

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

CASE NO: 5123/2022

In the matter between:

[REPORTABLE]

THE DEPARTMENT OF ECONOMIC

DEVELOPMENT AND ENVIRONMENTAL AFFAIRS

Applicant

and

BANDILE BOYANA

1st Respondent

M R NONXUBA

2nd Respondent

JUDGMENT

RUSI J

‘It is rather odd that – 20 years into our constitutional democracy – we are left with a statute book cluttered by laws surviving from a bygone undemocratic era remembered for the oppression of people; the suppression of freedom; discrimination; division; attempts to break up our country; and military dictatorships. . .’¹

¹ *Khohliso v S and Another* (CCT 12/14) [2014] ZACC 33; 2015 (2) BCLR 164 (CC); 2015 (1) SACR 319 (CC) (2 December 2014).

[1] These were the words of Van Der Westhuizen J in the end note of the Court's judgment in *Khohliso*² in which certain of the provisions of the Environmental Conservation Decree 9 of 1992 ("the Decree" or "Decree 9") were under consideration. The Decree is old-order legislation which was issued by the President of the former Republic of Transkei upon the recommendation of the Military Council and intended to apply only to the Transkei Republic.

[2] I must interpose to mention that it would be dishonest of this Court not to acknowledge that legislation such as Decree 9 regrettably perpetuates the horrible apartheid policy of dividing the country into homelands, let alone its effect on the property rights and the right to dignity and equality which are enshrined in the Constitution.

[3] Decree 9 is among other old order legislation which undeniably bears an indelible mark of the dreadful history of our country relating to land distribution and tenure which is characterized by the system of permissions to occupy, a product of the multilateral discriminatory land policy of the apartheid regime. Not to forget the spate of land grabs that have plagued certain pockets of the Republic of South Africa as the populace tries in desperation to own land or obtain secure land tenure in order to establish various forms of human settlements.

[4] That being so, it must be stated clearly that the Decree is still in force in the former homeland, Transkei, by virtue of item 2 of Schedule 6 read with section 241 of the Constitution, 1996 ("the Constitution") subject to it being consistent with the Constitution.³ It bears mentioning as well that no challenge to the constitutional validity of Decree 9 serves before me.

² *Op cit* para 53.

³ *Khohliso* supra, para 47 (also, by virtue of the savings provisions of section 229 of the Interim Constitution, Act 200 of 1993 and; *Barnett and Others v Minister of Land Affairs and Others* 2007(6) SA 313 (SCA) para 14; *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the RSA &*

[5] The first respondent erected residential buildings and other structures on a piece of land situated in Ngcatha Locality, Cebe Administrative Area, Centane, not far from the seashore (“the land” or “coastal conservation area”). When the erection of the said building and other structures came to the knowledge of the applicant, several interactions including written communication, were exchanged between the first respondent’s legal representatives and those representing the applicant.

[6] At the center of such communication was the applicant’s assertion that the first respondent had illegally constructed the building and structures on the land. The applicant contended that the first respondent is carrying out a development within a protected coastal conservation area in contravention of section 39 of Decree 9. This section of the Decree provides, in essence, that all State land situated on the landward side of the entire Transkei coast within a strip of one thousand meters (one kilometer) from the highwater mark, is a coastal conservation area. Further in terms of this section, no development may be carried out inside the coastal conservation area, by any person (including departments of State) save under authority of a permit issued by the Department of Agriculture, Land Reform and Rural Development (“the Department of Agriculture”)

[7] Based on these provisions of the Decree, the applicant demanded that the first respondent cease and desist from any further construction of the structures and that he demolishes the structures that were already erected on the land, which demand the first respondent did not heed.

Others [1996] 3 All SA 462 (Tk) in which PICKERING J directed the national Minister of Environmental Affairs & Tourism to enforce the provisions of s 39(2) of the Decree in relation to the illegal building of cottages and roads in the coastal conservation area. The court furthermore interdicted four Chiefs or Headmen of certain administrative areas from purporting to grant rights in land which formed part of the territory that formerly constituted the Transkei.

[8] In this application which was first brought on urgent basis on 18 October 2022 on the strength of the provisions of section 39 of the Decree, the applicant seeks an order restraining and interdicting the first respondent from carrying out any further construction on the land, directing him to demolish the building and structures he erected and rehabilitate the land, as well as other ancillary relief.

[9] The first respondent opposes the application on two grounds, the first being that the urgency with which it was brought was self-created, and that on the merits, the application is unsustainable in that the land on which he erected the structures is a family land which he obtained from the now deceased Mayongwana Fo (“Mayongwana”) to whom it was previously allocated by the Native Commissioner in 1956 in terms of section 2(3) of Proclamation 26 of 1936 by means of a land allotment certificate.

[10] It is expedient that I interpolate to first deal with a few preliminary issues. This application was launched in October 2022 with its Part A as an application for urgent interim relief interdicting the further construction of structures on the land, while in its Part B the applicant sought a *mandamus* directing the demolition of the structures with the ancillary relief pertaining to the rehabilitation of the land.

[11] No interim order was granted, and it appears that of his own accord the first respondent gave an undertaking to stop any further construction on the land pending the final determination of the application. When the matter served before me on 27 July 2023, it was, therefore, for the determination of the final relief. Owing to the lapse of time since the application was launched, its urgency has clearly fallen away and, therefore, I do not need to determine the question of urgency. In any event, none of the counsel representing the parties argued the issue of urgency.

[12] Secondly, even though the applicant cited the second respondent as the person it alleged was in charge of the construction of the structures on the land, it was indicated on the day of hearing of the application that the parties have made common cause of the fact that there was a misjoinder of this respondent. No further reference need therefore be made to the second respondent as a party to this application save for reference to a confirmatory affidavit which he filed and had not been struck out, in which he confirms the contents of the first respondent's answering affidavit. Reference henceforth, to "the respondent", shall be to the first respondent.

[13] Lastly, an application was made on the day of hearing of this application by counsel for the applicant, Mr *Notshe*, for condonation of the late filing of the applicant's heads of argument. The condonation sought was granted, unopposed by the respondent whom Mr *Nyangiwe* represented.

The factual background

[14] Ngcatha Locality, which is under Cebe Administrative Area in Centane, is one of the localities which are situated along the coastline of the former Transkei. On the seashore of the same area are cottages which are privately owned and are mostly used as holiday homes.

[15] During the period of 2018 and 2021, the respondent erected on the land described by the applicant as a coastal conservation area four semi-subterranean plastic holding tanks, fencing a small structure located near the gate of the fenced parameters of the site, and a large brick and mortar structure, which, at the time of the application was still under construction. The large brick and mortar structure consists of thirteen rooms.

[16] When a compliance and law enforcement officer of the applicant discovered the construction of these structures, the applicant initiated written communication in which it advised the respondent at whose instance the structures were constructed, that the construction that was carried out on the land was unlawful in that it was carried out on the coastal conservation area without authorization to do so. The applicant also requested the respondent to cease and desist from the alleged unlawful construction.

[17] In spite of the written communication exchanged between the applicant and the respondent in which the respondent's entitlement to develop the site was traversed, the issue remained unresolved as the respondent asserted his right to carry out development on the land by virtue of its alienation to him by Mayongwana.

[18] When these engagements reached a dead end, the applicant instituted criminal proceedings against the respondent. At the time of this application the charges against the respondent in the criminal proceedings had been withdrawn provisionally. The applicant persists with its contention that the land on which the structures are erected falls within the protected coastal conservation area, and that the respondent is barred from carrying out any development on it.

Legislation framework relevant to this application

[19] In order to facilitate ease of comprehension, it is necessary that I set out the two pieces of legislation that are of relevance to this application.

[20] Section 39 of Decree 9, on which the applicant relies for the relief it seeks, provides:

- “(1) There is hereby established on the landward side of the entire seashore, excluding any national park wildlife reserve, municipal land sea-side resort, site occupied in terms of Proclamation No. 174 of 1921 or Proclamation No. 26 of 1936, privately owned land and lease hold land, a coastal conservation area 1000 meters wide measured –
 - (a) in relation to the sea, as distinct from a tidal river and tidal lagoon, from the high water mark.
 - (b) in relation to a tidal lagoon, from the highest water level reached during ordinary storms during the most stormy period of the year excluding exceptional or abnormal floods.
- (2) Notwithstanding anything in any other law or in any condition of title contained, no person (including any department of state) shall within the coastal conservation area save under the authority of a permit issued by the department in accordance with the plan for the control of the coastal development by the military resolution of the Military Council –
 - (a) clear any land or remove any sand, soil or vegetation;
 - ...
 - (c) erect any building;
 - ...
 - (h) construct any public or private road or any bridle path; or
 - (i) carry on any other activity which disturbs the natural state of the vegetation, the land or any waters or which may be prescribed.

[21] Furthermore, section 4 of Proclamation 26 of 1936 (“the Proclamation”) provides as follows:

“Permission to Occupy Homesteads and Arable Allotments

- (1) The Native Commissioner may grant permission –
 - (i) to any Native to remain in occupation of such homestead and arable allotments as were in his lawful but unregistered occupation immediately prior to the commencement of the Transkei Land Amendment Act, 1968;

- (ii) to any Native domiciled in the district to occupy a homestead or arable allotment for domestic and agricultural purposes respectively;
 - (iii) to any missionary society or educational authority to hold a homestead or arable allotment in a residential area or an arable allotment for occupation by paid Native Ministers, preachers or evangelist, or teachers in its employ.
- (2) The issue of such permission shall be subject to the following conditions:
 - (i) The extent of land to be allotted under paragraphs (i) and (ii) of subsection (1) shall not without the approval of the Chief Native Commissioner exceed one half morgen approximately in the case of a homestead and five morgen in the approximately in the case of an arable allotment.
 - (ii) Not more than one homestead and one arable allotment shall be allotted under paragraph (ii) of subsection 1 to any Native, provided that if such a native is living in a customary union with more than one woman, one homestead and one arable allotment may be allotted for the purposes of each household.’

[22] Section 1 of the Proclamation defines “*allotment*” as a portion of land allotted from the commonage of a Native Location on Crown land and held under the provisions of section 3 of section 4 of the Proclamation. Section 3 relates to all land occupied for homestead or cultivation purposes continuously before 09 May 1908 or by virtue of permission granted in terms of Proclamation 143 of 1919.

[23] In terms of s 2 of the Proclamation, the Native Commissioner is mandated to keep a register of all permissions to occupy land granted by him under section 4, and of all transfers, cancellations, and temporary arrangements for the use of allotments.

[24] The transfer of allotments under the Proclamation is governed by its section 7 which provides, *inter alia*:

- 7(1) Subject to the approval of the Native Commissioner, any Native may transfer any allotment in his lawful occupation to any other Native domiciled in the district. If the allotment to be transferred has already been registered, transfer shall be effected by entry in the land register opposite the entry of allotment to the transferor and by endorsement on the duplicate thereof and if no such registration has taken place, permission shall be issued to the transferee.
- (2) In considering any such application the Native Commissioner shall have regard to the conditions prescribed in paragraph (ii) of subsection (2) of section *four*.

[25] Furthermore, section 9(2) of the same proclamation regulates the devolution of the rights to occupy an allotment upon the death of an allotment holder, by providing as follows:

‘Upon the death of an allotment holder his rights to occupy such allotment shall ipso facto be cancelled, but the widows or heirs of the deceased allotment holder shall have first claim of re-allotment of the land should the Native Commissioner consider that they require same.’

[26] It must be accepted that in the country’s constitutional and democratic order, the administration of all state-owned land vests in the Department of Agriculture and all unsurveyed land is owned by the state (subject to indigenous rights of ownership as may be applicable in a given case). Furthermore, and importantly, reference in the above quoted provisions of the Proclamation, to ‘Native’ must be interpreted to mean “person” and the “Native Commissioner” means the Magistrate.

Case for the applicant

[27] The applicant anchors its case on the provisions of the above quoted Decree. In its founding affidavit deposed to by its compliance and enforcement officer, Mr De Villiers, the applicant alleges that the land on which the

respondent erected the structures is a coastal conservation area. The applicant further alleges that a compliance notice that it issued to the respondent informing him of his unlawful conduct was set by the respondent at a naught.

[28] According to the applicant, residential sites for recreational and agricultural use on the coastal conversation area are governed by Proclamation 26 of 1936, in terms of which only a magistrate may authorize use of this protected area for such purposes. It is the applicant's evidence further, that no traditional leader (a Chief or Tribal Authority) has authority over the allocation of sites on the coastal conservation area.

[29] The clear right to the relief it seeks, so the applicant says, emanates from the authority vested in it to manage and protect the coastal conservation area. The applicant further asserts that the prohibition contained in the Decree, of the erection of structures in the protected coastal conservation area coupled with the fact that the respondent has defied the applicant's authority by continuing with the construction of the structures on the land, forms the basis of the relief it seeks. It goes on to state that since the respondent obtained no permit or authorization from a magistrate for the development of the site as required by the Decree, he has acted unlawfully in carrying out the construction.

[30] The applicant further alleges that it has reasonable apprehension of harm that if the respondent's conduct is not interdicted it will encourage neighbouring communities to unlawfully erect structures on the coastal conservation area with impunity.

[31] It is the applicant's contention further, that it has no alternative remedy to protect the interest it has in conserving the land, and that even though applicant received a compliance notice, the construction continued and as at June 2022 and the structures were near completion. Despite two further letters that were

written by its legal representatives to the respondent demanding that he stops the construction, he disregarded the said correspondence and continued with the construction.

Case for the respondent

[32] Shorn of all verbiage, the respondent's case is that the land on which he has carried out the impugned construction does not fall within the protected coastal conservation area. This, he says, is so because the land was allotted to his grandfather Mapoyo Fo who used it from the early 1930's for ploughing mealies. According to the respondent, the land has since passed on to Mapoyo Fo's children. In 2018 Mapoyo Fo's son, Mayongwana, gave the land to him and his wife. At the time of this application Mayongwana had since died, as a result, the respondent annexed to his answering affidavit a confirmatory affidavit of Mayongwana's widow, Nogudile Mapoyo Fo, confirming the fact that her husband gave the land to the respondent.

[33] The respondent challenges the applicant's stance of interdicting the construction of the structures on the land as draconian approach which he says is inimical to the democracy established by the Constitution of the land in terms of which his right to own property is protected. In this regard, he relies of section 25 of the Constitution.⁴

[34] The respondent asserts that his construction and occupation of the property flows from that of the Fo's who have occupied it and used it from time immemorial for cultivating crops. He further asserts that the land on which the impugned construction was carried out forms part, instead, of the commonage where no restrictions such as the ones provided in the Decree apply. The

⁴ The Constitution of the Republic of South Africa, Act 108 of 1996. Section 25 of the Constitution provides, inter alia, that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

respondent further alleges that the allotment of land certificate that was issued to Mapoyo Fo for his occupation of the land could not be located after a diligent search.

[35] It is the respondent's evidence in this regard that despite attempts made by him and his father-in-law, Mr Mlandeli Nonxuba, to obtain from the offices of the Department of Agriculture in Centane, records of allotment of the land, he could not obtain any assistance. As a consequence, he relies on the confirmatory affidavits of the former and current headmen of Ngcatha Locality, as well as that of Mayongwana's widow, to prove his title to occupy the land. He also relies on affidavits deposed by the same persons before a member of the South African Police Service on 02 and 03 February 2022, respectively, confirming the respondent's assertions that he obtained the land from Mayongwana and that it has previously been used to plough mealie fields.

[36] Mr Mlandeli Nonxuba has also filed a confirmatory affidavit in which over and above confirming what the respondent states in his answering affidavit, he states that the arable allotments that exist in Ngcatha were allotted to the families of that community at the time when both residential and arable allotments were distributed to each household.

[37] The respondent adds that in any event, the applicant is clothed with investigative powers in terms of which it would be able to expeditiously obtain information regarding the ownership of the land forming the subject of this application and determine whether the land is indeed part of the coastal conservation area which the Decree protects. He further states that these proceedings are calculated to harass him and thwart a right he enjoys in terms of the Constitution. According to the respondent, this application was impelled by a report that was conveyed to the officials of the applicant that he was

constructing a Bed and Breakfast lodging facility on the land. He denies that he was issued with a compliance notice by the applicant.

[38] In *lieu* of an allotment certificate in relation to the land forming the subject of this application, the respondent annexed to his answering affidavit an allotment of land certificate which was issued to a certain Andrew Cotani. *Ex facie* this allotment certificate, Andrew Cotani's allotment is surrounded by commonage on all sides and his allotment of land certificate was indeed issued by the Native Commissioner in terms of section 2(3) of the Proclamation.

[39] The respondent further states that Cotani's mealie fields are not, however, located where the Fo family's mealie fields are located. According to the respondent, the Fo family's mealie fields are on the same land where he constructed the structures mentioned elsewhere herein, which he alleges was used by Mapoyo Fo to cultivate crops since the early 1930's.

[40] Also annexed to the respondent's answering affidavit are colour copies of photographs of the structures which form the subject of these proceedings including Annexure B9, a photograph taken in 2019 depicting a flat roof structure not far from the seashore, which was allegedly constructed prior to the construction of the large brick and mortar structure. There are no tilled ploughing fields depicted in Annexure B9. However, Annexure B8 depicts a piece of tilled land which the respondent describes as the area where mealies is ploughed. It is not clear from the respondent's answering affidavit when the tilled land depicted in Annexure B8 was photographed.

[41] The respondent further takes issue with what he perceives to be a 'systemic exclusion of black people from owning the land on the seashore' in comparison to people of European descent who, according to him, built cottages on the seashore and are generating income from them as holiday homes.

[42] Dealing with the existence of an alternative remedy available to the applicant in protecting the land forming the subject of this application, the respondent states that the applicant has the powers to arrest transgressors and could have recourse to section 31(h) of the National Environmental Management Act, 107 of 1998 (“NEMA”). For the sake of completeness, this section of NEMA deals with disclosure of information relating to threats to the environment, the protection afforded to those who so disclose such information and the powers of the applicant’s officials to investigate matters arising from the information so disclosed.

[43] In its replying affidavit, the applicant contends that the respondent’s failure to annex to his answering affidavit proof of his title to occupy the coastal conservation area in terms of the Proclamation militates against him. The applicant further states that contrary to what the respondent asserts as the ostensible basis for his occupation of the land on which he carried out the impugned construction, the right to occupy a site in terms of the Proclamation cannot be passed from person to person without the authority of government.

[44] In a supplementary affidavit filed on 15 December 2022 with leave of court, the respondent states, in relation to his alleged failure to adduce proof of his permission to occupy the land, that he made attempts to obtain its copy from the offices of the Department of Agriculture in Centane. At these offices, he was told by a certain Mr Hlwempu that there was a fire at some of the Department’s offices where some of the documents burnt. Further according to the respondent, Mr Hlwempu could not say whether or not the land registers burnt in the said fire.

[45] A further possibility, which, according to the respondent, was postulated by Mr Hlwempu, was that since there was a stage when the Department of Agriculture leased premises from a private entity in the form of temporary

shelter, some of the Department's documents could have been left in those leased premises. He was further told by Mr Hlwempu that he had attempted to trace the owner of the premises to no avail.

[46] The respondent further makes reference to a receipt of payment of R250.00 (two hundred and fifty rand) dated 21 November 2022; and a letter purporting to be written by S.F Sodladla similarly dated, in his/her capacity as the secretary of Mac Vigar Traditional Council, Centane. In the letter, S.F. Sodladla states the following, *inter alia (all sic)*:

“This is to certify that Dloko Nombalela ID NO 4[...] residing at Cebe A/A The real owner of the land is Mapoyo Mayongwana ID No 3[...] who passed away in October 2021 and left the land to Ms Dloko – Mapoyo and the community was consulted.”

[47] According to the respondent, the receipt and letter by the secretary of the Mac Vigar Traditional Council entitled him to be issued with a permission to occupy the land. As further proof of his title to occupy the land, the respondent further makes reference to a further affidavit deposed to by Mayongwana's widow on 21 November 2021 before a commissioned member of the SAPS, in which she states the following:

“The Mealiland that was given to me and my late husband ID 3[...] in 1956 is handed over to Bandile Brian Boyana who is related to me as my brother-in-law's son. The Traditional Council's Office had been consulted and approved the matter. This serves to confirm that I consulted all my family members and we agreed unanimously about the permanent handing over of ownership.”

[48] Further confirmatory affidavits of the former subheadman of Cebe Administrative Area, Mr Lunga Lister Longman Reve and the current headman, Mr Greon Mjeyile Papa, dated 13 December 2022, are annexed by the

respondent to his supplementary affidavit as further confirmation that he holds title to occupy the land.

[49] Mr Reve's confirmatory affidavit sets out the customary or traditional process of allocation of sites which begins with him whereby the prospective site owners would submit their applications to him. He would escalate the application to the community who would either approve or reject the application. While also stating that the coastal conservation area is excluded from his administration of land allocation, he significantly states that the agricultural land which belonged to the Fo family forms part of the 'communal land'.

[50] Further according to Mr Reve, his allocation of sites as the former headman of Cebe during the period of 2002 to 2022, he would not, in the execution of his duties which included allocation of sites, allocate sites which fell within the coastal conservation area which was clearly demarcated. In this regard this is what he states:

"The mealifields that belong to the people were not included in the coastal conservation area. Once a site is allocated, the person to whom is allocated (sic) goes to Enqileni (Chief's place) where the permission to occupy were given. These permissions to occupy were previously given by the Magistrate's offices. This law changed and the permissions to occupy are now prepared and issued by the Department of Agriculture. A senior Agricultural Officer signs them. . . The site shall remain the property of that particular family and will fall upon the heirs of the said homestead. There is no stage where these permissions to occupy reverted back to the government after the death of the head of the homestead."

[51] According to subheadman Reve, the land under consideration in this application would have been allocated to the Fo family by his predecessors, and upon the death of the land owner, the permission to occupy the said land never

reverted to the government but ran in the family of the deceased holder of a permission to occupy.

[52] As at the date of hearing of this application, no confirmatory affidavits of Mr Hlwempu and Mr Ndzimande (Butterworth Office) were filed, nor that of the secretary of Mac Vigar Traditional Council.

The issues for the court's determination

[53] The issue to be determined by this court is a narrow one – namely, whether the land on which the respondent is building the house and other structures belongs to the Fo family and is part of the commonage; or whether it falls within the coastal conservation area as defined in Decree 9 of 1939.

The parties' submissions

[54] Mr *Notshe* submitted that the respondent's failure to adduce proof of his title to occupy the land must inescapably lead to the conclusion that he undertook development on the coastal conservation area unlawfully. He further submitted that the right to occupy the land asserted by the respondent which he claims flowed from the permission to occupy issued to Fo is non-existent. In making this submission he relied on section 9(2) of the Proclamation, stating that the right to occupy the land 'died with Fo'.

[55] That the land falls within the parameters of the coastal conservation area, so the submission continued, is apparent from the facts of the application. On this score, Mr *Notshe* submitted that the land will be excluded from the coastal conservation area only in terms of the law. This, he said, was by means of a permission to occupy issued in terms of Proclamation 26 of 1936.

[56] In response, Mr *Nyangiwe* submitted that the applicant has not established that the land belongs to the government and therefore has no basis to dispossess the respondent of the said land. He took the view that the applicant ought to adduce evidence of the stage at which the land which, on the version of the respondent, was allotted to the Fo family, became part of the coastal conservation area. Mr *Nyangiwe* submitted that the respondent's rights of occupation of the land are protected by Decree 9 in that he occupies it in terms of section 26 of the Proclamation which in turn excluded the land from the prohibition in section 39 of Decree 9. The applicant, so the submission continued, has not established the requisites for the grant of a final interdict.

[57] Regarding the provisions of section 9(2) of the Proclamation, Mr *Nyangiwe* submitted that they are unconstitutional in that they deprive black persons of the right to own land and bequeath it in any manner they deem fit. In developing this argument, he further submitted that no processes were invoked after Moyongwana's death to cancel the permission to occupy the land, and therefore, the applicant is barred from dispossessing the respondent or the Fo family of their constitutional right to the land.

The law

[58] An applicant for a final interdict must establish three requisites, all of which must be proven, namely, a clear right which he seeks to protect by means of the interdict; actual injury or a well-grounded apprehension of injury if the interdict sought is not granted; and that there is no other alternative appropriate relief available to him.⁵

⁵ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[59] In order to succeed in this application, the first hurdle to be surmounted by the applicant is establishing that it has a clear right which it seeks to protect. The meaning of ‘clear right’ in relation to an application for a final interdict relates to the degree of proof required to establish the right. This, in turn, entails the existence of a right as a matter of substantive law, which means that the right must be one that is recognized by law. The right asserted must, furthermore, be clearly established by the evidence.

[60] The applicant must establish a reasonable apprehension of injury in that a reasonable person faced with certain facts would entertain such apprehension of injury. While the applicant is not required to prove that on a balance of probabilities of undisputed facts that he will suffer harm, he must show that objectively, his fear of harm is well grounded in the sense that it is reasonable to apprehend that injury will result.⁶ In determining what an appropriate alternative remedy is, the circumstances of each case must be considered.

[61] These being application proceedings, and as held in *Plascon Evans*⁷, final relief may be granted if the facts alleged by the applicant, which the respondent admits, together with the facts alleged by the respondent justify the granting of such a final order.

Discussion

[62] Even though the respondent denies that he was issued with a compliance notice, what is clear is that his stance in the common cause communication that ensued between his legal representatives and those representing the applicant has been that of persisting with his assertion of entitlement to use and occupy the land.

⁶ *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd* 1961 (2) SA 505 (W) at 515; *Minister of Law and Order and Others v Nordien and Another* 1987 (2) 894 (AD) at 896F-I and all authorities cited therein; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* (462/07) [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) (30 May 2008), para 21.

⁷ *Plascon- Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984(3) SA 620 (SCA).

[63] There is clearly a dispute of fact regarding whether the respondent is entitled to carry out development on the land and whether as the respondent would have the court believe, the land forms part of the commonage whose alienation and use is not affected by Decree 9. Since these are motion proceedings, final relief would be granted if this Court accepts the facts alleged by the applicant in so far as they are admitted by the respondent, and those alleged by the respondent in so far as his version is plausible and credible.⁸

[64] That being the case, it is incontrovertible that allotments under Proclamation 174 of 1921 were in respect of locations established on surveyed districts and subject to quitrent, whereas allotments under Proclamation 26 of 1936 were on unsurveyed districts of the Transkeian territories, and in particular, on the commonage of a Native Location on State land. In the case of the 1921 Proclamation, allotments on a surveyed land could also be held under a titled deed. Otherwise, permissions to occupy could be issued in each case.

[65] It is settled law that the best evidence of ownership of immovable property is the title deed to it.⁹ In contrast, the system of permissions to occupy does not confer upon an occupier ownership of the property occupied.

[66] For the purposes of the present application, proof that the respondent obtained a personal right which allows him to use or occupy the land forming the subject of these proceedings, would be in the form of either a permission to occupy issued by the Department of Agriculture, or, at worst, a register which the Department of Agriculture keeps in terms of section 2 of Proclamation 26 of 1936, which would evince the allotment and transfer of the site under consideration.

⁸ *Airports Company South Africa Soc Ltd v Airports Bookshop (Pty) Ltd t/a Exclusive Books*, 2017 (3) SA 128 (SCA) para 26.

⁹ *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993(1) SA 77 (AD).

[67] It seems to me that what brings land within the parameters of the protected coastal conservation area is, in the first instance, its situation in relation to the seashore. In terms of section 39 of Decree 9, that would be a strip of 1000 metres (one kilometer) on the landward side of the entire seashore.

[68] The applicant's principal allegation regarding the situation of the land is that it does indeed fall within the area defined in section 39(1) of the Decree as a coastal conservation area. This allegation is not pertinently dealt with by the respondent. He does not admit or deny it, but places reliance on his title to occupy the land by virtue of its transfer to him by Mayongwana before his death. An allegation contained in the applicant's founding affidavit, which is not specifically disputed or admitted ought to be accepted by the court as correct. This is trite law.¹⁰

[69] A reading of the provisions of section 39(2) of the Decree does not suggest an absolute prohibition of development of the land situated within the coastal conservation area. In terms of this section, any development of the land falling within the coastal conservation area may take place only in terms of the authority of a permit issued by the Department of Agriculture in accordance with the plan for the control of the coastal development.

[70] The difficulty I have with the respondent's version is that he states without any specificity as to location, that Andrew Cotani's mealie fields to which he makes reference in bolstering his assertion, are not located where the Fo family's mealie fields are located. It should perhaps come as no surprise that *ex facie* Andrew Cotani's allotment certificate the description of the locality of allotment does not appear to be Ngcatha where the respondent erected the impugned structures. This does little or nothing to assist the respondent. I hold the view that the location of Cotani's and Fo's mealie fields becomes important

¹⁰ *United Methodist Church of South Africa v Sokufudumala* 1989(4) SA 1055 (O).

in determining whether the land is part of the commonage or the defined coastal conservation area.

[71] A relevant averment that appears from the confirmatory affidavit of Mr Reve, is encapsulated as follows:

“1.3 My duties as the headman were to deal with all the community issues. To allocate sites to people. Such allocation of sites did not include the areas that are closer to the sea or are within the coastal conservation area. The reasons thereof were that there was a perimeter fence that ran through separating the coastal conservation area from the land which fall (sic) in the village. There are beacons that do separate the conservation area and the land that belongs to the people. The mealifields (sic) that belong to the people were not included in the coastal conservation area.”

[72] A pertinent observation to be made from this paragraph of Mr Reve’s confirmatory affidavit in so far as the location of the land in question is concerned, is that he too does not specifically state where in relation to the seashore the community mealie fields are situated. Nor does he specifically state that the land forming the subject of this application is in fact not situated close to the seashore.

[73] The averment that the current headman, Mr Papa, makes in this regard in his confirmatory affidavit, is as follows:

“1.6 The agricultural land that belongs to the Fo family is part of the land within the village. The beacons separating the land that belong to the community and the prohibited land are beyond the agricultural land. There used to be a fence that ran through and separated the agricultural land from the prohibited land. The said fence has through the years deteriorated to the extent that some parts are not visible. However, it is visible where the fence ran.”

[74] While Mr Papa states that he confirms what is stated in the affidavit of the respondent, nowhere does he state in his narration of how the land is allocated and used, that he is aware or became aware at some stage, of a transfer of the land from Mayongwana to the respondent. I emphasize that such a transfer would have been registered by the Department that administers land use or in respect of which a permission to occupy would be issued by the Department concerned following the said transfer.

[75] Also important to note is that the receipt for payment of R250.00 as the ostensible recordal of the fee that allegedly entitled the respondent to obtain a permission to occupy the land postdates the year on which the alleged transfer from Mayongwana to the respondent took place. The land was given by Mayongwana to him in 2018, it has been stated that Mayongwana died in October 2021. However, and quite surprisingly, the receipt of payment of R250.00 is dated 21 November 2022, some four years after the alleged transfer and almost a year after the launch of these proceedings.

[76] Furthermore, the respondent makes no averment in his answering papers duly supplemented, regarding the fact that the alleged transfer was *de facto* registered by the magistrate or the Department of Agriculture. Similarly, Mayongwana's widow makes no mention of the fact that the transfer of the allotment from her late husband to the respondent was registered with the already mentioned Department or magistrate.

[77] Even if it were to be accepted for a moment that the land on which the respondent carries out the development forms part of the commonage, which fact the applicant strenuously denies, there would have to be cogent proof of the fact that the alleged transfer was approved by the Department responsible for land administration. Such approval is, in terms of section 7(1) of Proclamation 26 of 1936 a requisite for the transfer whether such a transfer has been

registered on not. It is the Department responsible for administering land use which would in turn satisfy itself that the transfer is in line with the conditions of allotment set out in paragraph (ii) of subsection (2) of section 4.

[78] To his credit, what the respondent did when on his version, he went in search of the land registers at the Offices of the Department of Agriculture, was a sensible thing to do. That being the case, the explanation proffered by the respondent regarding the steps he took in securing from the applicant's offices the records of the transfer of the land from Mayongwana to him amounts to no more than hearsay evidence. This relates to what the respondent claims he was told by the respective officials of the said Department named Mr Hlwempu of the Centane office and Mr Ndzimande of the Butterworth office. The same is to be said regarding the letter purporting to be written by F.S Sodladla who is said to be the secretary of Mac Vigar Traditional Council on which the respondent places reliance.

[79] Regard being had to the fact that the right of the respondent to occupy and use the land is a contentious issue in these proceedings, it is not farfetched to conclude that evidence of Mr Hlwempu, Mr Ndzimande regarding the alleged loss of the applicant's land registers is crucial. As held in *Drift Supersand (Pty) Ltd v Mogale City Local Municipality*¹¹, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement loses cogency.

[80] As regards the ownership of the land, I hold the view that Mr *Nyangiwe*'s submission that it is has not been established by the applicant that the land on which the respondent built the structures belongs to the state, is misplaced. From the respondent's own version, he took the steps set out in his answering

¹¹ *Drift Supersand (Pty) Ltd v Mogale City Local Municipality* (1185/2016) [2017] ZASCA 118 (22 September 2017), para 31.

papers duly supplemented, in order to obtain the land. This must surely have been upon a realization and acceptance of the fact that the unsurveyed land in Ngcatha Locality belongs to the state.

[81] In the present democratic era, most of the communal land continues to be held by the government in trust for the benefit of the communities, albeit managed through traditional authorities, save for cases where the community concerned successfully lodged a claim for the restitution of their land, or hold indigenous rights of ownership to the land in question.

[82] In any event, a common allegation made by the former subheadman and current headman of Ngcatha (Mr Reve and Mr Papa) regarding the land is that as the traditional leaders of Ngcatha Locality they are the ones who managed or administered the use and occupation of the land forming part of the commonage. It does not appear from any of affidavits filed by these traditional leaders that its community has any indigenous ownership rights or title to any portion of the land on which Cebe Administrative Area is established. Instead, both these traditional leaders state that the system of permissions to occupy the land situated in Ngcatha still applies, albeit that such permissions to occupy are no longer issued by the magistrates but the Department of Agriculture.

[83] Likewise, Mr *Notshe*'s argument that the respondent's assertion of title to occupy the land is misplaced as such a title became *ipso facto* cancelled upon the death of Mayongwana, cannot stand. This is so for three reasons – the first is that the cancellation of Fo's right to occupy was not pleaded by the applicant in its founding papers. It is settled law that an applicant must stand or fall by his or

her founding affidavit.¹² In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*¹³, Joffe J stated:

‘It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In *Hart v Pinetown Drive-Inn Cinema* it was stated that “where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.” An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge.’ (footnotes omitted)

[84] The second reason is that in terms of the section 9(2) of the Proclamation, that right, if established *in casu*, would have devolved upon Mayongwana’s widow when Mayongwana died. This much is clear from the wording of section 9(2). Thirdly, the defence posited by the respondent is that there was a transfer of the allotment to him by Mayongwana during his lifetime in 2018. Such a transfer would have to meet the requirements of section 7 of Proclamation 26 of 1936.

¹²*Mashamaite and others v Mogalakwena Local Municipality and others, Member of the Executive Council Coghsta, Limpopo and another v Kekana and others* [2017] ZASCA 43; [2017] 2 All SA 740 (SCA) at para 21.

¹³ 1999 (2) SA 279 (T) at 323F – 324J.

[85] Regarding Mr *Nyangiwe*'s submission pertaining to the constitutionality of section 9(2) of the Proclamation, suffice it to state that Uniform Rule 16A requires a party raising a constitutional issue to prepare a notice (a 'Rule 16A Notice') containing a clear and succinct description of the constitutional issue raised. Furthermore, a party raising a constitutional issue must raise the matter appropriately in the affidavits or the pleadings.¹⁴

[86] That has not happened in this case even though the respondent generally asserts that his constitutional right enshrined in section 25 of the Constitution is violated by the applicant's attempt to deprive him of his rightfully owned property under the guise of this application. In *South African Transport and Allied Workers Union and another v Garvas and Others*,¹⁵ the Court held:

'[114] Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'

[87] Mr *Nyangiwe*'s submissions regarding the constitutionality of section 9(2) cannot, at least for the present purposes, be sustained.

[88] That the applicant could, as an alternative remedy, call to aid its investigative powers set out in section 35(h) of NEMA as suggested by the respondent is of no consequence for the present purposes. In *Hotz and Others v University of Cape Town*¹⁶, Wallis JA (with whom Navsa, Bosielo, Theron and Mathopo JJA concurred) said of the requisite of absence of an alternative remedy:

¹⁴ *National Director of Public Prosecutions v Phillips & Others* 2002 (4) SA 60 (W) at para 37.

¹⁵ 2013 (1) SA 83 (CC) para 114.

¹⁶ *Hotz and Others v University of Cape Town* (730/2016) [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) (20 October 2016).

‘[T]he existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended. That is why, in many cases a court will weigh up whether an award of damages will be adequate to compensate the injured party for any harm they may suffer. There may also be instances where, in the case of a statutory breach, a criminal prosecution, in appropriate circumstances, will provide an adequate remedy, but there are likely to be few instances where that will be the case. . . The alternative remedy must be a legal remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of court. The fact that one of the parties, or even the judge, may think that the problem would be better resolved, or can ultimately only be resolved, by extra-curial means, is not a justification for refusing to grant an interdict.’¹⁷

[89] From the evidence of the applicant which the respondent has failed to seriously challenge, it appears that it was through its investigative processes that the applicant challenged the respondent’s development on the land, which further culminated in the now provisionally withdrawn criminal proceedings. On the respondent’s own showing, none of these processes would have yielded any resolution to the matter since he persists with his claim of title to occupy the land.

[90] The respondent’s failure to produce the permission to occupy the land and to file the confirmatory affidavits of Mr Hlwempu and Mr Ndzimande ineluctably leads to a conclusion that it is implausible that Mayongwana or his father Fo, was allotted the land on which he has erected the impugned structures. What is plausible is that the land on which the respondent erected the impugned building and other structure is a protected coastal conservation area.

¹⁷ *Op cit*, para 36.

[91] Even if the respondent produced a permission to occupy that is in the name of Mayongwana, the confirmatory affidavit of Mayongwana's widow does not assist his case in the absence of an averment and proof that the said transfer was in any event approved by the Department of Agriculture. The same is to be said regarding the confirmatory affidavits of Mr Reve and Mr Papa for the reasons I have stated elsewhere in this judgment.

[92] In the final analysis of the facts of the instant application, I make a finding that the applicant has made out a case for the relief it seeks. In contrast, the respondent's defence is untenable and implausible that this court is entitled to determine the application on the acceptance of that of the applicant. For all the afore going reasons, the application must succeed.

Costs

[93] The general rule is that the successful litigant must be awarded its costs. There are no grounds for me to deviate from this general rule. Costs must follow the result.

Order

[94] In the result, the following order shall issue:

1. The respondent is interdicted and restrained from continuing to erect and occupying structures on the land falling within the coastal conservation area located at Ngcatha Locality, Cebe Administrative Area, Centane ("the site").
2. The respondent is directed to cease and desist, forthwith from occupying and erecting structures on the site.
3. The respondent is directed to vacate the site forthwith.
4. The respondent is directed to demolish and remove the structures erected and established on the site.

5. The respondent is directed to rehabilitate the site by:
- 5.1 demolishing the structures built on it within 20 days of this order.
 - 5.2 appointing a suitably qualified person to compile a rehabilitation plan for the restoration of the site to remove the scars caused by the respondent's unlawful development on it.
 - 5.3 The respondent shall submit the rehabilitation plan referred to in 5.2 to the applicant within 20 days of this order, which plan the applicant may approve or decline.
 - 5.4 In the event of the applicant approving the rehabilitation plan, the respondent shall appoint a suitably qualified person to execute the plan so approved.
 - 5.5 Upon completion of the rehabilitation, the respondent shall inform the applicant in writing of such completion, whereupon the applicant shall inspect the site in order to certify the appropriateness of the rehabilitation so completed.
6. The respondent shall pay the costs of the application.

L RUSI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant : *Adv. VS Notshe SC*

Instructed by : The Office of The State Attorney
Broadcast House
94 Sisson Street
MTHATHA

Counsel for the respondent : *Adv. X Nyangiwe*

Instructed by : MASETI INCORPORATED
c/o 26 Madeira Street
MTHATHA

Date heard : 20 July 2023

Date delivered : 23 April 2024