Rule 12 of the Joint Rules of Practice of the Eastern Cape and a judge had directed that the matter be enrolled. In my view the submission misconceives the

purpose of a certificate of urgency as is required by Rule 12 of the Joint Rules. The Rule provides that:

(a) In urgent applications:

- (i) The practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the application papers are placed before the judge and in which the reasons for urgency are fully set out. In this regard, sufficient particularity is to be set out in the certificate for the question of urgency to be determined solely therefrom and without perusing the application papers. The certificate of urgency will be placed before the judge who will make a determination solely from that certificate as to whether or not the matter is sufficiently urgent to be heard at any time other than the normal motion court hours. Should he or she determine that it is sufficiently urgent, he or she will then give directions as to the time and place, when and where the application is to be heard.
- (ii) Details of why the applicant alleges a matter is urgent should also be set out in the founding papers.

[11] The principal purpose of the Rule is to regulate the hearing of urgent applications outside of the normal motion court hours. In circumstances where a party seeks to have a matter heard other than in normal motion court hours, the hearing of such matter is subject to the duty judge being satisfied that it is sufficiently urgent and the directions of the judge as to the time when the matter will be heard. It is for this reason that a detailed certificate is placed before the judge. This much is clear from the language of the Rule.

[12] In the event that a party intends to move an application (whether utilising the short form of notice or upon abridged time periods) on a normal motion court day, a certificate of urgency which complies with

the Rule must be filed before the application papers are placed before the judge who will hear applications on the relevant motion court day. This much too is apparent from the first portion of the Rule.

[13] The Rule only contemplates that directions will be issued in respect of matters to be heard other than during normal motion court hours. A direction issued by a judge in chambers that a matter be enrolled on an ordinary motion court day can therefore mean no more than that the judge concerned did not consider that the matter warranted his or her attention outside of normal motion court hours, leaving the question as to the justification for urgent enrolment on a motion court day to be considered by the judge presiding over that motion court. Accordingly, the direction issued in this matter does not mean that the application must of necessity be dealt with as one of urgency.

[14] For the reasons already mentioned I am of the view that the applicant has failed to make out a case for the urgent enrolment of this matter. I accordingly make the following order:

- a) The application is struck off the roll.
- b) The applicant is ordered to pay the respondents' costs occasioned by the enrolment and hearing of the application on 6 June 2013.

G GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR APPLICANT: Mr Mtshabe

FOR RESPONDENTS: Mr Kincaid
Mr Bodlani