



IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE LOCAL DIVISION, MTHATHA

Case No: CA 27/2021

In the matter between:

<sup>s</sup> VUYO NGQONGA	1 <sup>st</sup> Appellant
ARON HANISE	2 <sup>nd</sup> Appellant
PHILA HANISE	3 <sup>rd</sup> Appellant
ROAFANA DACA	4 <sup>th</sup> Appellant
NOZINTOMBI HANISE	5 <sup>th</sup> Appellant
MANDLENKOSI DYANTYI and	6 <sup>th</sup> Appellant
NOSAPHO XOLISWA NKONKI	Respondent

Coram: Pakati J et Stretch J et Qitsi AJ

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JUDGMENT

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PAKATI J

INTRODUCTION

[1] This is an appeal against the order granted by the court a quo on 25 June 2020, declaring unlawful the setting up and construction of wall structures and homesteads in the rural land known as Qolora E, in the district of Kentani ("the land") by the appellants or anyone in concert with them or acting on their behalf. The trial court

further granted an interdict against the latter from allocating and demarcating sites on the land. The appeal is with leave granted by the court a quo on 17 March 2021. The respondent, who was the applicant in the court below, opposed the appeal.

### GROUNDS OF APPEAL

[2] In their notice of appeal dated 19 March 2021, the appellants listed their grounds of appeal against the findings of fact and law thus:

The court a quo found that the applicant [respondent herein]:

- 1.1 had established a clear right;
- 1.2 had established the requirements for a final interdict.
2. found that the applicant had established her locus Mandi.
3. accepted the applicant's version in the face of material factual disputes in application proceedings in circumstances where the respondents' version was neither far-fetched, untenable nor fanciful.

### THE PARTIES

[3] The first appellant is the Headman of Kei Farm Locality in the district of Kentane. The second to sixth appellants also reside in the same locality. The respondent is a major female residing at Qolora Administrative Area, in the Eastern Cape.

### BACKGROUND FACTS

[4] The respondent contended that the land falls under her administrative area and 'by representation is my' area of inheritance in my capacity as Headman and descendant of my great grandfather [Nkonki]. She contended further that the land was surveyed as Lots 1, 2, 3, and 4 and according to the email of the surveyor-general data in the Eastern Cape dated 03 July 2017, it is recorded as Farm 1 10, 96, 95 and 109 under Melane Nkonki's Location- No. 47 Qolora E, Proclamation 1525/1912.

- [5] During 2016 the respondent observed intermittent strange movements on the land by individuals not originating from Qolora E. She alleged that the first appellant held meetings with other appellants where decisions to invade the land were taken. She and the local people kept these infrequent visits under surveillance. Although nothing sinister happened at the time, suspicion intensified that these unknown people came from the first appellant's area. It transpired that during the night the first appellant, in his capacity as Headman of Kei Farm locality, allocated sites to the second to sixth appellants, who surreptitiously set up and constructed structures and homesteads after having received written authorization so to do, from him.
- [6] As a consequence of the strange movements, the respondent addressed a letter to the first appellant informing him that site allocation on the land would be viewed as unlawful encroachment. She also sent warning letters to the other appellants. She noticed that some of those who had initially attempted to invade the land, stopped the invasion after they had received the letters.
- [7] After a passage of time, the respondent and the Land Committee again noticed strange movements on the land indicating that the invasion was continuing. She observed the sixth appellant setting up a shack after which she again addressed letters to the appellants through her attorneys of record as well as via the Sheriff. Seeing that the land invasion by individuals from another area caused commotion and rage in the community, she approached the court in order for the appellants to desist from their unlawful conduct. She stated that the land is utilised for grazing of stock and it produces crops and is therefore indispensable for the community's livelihood.
- [8] The respondent contended that the first appellant has no power to allocate sites to the other appellants as they have no entitlement or right to demarcate and invade the land. They also could not be allowed to have sites on the land because the children of the inhabitants of Qolorha E and their descendants required residential kraal sites and supporting grazing land for their sustenance.

- [9] According to the respondent, the land is subject to a land claim before the Land Claims Court at her instance in terms of the Restitution of Land Rights Act 22 of 1994. This was a consequence of the dispossession of the land by the government of the Union of South Africa. The matter is still pending before that court.
- [10] The appellants did not claim to be the owners of the land. They admitted that they have no documents showing any entitlement to the land. They contended that the land belongs to the state and the respondent has no jurisdiction over it. For this assertion, the first appellant attached to the answering affidavit a deed of transfer (annexure "VN<sup>T</sup>4") of the land to the government of the Union of South Africa. Notably, the said deed of transfer makes no reference to Kei Farm but to Kei Mouth Reserve. The first appellant also attached minutes of a meeting held on 09 March 2017 (annexures "VN2" and "VN3") attended by both parties as well as the Department of Rural Development and Land Reform ("DRDLR"), the Department of Rural Development and Agrarian Reform ("DRDAR"), the South African Police Services ("SAPS"), the Department of Cooperative Governance and Traditional Affairs ("COGTA"), local government as well as the Ward Councillor. Several other meetings were also held by all the stakeholders regarding the land issue. It is clear from the minutes that all the stakeholders as well as the parties agreed that the land dispute would be resolved through the auspices of the DRDLR. The following extracts appear from the said minutes under the heading 'WAYFORWARD' in annexures "VN2" and "VN3":

“WAYFORWARD[“VN2”]

Everyone is going on boundaries so that Qolora & Kei Farm know it

- The community of Qolora should lodge or follow proper procedure since they divulge during the meeting that there is claim by consultry (sic) [land claims commission].
- Boundary between Qolora & Kei Farm has been clarified that the land [in dispute] is under delegation of Kei Mouth, any development that is taking place in this farm should be via department of Land Reform since it's a state land even any development taking place in Qolora should be via relevant department. (My underlining)

"9. Wayforward ["VN3"]

- Mr AM Morai from DRDAR (TSI) should make sure that the officers from the office of the Surveyor General will be available and also to make a follow-up with the Land Restitution Support on the availability of any land claim lodged on the land in dispute;
- The community of Oolora should stop interfering with the affairs of Kei farm: only the government departments will take care of any unlawful demarcation of sites on the land since the land belongs to the state. (emphasis added)
- Reconciliation should be emphasized to the communities that are in dispute.
- Mr. S. Nibe should provide the stakeholders with any document that says farm 95 is under the caretaker ship of Imidushane Traditional Authority;
- The community of Kei farm should not demarcate sites without consulting the Department of Rural Development and land Reform and the Department of Rural Development and agrarian Reform (Land Administration office - Centane Office)" (emphasis added)

[11] The first appellant further relied on a handwritten letter by Headman M Phikisa of Imidushane Traditional Council (annexure "VN5") which stated that the land belonged to Kei Farm and the first appellant was granted authority over it. This was unsubstantiated. It is my view that the letter is contradictory to the appellants' version that the land belongs to the state.

## JURISDICTION

[12] Mr Bodlani, on behalf of the appellants, submitted that this court has no jurisdiction to entertain this matter. For this assertion, he relied on section 22 (1) and (2) of the Restitution of Land Rights Act 22 of 1994<sup>1</sup>. This argument did not arise before the

Section 22(1) and (2) of Act 22 of 1994 provides: "22 Land Claims Court

(l) There shall be a court of law to be known as the Land Claims Court which shall have the power, to the exclusion of any court contemplated in section 166 (c), (d) or (e) of the Constitution-

(a) to determine a right to restitution of any right in land in accordance with this Act;

C) Subject to Chapter 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have-

court a quo and was also not contained in the appellants' heads of argument. It is also not one of the grounds of appeal. Be that as it may, it can be disposed of swiftly.

- [13] In seeking an order declaring unlawful the setting up of structures and the construction of walls as well as homesteads in Qolora E, the respondent did not claim ownership of the land. She contended that the appellants had no right or entitlement to invade and demarcate the land in Qolora E. She alluded to the dispute regarding ownership of the land which is still pending before the Land Claims Court, as stated. The court a quo also alluded to the fact that the intention of the respondent was not to resolve the land ownership issue.
- [14] In view of the above, an argument that this court has no jurisdiction to hear this matter has no merit.

### LOCUS STANDI

- [15] The appellants alleged that the trial court erred in finding that the respondent has established locus standi in iudicio. They denied that she is the owner of the land or that she has jurisdiction over it. In response to her allegation that she is an Inkosana of Qolora E and vested with powers to supervise and ensure good administration, the first appellant stated at paragraph 36.1 of the answering affidavit as follows:

"36.1 I deny that the applicant has territorial jurisdiction over the land in question. I have no knowledge of the applicant's powers in terms of the cited Acts nor her appointment as a traditional leader. I put her to proof thereof, as there is no copy of a signed certificate tendered to prove her traditional leadership claim.'"

- [16] The respondent did not claim to be the owner of the land, as indicated supra. She attached a letter from the district office of the then Department of Local Government and Traditional Affairs in terms of the Traditional Leadership Act 14 of 2005 dated 3

all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings at the place where the land in question is situated, including the powers of a High Court in relation to any contempt of the Court."

March 2016 (Annexure "C",) confirming her employment as the traditional leader of Qolora E Administrative Area, in the district of Kentane from 01 March 2013. This, and the fact that she is a descendant of Nkonki to whom the land was allocated as far back as 1893, was undisputed.

[17] In paragraph 8.1 of the replying affidavit, the following can be captured:

"8.1 I dispute that I have no jurisdiction over the land in issue. Firstly, the land within the boundaries of the Kei Farm had been owned by Nkonki prior to dispossession by the Colonial Government during the period of the annexation of the land East and North of the Kei River hence our claim with the Land Claims Commission against the Government."

[18] The above confirms her version that there is a dispute regarding the land whose ownership was, according to the appellants, transferred to the government of the Union of South Africa. In my view, the trial court did not misdirect itself when it found that the respondent had established locus Mandi.

#### PLASCON-EVANS PRINCIPLE

[19] Mr Bodlani submitted further that the court a quo did not apply the Plascon-Evans principle in deciding the matter and had she done so, she would have dismissed the application with costs. In response, Mr Mgxaji, for the respondent, submitted that this allegation was not raised and was also not an issue in the court below when the matter was heard. It was undisputed that it was raised for the first time during the hearing of the application for leave to appeal. Mr Mgxaji submitted further that no genuine dispute of fact had arisen in this matter and urged us to dismiss the appeal with costs.

[201] In *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) <sup>1</sup> Corbett JA remarked:

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bonafide dispute of fact."

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<sup>1</sup> At 634-635.

[21] The first appellant did not deny that as a Headman, he allocated sites to the other appellants and they held meetings in which decisions to invade the land, were taken. In paragraph 3 1 of the answering affidavit he stated:

"31.1 I admit being a Headman at Kei Farm. It is known to the owner of the land that as Respondents we started building our homes and occupying the land in question as from 2016. The true owners of the land have not declared our occupation as unlawful.'

[22] Although according to the respondent the first appellant did not allocate land to himself, the latter asserted that he is part of the community that has settled on the land in question, as admitted in the answering affidavit above. The intermittent strange movements onto the vacant land, the letters that were written to the appellants advising them of the unlawfulness of the allocation of sites, the encroachment as well as the setting up of structures during the night, were undisputed. The first appellant also did not dispute that he wrote letters to the other appellants authorizing the construction of wall structures. In response to these allegations, he stated that 'this is a dispute that has been going on for several years.'

[23] The appellants acted against the decision of the stakeholders referred to in the minutes of the meeting held on 09 March 2017 that no one should demarcate and allocate sites without consulting the DRDLR and DRDAR. It was also not the case of the appellants that they sought permission from the two state departments before they invaded the land. It is therefore incorrect that they lawfully occupied the land freely, openly and without force with the knowledge of the true owner of the land as no proof was forthcoming from them to support this allegation. The question that remains is, on what basis and by virtue of whose permission did the appellants demarcate, allocate, and construct wall structures and homesteads on the land? It stands to reason that in the circumstances, the respondent could not sit back and watch the appellants continue to unlawfully invade the land in respect of which a dispute was still pending in the Land Claims Court.



[24] In my view, the denial by the appellants of facts alleged by the respondent, are not such as to raise a real, genuine or bona fide dispute of fact. The appellants' version consists of bald denials which are far-fetched and untenable.

### REQUIREMENTS FOR A FINAL INTERDICT

[25] The appellants submitted that the trial court erred in finding that the respondent had proved that she had a clear right to the land and therefore did not satisfy the requirements for the grant of a final interdict. This was disputed by the respondent.

[26] A final interdict can only be granted if the applicant establishes the requirements for a final interdict as set out in *Setlogelo v Setlogelo* 1914 AD 221<sup>3</sup> where the court, as per Lord De Villiers, set out the requirements thus:

"So far as the merits are concerned the matter is very clear. The requisites for the right to claim an interdict are well known: a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy.."

[27] A party seeking to establish a clear right so as to justify a final interdict is required to establish, on a balance of probabilities, facts and evidence which prove that he/she has

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a definite right in terms of substantive law.

[28] In my view, the respondent as a traditional leader, Inkosana and a descendant of Nkonki, has established a clear right, as demonstrated above. It is evident from the papers that the appellants acted unlawfully by invading land. They admitted that they had been settling on the land and after receiving correspondence from the respondent's attorneys of record, they "continued to settle on the land openly and without interference from the respondent until sometime in February 2017 when the

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<sup>3</sup>

At 227.

<sup>4</sup> See *Edrei Investments v Dis-Chem Pharmacies* 2012 (2) SA 553 (ECP) at 556B-C) and cases cited therein.

Nkonki clan descended on our settlement in numbers, causing fear and panic to such an extent that police were called to quell the situation." This clearly showed that the conduct persisted and caused the respondent to have a reasonable apprehension of harm.

[29] The respondent had no alternative remedy, taking into account the continued open settlement on the land. She was entitled to have her rights protected pending the application before the Land Claims Court. It is unimaginable what would have happened if the respondent had ignored the appellants and allowed them to continue with their unlawful conduct pending the finalisation of the land claim issue before the Land Claims Court. I say so because the effect of the refusal of the interdict would encourage the appellants to continue with the illegal invasion of the land.

[30] In my view, the court a quo did not misdirect itself when it found that the respondent had established all the requirements of a final interdict.

### CONDONATION

[31] The appellants applied for condonation for the late filing of their heads of argument. On 23 August 2021, the court had directed them to file their heads of argument on or before Friday, 03 September 2021 and they failed to do so. Instead, they filed same a day later, on 05 September 2021. The respondent did not oppose the application.

[32] Jafta J in *Mukaddam v Pioneer Foods* 2013 (5) SA 89 (CC)<sup>2</sup> remarked:

"Flexibility in applying requirements of procedure is common in our courts. Even where enacted rules of courts are involved, our courts reserve for themselves the power to condone non-compliance if the interests of justice require them to do so. Rigidity has no place in the operation of court procedures.'<sup>1</sup>

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<sup>2</sup> At para [39].

[33] In my view, the appellants gave a satisfactory explanation for their failure to file heads of argument timeously. It is also in the interest of justice that the matter reaches finality.


### COSTS

[34] Mr Bodlani submitted that the court a quo erred in making a costs order against the appellants. In response, Mr Mgxaji requested us to dismiss the appeal with costs.

[35] The purpose of an award of costs to a successful litigant is to indemnify him/her for the expense to which he/she has been put through having been unjustly compelled to initiate or defend litigation.<sup>3</sup> The matter of costs is wholly within the discretion of the court but this is a judicial discretion and must be exercised on the grounds upon which a reasonable person could have come to the conclusion arrived at. The general rule is that costs follow the event. There is no reason why that rule should not be applicable in this case.

### ORDER

The appeal is dismissed with costs.



BM PAKATI

JUDGE OF THE HIGH COURT, EASTERN CAPE LOCAL DIVISION,

GQEBERHA

I agree




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IT STRETCH

JUDGE OF THE HIGH COURT, EASTERN CAPE LOCAL DIVISION,  
BHISHO

I agree




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DK QITSI

ACTING JUDGE OF THE HIGH COURT, EASTERN CAPE LOCAL  
DIVISION, BHISHO

FOR APPELLANTS:	ADV BODLANI
INSTRUCTED BY:	TL LUZIPHO ATTORNEYS

FOR RESPONDENT:	MR SL MGXAJI
INSTRUCTED BY:	MGXAJI A HORNEYS
HEARD ON:	07 MARCH 2022
DELIVERED:	13 JUNE 2022