



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

Case No: 33/2022

In the matter between:

**MDENI COMMUNITY MEMBERS –
NCISE ADMINISTRATIVE AREA**

Applicant

And

**THE MINISTER OF RURAL DEVELOPMENT AND
LAND REFORM**

First Respondent

THE HEADMAN (GOBELINYANISO MAKLAULA)

Second Respondent

THE FORMER SUB-HEADMAN (ZUKILE SODO)

Third Respondent

**UNKNOWN OCCUPIER / TRESSPASSER
(MZWAMADODA MBAMBODUNA)**

Fourth Respondent

**CHIEF NO-ITALY MTIRARA MPHEKO
ADMINISTRATIVE AREA**

Fifth Respondent

THE SHERIFF OF THE HIGH COURT, MTHATHA

Sixth Respondent

JUDGMENT

BESHE J:

[1] These proceedings concern an application for an interdict as prayed for in the notice of motion. The notice of motion consists of 12 prayers. Of those it is sought that prayer 7 amongst others, operate as interim relief pending the finalisation of this application. The matter was set down for hearing on the 18

January 2022 and duly opposed by second and third respondents. The respondents are called upon to show cause on 25 January 2022 why the *rule nisi* (that would have been issued on the 18 January 2022 should not be confirmed.

[2] One of the prayers in respect of an interim interdict is as follows:

“2.7 That in the event that fourth respondent has already built any structure in the reserved land, he be ordered and directed to demolish such a structure within 10 days of the issuing of this order.”

So much for an interim order. Needless to say that the fourth respondent who is identified as unknown occupier / trespasser (Mzwamadoda Mbamboduna) is, according to the applicant, in the process of erecting a structure in the piece of land in question. So, applicant is aware that construction is already taking place. To order the fourth respondent to demolish the structure by way of an interim interdict will have the effect of a final interdict in my view.

[3] It does not appear as though the fourth respondent was effectively served with the process initiating this application. The Sheriff's return of service records that:

“On the 11 January 2022 at 17:47 the amended certificate of urgency, notice of motion, founding affidavit and annexures were served by way of affixing at the main door of the given address”. The address as specified is given as: Mdeni Location, Ncise Administrative Area Mthatha.

To grant an order against the fourth respondent in circumstances where it is not clear whether the notice of proceedings came to his attention will not be appropriate and will be unjust in my view.

[4] As is apparent from the notice of motion, the catalyst for this application is essentially a complaint by the applicant that third respondent, a “*deposed*” sub-headman, with the support of the headman (second respondent) unlawfully allocated sites to strangers from a piece of land at Mdeni Location. This, against a decision by the members of the community to earmark or set aside the land for use for the benefit of the community at large.

[5] The founding affidavit is deposed to by **Mr Maso** who claims that he was duly appointed as sub-headman of Mdeni Location on the 17 October 2021 at a meeting, by members of the community. This is not common cause however. From the founding affidavit, it emerges that there is a structure that is being erected on the vacant land referred to above purportedly at the behest of fourth respondent.

[6] The crux of this application can be gleaned from paragraph 14.1 of the founding affidavit which reads thus:

“14.1 If the interdicts sought in the Notice of Motion by the Applicant are not granted the members of the Community stand to lose a lot because the successful erection of one structure in the land in question will encourage a massive invasion of the land by other people from Town who run away from the Municipal rates and seek sites in the nearby rural areas, and they are prepared to pay large sums of money buying the sites from the Headman and the sub-Headman. To discourage any further invasion of the land of the Mdeni Community it is imperative that the Court issues the interdicts sought by the Applicant Community against the Respondents to prevent great harm that will befall the members of the Community if such interdicts are not granted. They will not be able in future to build any Community hall to cater for the general needs of the Community. They may need to build a school or two for their children, the land will no longer be available having been subdivided to strangers by the 2nd and 3rd Respondents for their own economic benefit and not for the needs of the Community. In all that disadvantaging the Community for the benefit of a few individuals.”

I do not have any qualms with what is contained in this paragraph as well as with the issuing of a *rule nisi* returnable on a future date.

[7] I have already alluded to the difficulties I have with one of the prayers in respect of which an interim interdict is sought. There are several other such prayers – 2.2 to 2.8. The question that arises is whether the applicant has satisfied the requirements for an interim / interlocutory interdict in regard thereto. Those being:

- (a) A *prima facie* right;
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) a balance of convenience in favour of granting of the interim relief; and
- (d) the absence of any other satisfactory remedy.

[8] The *locus standi* of the applicant is challenged by the second and third respondents who are opposing the application. I am of the view that members of the community of a particular area, have sufficient interest in what is happening in their community, in respect of what applicant claims is communal land over which they have rights. It is on the basis of this that I formed the view that the first requirement, namely, *prima facie* right has been established albeit being subject to some doubt.

[9] Is applicant's apprehension of harm as encapsulated in the extract from the founding affidavit reasonable? Is there evidence to support it or is there mere speculation and conjecture on the part of the applicant that the erection of one structure on the land in question will encourage a massive invasion of land by other people from town who want to avoid paying rates? The land has remained unused since a decision was taken in 2016 to initiate a process to have it proclaimed / reserved by first respondent for purposes of building structures that are going to be for the benefit of the community. No massive invasion has taken place.

[10] I am not persuaded that the applicant will suffer irreparable harm if the interim relief is not granted and the final relief is granted in due course. In my view, if the interim relief were to be granted as sought, fourth respondent would suffer irreparable harm in the event the main application fails. Similarly, I am not persuaded that the balance of convenience favours the applicant. Regarding the fourth requirement, applicant submits that there is no satisfactory / suitable alternative remedy, because trying to evict the fourth respondent should the application be successful will entail further litigation and resultant costs. It is accepted that this requirement is allied to the apprehension of irreparable harm. I have already found that this has not been established. It is not a good enough reason in my view to say it will be costly to evict later. Or that it will be cumbersome to embark on the procedure envisaged by the PIE Act. I have avoided making any pronouncement regarding the merits of the main application. I may, however, mention that there appears to be a myriad of disputes of facts between the parties. I will leave it at that.

[11] Lack of *locus standi in judicio* was not the only point *in limine* raised by the second and third respondents. They also assailed the application for lack of urgency. There can be no doubt that a delay of about one month after the applicant became aware of the construction that is taking place before the application was launched, occurred. The explanation proffered by the applicant is that the delay was caused by the need to collect money from members of community in order that they can appoint legal representatives of their choice. Also, that attempts were made to engage with second, third and fourth respondents before resort was had to litigation. The explanation in my view appears to be reasonable.

[12] For the reasons stated above, I am satisfied that the applicant has made out a case for the issuing of a *rule nisi* returnable in future as sought. I

am, however, not persuaded that the order should operate as an interim interdict in respect of prayers 2.2 to 2.8.

[13] Accordingly, a *rule nisi* is hereby issued calling upon the respondents to show cause, if any, on Tuesday the 15 February 2022 at 09h30 or soon thereafter as the matter may be heard why the following orders cannot be made final:

- 1. That the 2nd Respondent's action as the Traditional leader in whose area of jurisdiction the Mdeni Community falls, of supporting the unlawful actions of the former Sub-Headman of Mdeni Community of subdividing the land belonging to the Mdeni Community to strangers contrary to the decision taken in a meeting held in 2016 be and is hereby declared unlawful.**
- 2. That the 2nd Respondent be and is hereby interdicted and prohibited from continuing to support 3rd Respondent in breaching the Mdeni Community decision taken with regards to a section of vacant land in the area.**
- 3. That the 2nd Respondent be and hereby ordered to work together and support the newly appointed Sub-Headman of Mdeni Community, Mr Maso in solving the problems of the Mdeni Community.**
- 4. That the 3rd Respondent be and hereby interdicted and prohibited from dishonouring the decision of the members of Mdeni Community regarding a piece of vacant land in a meeting held in which meeting the 3rd Respondent was also present.**
- 5. That the 2nd and 3rd Respondents be and are hereby ordered and directed to reverse any unlawful allocations of land they had made to some strangers without the approval of the members of the**

Mdeni Community nor for the needs of Mdeni Community members.

6. That the unknown occupier cited herein as the 4th Respondent and referred to as (Mzwamadoda Mbamboduna) in the Return of Service of a letter of demand by the Sheriff and allocated land by either the 1st Respondent or 2nd Respondent or both in the land reserved for specific purposes by the Community of Mdeni, be and is hereby ordered and directed to stop building any structure in the reserved land in question.

7. That in the event the 4th Respondent has already built any structure in the reserved land, he be ordered and directed to demolish such structure within ten (10) days of the issuing of this Court's Order.

8. That in the event the ten (10) days referred to in paragraph 7 above expires without the 4th Respondent having demolished his structure, the Sheriff of the High Court (6th Respondent herein) be and hereby ordered and directed to organise demolishing equipment to be paid for by the 4th Respondent and demolish the structure built by the 4th Respondent with the assistance of the South African Police Services, if needs be.

9. That the 5th Respondent as the Chief under whom both the 2nd Respondent and the 3rd Respondent serve as traditional leaders be and is hereby ordered to ensure that there is order in the Mdeni Community and that there is only one Sub-Headman operating, the one appointed by the Community on the 17th October 2021 and that the 2nd Respondent does not function as a Sub-Headman of Mdeni Locality anymore.

10. That the first Respondent as the responsible Minister be and hereby ordered to respond to the request of the Mdeni Location to have vacant land in their location reserved for special uses by the members of the Community for the benefit of the whole Community with immediate effect, in a time frame not more than two month's period.

Costs to be costs in the application.



N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Adv: E N Nyobole
Instructed by	:	P. N. ZIDE & PARTNERS INC. 28 Madeira Street Clublink Building, First Floor MTHATHA Ref: PZ/lz/MCM285-CIV Tel.: 081 541 0324 / 072 704 1298
For the Respondents	:	Adv: S. S. T. Mapekula
Instructed by	:	MESSRS GUBEVU HLALUKANA INC 18 Owen Street MTHATHA Ref: Mr Hlalukana/NT/MAT 01-22 Tel.: 047 – 531 3863
Date Heard	:	18 January 2022
Date Reserved	:	18 January 2022
Date Delivered	:	1 February 2022