

SOUTH AFRICA / JUDGMENT

Ngishe v Sontundu and Others (380/2013) [2014] ZAECHMHC 20 (27 May 2014)

[2014] ZAECHMHC 20**COURT**

Eastern Cape High Court, Mthatha

BEFORE

Stretch

CASE / FILE NUMBER

380/2013

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE LOCAL DIVISION, MTHATHA****CASE****NO. 380/2013****In**

the matter between:

MAGCALEKA
NGISHE
Applicant
and
ERIC
SONTUNDU First
Respondent
XOLANI
NGOTYA Second
Respondent
NOKHAYA
QUVANE Third
Respondent
MIKEL
DIBELA Fourth
Respondent
NOMPUMULELO
TIBE Fifth
Respondent
MPISITYA
MCANJANA Sixth
Respondent

LATHUKUZA
DUKADA Seventh
Respondent
MFUNEKO
MATIKINCA Eighth
Respondent
NTOMBENTSHA
DUKADA Ninth
Respondent
MZODUMO
GXAGXISA Tenth
Respondent
ZONGEZILE
TAMBO 11th
Respondent
NTOMBIZANDILE
GIQWA 12th
Respondent
NOSIPHO
KWAZA 13th
Respondent
THE
MINISTER OF LAND
AFFAIRS 14th
Respondent
THE
PREMIER OF THE EASTERN
CAPE 15th
Respondent
THE
M.E.C. FOR LOCAL
GOVERNMENT 16th
Respondent
THE
HEAD OF THE XESIBE TRADITIONAL
AUTHORITY 17th
Respondent
THE
CHAIR OF THE HOUSE OF TRADITIONAL LEADERS 18th
Respondent
FUNIKA
NCWANA 19th
Respondent
CHIEF
ZANODUMO
MTIRARA 20th
Respondent
THE
QOKOLWENI COMMUNITY
TRUST 21st
Respondent

JUDGMENT**STRETCH J:**

- [1] The applicant alleges that he is a headman of the Qokolweni Administrative Area of Mqanduli (hereinafter referred to as “the area”). He has launched an application for the following final relief:
- (a) That the first 13 respondents be interdicted from performing headmanship duties in the area referred to unless he, who is responsible for these duties by virtue of his position as duly appointed headman of the area and as stipulated in section 24 of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 (“the Act”), requests them in writing to do so;
 - (b) That the first 13 respondents be interdicted from demarcating and allocating residential sites from the commonage of the aforesaid area without the written approval of the 14th and the 17th respondents;
 - (c) That the first 13 respondents, the 20th respondent and the 21st respondent be directed to advise all persons to whom they have already allotted sites to discontinue the development of these sites;
 - (d) That the first 13 respondents be interdicted from issuing permits for the mining of building sand or for tree felling in the aforesaid area;
 - (e) That the second, third, fourth, fifth and eighth respondents be directed to hand over to the 17th respondent the community hall keys, receipt books, bank books and money in their custody pending the finalisation of these proceedings;
 - (f) That the second, third, fourth, fifth and eighth respondents should refer any persons in need of residential sites, sand or poles to the 17th respondent until further notice;
 - (g) That the letter dated 24 August 2006, written by the 19th respondent advising the 18th respondent that the applicant had resigned from his position as headman of the aforesaid area be set aside and declared to be invalid;
 - (h) That any respondent opposing the application be directed to pay the costs thereof.
- [2] The first 13 respondents (hereinafter referred to as “the respondents”) have opposed the application. They have raised certain points in limine which all, in one form or the other, aver that the applicant has failed to make out a *prima facie* case against them in his founding papers. The objections in limine are also to the effect that the applicant has not established that he has *locus standi in iudicio* to launch the application, nor has he shown upon what authority he relies to do so. Other than that, it is also contended on behalf of the respondents that the applicant has failed to establish that he has complied with the requisites for the granting of final interdicts.

- [3] It goes without saying that a finding in the respondents' favour on any one of these issues raised would have the effect of disposing of the application in its entirety.
- [4] This is so because the applicant has elected to approach this court for relief which involves the final determination of the rights of the parties. A final interdict is granted 'in order to secure a permanent cessation of an unlawful course of conduct or state of affairs' (Jones & Buckle Civil Practice 81).
- [5] For the grant of such an order there are three requisites, all of which must be present (see *Setlogelo v Setlogelo* 1914 AD 221 at 227). They are: a clear right, an injury committed or reasonably apprehended and the absence of any other satisfactory remedy.
- [6] Being a drastic remedy from the respondents' point of view (probably largely for that reason), and in the court's discretion, a court will not in general, grant an interdict when an applicant can obtain adequate redress in some other form of ordinary relief. An applicant for a permanent interdict must allege and establish, on a balance of probability, that he has no alternative legal remedy: see *Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 (W) at 965H.
- [7] The author Nathan suggests that a more precise rendering of 'clear right' would be a 'definite right': see *Nathan Interdicts* 6n1; *Edrei Investments 9 Ltd (in Liquidation) v Dis-Chem Pharmacies (Pty) Ltd* 2012 (2) SA 553 (ECP) at 556B-C. Following this suggestion, *Erasmus J in Welkom Bottling Co (Pty) Ltd v Belfast Mineral Waters (OFS) (Pty) Ltd* 1967 (3) SA 45 (O) at 56 held that 'eintlik is dit 'n reg wat duidelik bewys is' (a right clearly established). The word 'clear' relates to the degree of proof required to establish the right and should strictly not be used to qualify the

right at all (*Edrei supra* at 556C-D). The existence of a right is a matter of substantive law. Whether that right is clearly established is a matter of evidence (*Jones & Buckle supra* 85n607). In order to establish a clear right the applicant must, by way of evidence, prove the existence of this right which he seeks to protect on a balance of probability: see *Nienaber v Stuckey* 1946 AD 1049 at 1053-4; *Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier, SA Polisie, Noord-Transvaal* 1972

- (1) SA 376 (A) at 396H. If the parties do not request such issues to be referred for trial or evidence in terms of rule 6(5)(g) of the rules governing the conduct of proceedings in this court, factual disputes must be resolved by applying the test enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-G, the effect of which is that the interdict can only be granted if the facts as stated by the respondents, together with the admitted facts set forth in the applicant's papers, justify the granting thereof (*Erasmus Superior Court Practice Supplementary Volume Service* 39, 2012 E8-6D).

[8] Over and above this requirement, rule 6 of the uniform rules of this court states that with the exception of petitions, all applications must be brought by way of notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief. These facts must be set out simply, clearly, in chronological sequence and without argumentative matter. The statement of facts supporting the motion must at least contain the following information:

(a) The applicant's right to apply, that is his *locus standi in iudicio*. The fact that the parties to the application have the necessary standing must appear *ex facie* the pleadings (see *Mars Inc v Candy World (Pty) Ltd* 1992 (1) SA 567 (A) at 575; *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1057G-H). By the same token a respondent who chooses to place in dispute the applicant's right to apply must

do so in clear and unambiguous terms. Thus, where a bare denial of authority is raised or where surrounding circumstances clearly confirm the existence of authority, minimal formal evidence is required (see *Tattersall v Nedcor Bank Ltd* [1995] ZASCA 30; 1995 (3) SA 222 (A) at 228F-H; *Cekeshe v Premier, Eastern Cape* 1998

(4) SA 935 (TK) at 952A-B).

(b) The facts indicating that the court has jurisdiction.

(c) The cause of action on which the applicant relies (see *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636F). The respondent is entitled to raise an objection in limine that the founding affidavit in this regard does not make out a *prima facie* case for the relief claimed (*Erasmus supra* Service 39, 2012 B1-38B).

(d) The evidence in support of the application. In application proceedings the affidavits take the place not only of pleadings in an action, but also of the essential evidence which would otherwise be led at a trial (see *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012

(2) SA 542 (SCA) at 50G-551C). The rule is that the necessary averments upon which the applicant relies must appear in his affidavit, as he will not generally be allowed to supplement it by adducing supporting facts in reply (see *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at 348A-B; *Betlane v Shelly Court CC* 2011

(1) SA 388 (CC) at 396C). Facts could be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are referred to as secondary facts, which, in the absence of the former, are nothing more than the deponent's own conclusions

and do not constitute evidential material capable of supporting a cause of action (see for example *Willcox v Commissioner for Inland Revenue* 1960

- (4) SA 599 (A) at 602A). It goes without saying too that the source of the deponent's information must be given. Furthermore, it is not open to a party merely to annex to his affidavit documentation and to request the court to have regard to it. What is required, is the identification of the portions of these documents on which reliance is placed and a clear indication of the case which is sought to be made out on the strength of these papers (see *Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008
- (2) SA 184 (SCA) at 200C; *Van Zyl v Government of the Republic of South Africa* 2008
- (3) SA 294 (SCA) at 306D-E). It cannot be expected of a party or of this court for that matter to wade through lengthy annexures to the deponent's affidavit and then to be constrained to speculate on the relevance of the information contained in these documents (*Wevell Trust supra* at 200D).
- [9] The applicant alleges that he is suing in his personal capacity and in his official capacity as the duly appointed headman of the administrative area. He does not put up any evidential matter capable of supporting a cause of action in his personal capacity.
- [10] He seeks, in his notice of motion, a bouquet of relief against various parties, ranging from prohibitory interdicts relating to the performance of the "duties" (as a general term) of a headman, the general allocation of residential sites without any specifics, prescripts regarding vague messages to be conveyed by some of the respondents to undetermined recipients, the general issuing of diverse permits, that this court should act as a registrar of obligations and in effect, as a general factotum, the exceptionally wide interdicting of books of accounting not described and money not quantified, together with certain other relief which, despite this court's best endeavours to elucidate, still remains as clear as mud.
- [11] The respondents have taken points in limine that the applicant has not established his locus standi and together with that has, in any event, failed to make out a prima facie case for the relief sought.
- [12] I am constrained to agree. It goes without saying, that if the applicant fails to establish his legal standing, he cannot be said to have a clear right or a definite right which is the first requisite for final relief of this nature. Even
- after having read the papers in reply, I still fail to understand on what basis the applicant is before me.
- [13] The applicant says that he launches these proceedings inter alia as duly appointed headman of the area. To this end he annexes to his founding papers what purports to be a copy of a certificate of appointment and recognition purportedly signed by the 16th respondent during March 2010, backdating the appointment to 1993.
- [14] Also annexed to his founding papers is a document bearing two signatures which reads as follows:

‘Extract for minutes of representatives of Qokolweni Headman’s Committee held on 15 February 2013 ... It was resolved that MAGCALEKA ZWELIXOLILE DARRINGTON NGISHE may take his dispute with ERIC SONTUNDU and those who are with him in the disturbance of MR NGISHE’S headmanship powers.’

[15] The applicant says that this is a resolution by the local community of the area authorizing him to take the problem of the area to a court of law. In my view the applicant, in attempting to furnish a resolution from the community members, concedes (and correctly so) that such a resolution is necessary before he can approach this court for relief. Insofar as the applicant seeks to persuade this court that this is a valid resultion, he has failed. The document is nonsensical. Firstly, it does not specify the nature and the essence of the dispute referred to. Secondly, it does not say where the dispute should be taken. Thirdly, it does not identify the nature of the disturbance referred to. Fourthly, it does not explain what these headmanship powers are. And fifthly, there is no description of the capacities of the signatories.

[16] Accordingly, and on the ground of lack of authority alone, the application should fail, particularly when the applicant seeks relief which is extremely wide, all-encompassing and final.

[17] Similarly, the applicant avers that he was authorised to launch this application by the 17th respondent, who is described as the head of the Xesibe Traditional Authority of the Ngqwara Administrative Area, Mqanduli, and the administrative head of the area in question. In my view any authority from a figure in the position of the 17th respondent must not only be clear and unambiguous, but must also specify on what basis the applicant is authorised to pursue wide-ranging and typically domestic relief of this nature in a court of law without first exhausting practical and purposefully tailored domestic remedies, such as those provided for in the Act embracing the assistance, wisdom, guidance and the authority of the Royal Family and the Traditional Leaders.

[18] The document which the applicant relies on for authorisation is insufficient for the purpose for which it was intended for a number of reasons, the most obvious of which are the following:

[19] Firstly, the purported authorisation itself reads as follows:

‘... I have given permission to Nkosi (Headman) Magcaleka Darrington Ngishe of Qokolweni Administrative Area to go to other courts of laws with the matter of Qokolweni.’

This type of authorisation is so vague as to border on being embarrassing not only for anyone who may wish to respond thereto but particularly for this court, which has to satisfy itself that the applicant is properly before it.

[20] Secondly, the document is dated just short of two years preceding the date of the applicant’s notice of motion. That being the case, the “matter of Qokolweni” referred to in the purported authorisation at that time, may have been vastly different to the “matter of

Qokolweni” at the time of the launching of this application. “The matter” not having been clarified, this court (and any interested party for that matter) is in the dark as to what the “matter of Qokolweni” in fact is. On these grounds of lack of authority and failure to have demonstrated attempts to exhaust domestic or internal remedies alone, the application serves to be dismissed.

- [21] The disturbing lack of particularity in the founding papers to establish a prima facie case does not assist an applicant who already has insurmountable problems with his authority and legal standing to launch the proceedings in the first place. The applicant seems to be of the view, and has contended somewhat vociferously, that he is entitled to make bald and vague allegations in his founding papers, and that any attempt whatsoever to present a clear picture to this court and to any prospective respondent (of which there are no less than 21 in a variety of capacities accused of doing or not doing a variety of things), would be disallowed as falling into the category of pleading evidence or law.
- [22] I have already referred to the general principle that affidavits take the place of what would otherwise have been set forth in pleadings to support an action. For a party to establish a cause of action, the affidavit must contain all the essential evidence and material which would otherwise be lead at a trial.
- [23] The applicant has made no effort to meet this standard, not even in reply. I mention but a few examples where lack of particularity has had the inevitable result of failing to establish a cause of action:
- (a) The applicant fails to explain what the first to 13th respondents have been doing which only headmen are entitled to do. It is not sufficient to attach a copy of the Act and to expect this court and unsuspecting respondents to establish the applicant’s case from various open-ended lists setting forth the duties of headmen.
 - (b) The applicant fails to identify (even if only by way of one or two examples) residential sites which have been demarcated and allocated, and why this cannot, in any event, be done by someone other than himself or persons delegated by him.
 - (c) The applicant fails to identify (even if only by way of one or two examples) persons to whom permits have been given to mine sand or to cut trees, and why this cannot, in any event, be done by someone other than himself or persons delegated by him.
 - (d) The applicant has failed to establish why he should be the only custodian of certain keys.
 - (e) The applicant seeks final relief against individuals in their personal capacities for them to hand over all their money, any receipt books they may have and any and all bank books in their possession. The relief sought is incompetent.

[24] The respondents have, quite correctly in my view, traversed these bald allegations, where applicable, with bare denials. Insofar as these bald allegations are clearly material to the applicant the bare denials have created disputes of fact, incapable of resolution on the papers. Applying the Plascon-Evans test referred to above, the applicant on this ground too, cannot be entitled to final relief.

[25] I have one further concern with the nature and the extent of this application.

[26] Insofar as it may be relevant, the applicant avers in his founding papers that in 2006 the first and seventh respondents forced him to sign a blank document (which later turned out to be his resignation as headman apparently drafted by the 19th respondent whom he subsequently joined as a party) at gunpoint. Before the 19th respondent was joined, she, together with the first and seventh respondents, denied on oath that this transpired and I see no reason

why she should repeat this denial now that she had been joined as a party.

[27] The applicant has also annexed to his founding papers, what purports to be a certificate of appointment and recognition from the 16th respondent issued during March 2010, but retrospective to 1993. The respondents seem to be of the opinion that if this document is authentic it is intended to be a re-appointment as the applicant had voluntarily resigned in 2006 rather than to face criminal charges.

[28] The first respondent, who purports to be a sub-headman of the area, has attached to his opposing affidavit an order by this court dated 22 September 2011, made subsequent to the purported certificate of appointment and recognition. In that matter, under case no. 940/2010, an application was brought against the applicant before me, the 16th respondent before me and the 17th respondent before me, by “the concerned community of Qokolweni Administrative Area” and others. The relief granted in that matter reads as follows:

(a) That the first respondent (Chief Gcinisizwe Mtwla) be and is hereby directed to charge the third respondent (the applicant in this matter) within ten days of this order with acts of misconduct, namely:

- Improperly, irregularly and unlawfully selling sites without consulting his land committee and wrongfully utilizing the proceeds thereof for his personal use.
- Wrongfully and unlawfully demanding and receiving payment by sheep, money and liquor for allocating sites to members of the community without disclosing them, which is an act of corruption.
- Theft, in that he has wrongfully and unlawfully sold impounded beasts and utilised the proceeds thereof for his personal gain.
- Failure to refund money to members of the community to whom he has failed to allocate sites.
- Continuing to work as Inkosana despite his resignation.

- Dividing the community in his attempt to get support from other members of the community.
 - (b) That the first respondent be and is hereby directed to appoint an officer within ten days of this order to enquire into the matter and give such instructions in regard to such an enquiry as he may deem fit.
 - (c) That the first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.
- [29] Returning to the matter before me, the first respondent, in his opposing affidavit, avers that this order has not been complied with.
- [30] The applicant's response to this averment is significant in my view, particularly with respect to the issue of whether he is properly before this court. He says this:

'I see that court order and I wish to draw the attention of this Honourable Court to the effect that, that it did not direct me to do anything. Further to that, the Respondent does not take this Honourable Court to his confidence and reveal the results of such alleged charges; if any.'

- [31] On either versions there appears to be unfinished business before this court and I would have expected the applicant to have made full disclosure about this other case in his founding papers, or at the very least, in reply. He has not. He has also not averred that such an enquiry has been held and what the outcome was. In the premises, the probabilities are that the first respondent is correct and that such an investigation, despite having been ordered by this court, has not been conducted; alternatively, is pending. Whatever the position may be, Judge Tshiki in this Division, on 22 September 2011 directed the holding of a misconduct enquiry against the applicant before me, the outcome of which is particularly relevant not only to the relief which is presently in issue, but also whether it is even regular and/or proper for the applicant to approach this court when the outcome or the status of that enquiry is not known. This is particularly so because the applicant has not sought interim relief pending the resolution of either the issues which he has presently raised, and/or those raised before Judge Tshiki. He seeks final relief.
- [32] To conclude, I am of the view that the applicant has not established that he has locus standi or a prima facie case. Even if I were incorrect in concluding thus, the applicant has in any event not established (particularly in that the results of the enquiry ordered on 22 September 2011 are unknown) that he has a clear right, that he has been injured or reasonably apprehends injury, and that there is no other remedy available to him.
- [33] Finally, it is also evident that this dispute is in any event incapable of resolution on these papers.

[34] There is nothing before me to suggest that costs should not follow the order I am about to make. On the contrary, I gain the distinct impression, as I have said, that it is the applicant who has not made full disclosure and has not approached this court with clean hands. The applicant may consider himself fortunate that the order which I am about to make does not mulct him in punitive costs.

ORDER:

The application is dismissed with costs.

STRETCH J

JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant: Mr A.F. Noxaka

A F Noxaka & Co, Mthatha (Ref: AFN)

For the respondents: Mr V.M. Sapulana

D Z Dukada & Co Inc., Mthatha (Ref: VMS/VVM)

Heard: 3 December 2013

Delivered: 27 May 2014

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