

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

CASE NO: 4181/2019

In the matter between:

WATERFALL COMMUNITY

APPLICANT

And

MZUKISI MTYINGIZANE

1st RESPONDENT

ZIYATSHA MTYINGIZANE

2nd RESPONDENT

NDILEKA SOKHOMBELE

3rd RESPONDENT

NONZWAKAZI LANGA

4th RESPONDENT

MCWERHA YALIWE

5th RESPONDENT

MALIBONGWE YALIWE

6th RESPONDENT

MASIXOLE MAKHEHLA

7th RESPONDENT

WAWI MAPHINI

8th RESPONDENT

THOBELA MABHIJA

9th RESPONDENT

HLANGANI COMMUNITY

10th RESPONDENT

DEVELOPMENT AND LAND REFORM

11th RESPONDENT

STATION COMMANDER TSOLO SAPS

12th RESPONDENT

JUDGMENT

NQUMSE AJ:

[1] The applicants seek a prohibitory interdict against the respondents for an order in the following terms:

- a) The 1st to 10th respondents be and hereby interdicted and prohibited from harassing, threatening and intimidating members of the applicant.
- b) The 1st to 10th respondents be and hereby interdicted from interfering either directly or indirectly, with the applicants' site demarcation process,
- c) That the 1st to 10th respondents be ordered to pay the costs of the application jointly and severally and
- d) The applicants be granted further and/or alternative relief the court may deem appropriate under the circumstances.

[2] In the notice of motion the applicant made it clear that the 11th respondent is cited merely as an interested party and thus no order is sought against it. Similarly, no order is sought against the 12th respondent.

[3] The respondents opposed the application and have raised a number of defences, ostensibly alleging a dispute of fact and the following points in *limine*:

- i. Lack of *locus standi*,
- ii. The application is unauthorized
- iii. Non-joinder of Hlangani Traditional Council and,
- iv. The absence of the requirements for a final interdict.

[4] The applicants are members of the Waterfall Community (Waterfall) and their respective families. They claim to have been residents therein for generations. The 1st to 10th respondents against whom the order is sought are residents of Hlangani Locality in the district of Tsolo in The Province of the Eastern Cape. It is to be noted that the 10th respondent(s) are the unidentified members of the Hlangani locality who have associated themselves with the actions of the 1st to 9th respondents and who are alleged to have acted in concert with them.

[5] The facts upon which the applicants rely for the relief sought are set out in the founding affidavit of the applicants' deponent Vuyokazi Majavele. The applicants allege that during the year 2018 in February of that year, their community of Waterfall convened a meeting to consider a request to allocate housing sites for the benefit of their local younger generation. After approval of the request and their resolution to demarcation of sites, they caused correspondence to be dispatched to the various structures such as the Traditional Council and the Ward Councilor informing them of their decision. (The letters are attached as "VM3" and "VM4" respectively). Both the structures referred to above reacted positively to their correspondence, thereby supporting the resolution of Waterfall.

[6] Furthermore, the applicants forwarded their resolution to the attention of the 11th respondent who advised that their action be publicized in a local newspaper. This was done through *Isolezwe* Newspaper (copy of the advert was attached and marked "VM5").

[7] In a subsequent meeting of Waterfall which was convened for purposes of allocating and demarcating the sites, members of Hlangani led by the 1st to 9th respondents arrived and disrupted their meeting, demanding a halt of the demarcation on the basis that the land in question belongs to their community. In support of their stance to prevent the applicants from continuing in their action to demarcate sites, the respondents declared a boundary dispute and resolved to engage the services of the 11th respondent.

[8] The 11th respondent carried out inspections and surveys of the land in question and produced a survey report (the report) which it sought to present in a meeting of both groups. The survey report was attached as "VM6". According to the report both Hlangani and Waterfall were initially demarcated as farms as far back as the late 1800's , the former being Farm 68 and the latter being Farm 69 within the district of Tsolo. Unhappy with the result of the report the respondents did not accept the boundary beacons as explained by the Surveyor-General and chose not to continue their participation in the report deliberations. Nevertheless, they were advised that in the event they wish to dispute or contest the outcomes of the report they are entitled to commission their own independent survey, something they failed to do. Instead they

caused a letter through their attorneys to be dispatched to the applicants claiming that they were being threatened by members of the applicant, (the letter from the respondents' attorneys was attached as "VM7").

[9] The applicants' deponent denies that there were threats emanating from their community which were directed to the respondents except to invite the respondents' community to a meeting in order to discuss the outcomes of the report and to clear the misapprehension that Waterfall is subject to the control of Hlangani locality. She further stated that it became apparent that the respondent will stop at nothing in their threats to disrupt the site demarcations by the applicants. Their conduct escalated informing the applicants that they will engage in violent means should it become necessary.

[10] The applicants' deponent further stated that notwithstanding making several reports to members of the South African Police Service that did not deter the respondents from issuing threats to the applicants. Notwithstanding a damage caused to a vehicle operated by an official of the 11th respondent, there were no arrests made. All attempts to resolve the matter amicably and through the involvement of the law enforcement authorities yielded no positive results.

Pursuant the advice from their attorneys and to avoid the possibility of members from both communities taking the law into their hands, the applicants decided to approach this court for relief. Both Novali Maphini and Noxolo Majavelo deposed to confirmatory affidavits in support of the founding affidavit.

[11] The case of the 1st to 9th respondents is set out in the affidavit of Mzukisi Mtyingizane (1st respondent) who refers to himself as the chairperson of Hlangani Traditional Council and a traditional leader (*Inkosana*) of Hlangani Administrative Area which comprises of the following areas :

- (i) Hlangani Location
- (ii) Boyce Location
- (iii) Lithemba Location
- (iv) Sithandathu Location
- (v) Waterfall Location.

He avers that he is entitled and authorized to oppose the application by virtue of his status as “*Inkosana*” and has been duly authorized by the 2nd to the 9th respondents who are Traditional Councilors of his Traditional Council.

[12] The respondents’ deponent alleges that Waterfall is not a standalone entity or a traditional community that is recognized in terms of section 5 of the Traditional Leadership and Governance Act¹ it is part of the five localities that constitutes Hlangani Administrative Area.

He concedes that some of the events that are mentioned as a background in his affidavit took place before he was born and were narrated to him by elders who were present when they unfolded. Whilst they may appear as constituting hearsay, he contended that the 2nd respondent who was amongst the elders who were present at the time has deposed to a confirmatory affidavit. He further contended that the hearsay evidence that appears in the background sketched out in his affidavit ought to be admitted in terms of section 3(b) of the Law of Evidence Amendment Act².

[13] According to the respondents’ deponent Hlangani Administrative Area has been in existence since 1945. However, due to its nominal population from then up to the late 1970’s a vast area of Waterfall was not occupied but used for grazing purposes.

It is further contended by respondents’ deponent that at some stage the then government requested to use a portion of Waterfall Location for a temporal forestation purposes and for the construction of temporal shelters for its employees.

After the then government no longer needed the use of the land it returned it to the administrative authority of Hlangani.

[14] Subsequently, four families he refers to as refugees and who are the forefathers and ancestors of most residents of Waterfall were accommodated on the disused portion of the land at the instance of their district magistrate Mr. Drakeitas with the

¹ Act 4 of 2005, Eastern Cape.

² Act 45 of 1988.

approval of the *Inkosana* of Hlangani, a Mr. Matole. Those families are, Wawi Nolusu and his brother Siyonto Majavele who fled from Xhokonxa- Kwa Gcina ,Tyokolwana Tsibiya family and Mahlubulo Gceli from Mjika.

According to the respondents' deponent the above families regarded themselves as the subjects and community members of Hlangani and participated in its community activities. Even their descendants including those listed in "VM2"annexed to the founding affidavit are fully aware that Waterfall is under Hlangani and had submitted themselves under its authority and traditional council. Their recent conduct to extricate themselves from Hlangani is of recent origin to subvert the authority of Hlangani Traditional Council which resorts under Phungulelo Traditional Authority. When the Waterfall community wanted to align themselves with Bovube Traditional Authority they were allowed to do so on condition that they leave behind the land in Waterfall since it belongs to Hlangani.

[15] In amplification of the points raised limine, the respondents' deponent alleged that the Waterfall community is not a legal entity which qualifies as a traditional community which is recognized under the applicable section of the Traditional Leadership and Governance Act referred to above. On this ground the application ought to be dismissed with costs. He further contended that nowhere did the applicants' deponent allege in its founding affidavit that she was duly authorized to institute these proceedings

[16] The respondents further contended that the 1st to 9th respondents who are councilors of the Traditional Council were acting in their official capacity when they stopped the applicants from carrying out their decision to demarcate the land. In light thereof, so it was contended, the council ought to have been joined for it has a direct and substantial interest in the affairs and land matters that affect Hlangani.

The respondent further concluded that the applicant failed to establish the requirements for a final interdict in that,

(a) The applicants did not establish a clear right entitling them to demarcate sites,

(b) The applicants have the remedy to approach the *Inkosana* to resolve the feud between the two localities and if the issue remains unresolved, they are entitled to approach the “*Inkosi*” (senior traditional leader) and finally the “*Ikumkani*” (King).

[17] As a final attack on the application the respondents contend that there is a dispute of fact which was glaring and foreseeable to the applicant relating to the applicants’ authority to deal with the Waterfall Land, as a result of which they invoked the services of a land surveyor. The respondents’ deponent further contends that when launching this application, the applicant should have realized the existence of a serious dispute of fact, incapable of resolving on the papers.

[18] The respondents’ deponent further contends that the conduct of the 11th respondent of advising the applicants to advertise their matter on a newspaper amounts to poking its nose in the internal affairs of Hlangani and invites the court to show its displeasure on a Mr. Phakade who is one of the officials of the 11th respondent. He further alleged that Chief Zipho Mchana of Masizakhe Local Traditional Council has no business over Waterfall. Similarly councilor Sophangisa of Ward 4 knows that meetings for issues relating to the development of Hlangani are held at Hlangani Great Place and are attended by Waterfall.

[19] The respondents do not deny that they stopped the applicants from carrying out their decision to demarcate sites since the applicants are their subjects. They however, deny that they engaged the services of the 11th respondent, instead they question the report of the Surveyor General which they allege was based on outdated colonial maps which do not take the country’s recent changes.

Further their dissatisfaction in the report stems from the surveyor’s intention to create an impression that Waterfall is a separate entity from Hlangani when it is not. Thereby raising false hopes and is fueling insurgency tendencies on the part of the applicants.

[20] The respondents deny that they remained idle, they contend that they reported the conduct of the applicants referred to as insurgents, to COGTA and to the Kingdom of *Amampondomise*. However, it must be noted that this letter that is claimed by the

respondents' deponent as proof of their assertion has not been attached to the answering affidavit.

[21] The respondents' deponent set out the process of demarcation of sites as follows. That the process starts with the Headman after receiving a request, The request is referred by the Headman to *Inkosana* who upon receipt of the request from the Headman will refer his recommendation to *inkosi*/ Senior Traditional Leader who after consideration and approval by the Traditional Council will refer it to the Department of Rural Development and Land Reform to assist with the demarcation. The respondents admit that the applicants are entitled to conduct their affairs in a lawful manner, therefore deny that they harassed, threatened or intimidated the applicants. If that was the case, the applicants ought to have attacked a police CR number as proof that their threats were reported.

[22] Daluhlanga Thomas Mtyingizana deposed to a confirmatory affidavit in which he states that he is one of the elders of Hlangani referred to in the answering affidavit and he is one of the elders who narrated the events to the respondent's deponent since he was present at the time the events were unfolding. He confirms the settlement in Waterfall described in the answering affidavit. Furthermore, that Waterfall area has been always part of Hlangani with its residents as subjects under the authority of Hlangani.

[23] In reply the applicants' deponent denies that Waterfall location belongs to Hlangani Administrative Area. The applicants contend further that the settlement of the Waterfall area took place much earlier than is alleged in the respondents answering affidavit. The settlement at Waterfall by the four pioneering families mentioned in the answering affidavit came about as those families decided to migrate to greener pastures for their livestock and a more habitable terrain for their families. The applicants deny that they occupied the area as a result of being chased away from their previous settlement. The Government's Forestry project which was part of a broader project of the Nqadu Forest which covered both Waterfall and Hlangani areas came to an end. It is further denied that Waterfall area was returned to Hlangana at the expiration of the project.

[24] The applicants insist that as a properly established community of residents who share the same interest in the development and upliftment of their community, they have the necessary locus standi to institute these proceedings. They further contend that the point in limine that they do not have the authority should be dismissed with costs since it is made clear in the founding affidavit that the deponent was authorised by a meeting of the community and that is reflected in its minutes.

[25] The applicants further contend in the reply that there is no entity known as Hlangani Traditional Council. This is borne out in the respondent's answering affidavit where in it is alleged in paragraph 1, thereof that Hlangani falls under the authority of Phungulelo Traditional Council with no explanation or a certificate of recognition as to how can there be a traditional council which at the same time falls under the authority of another. For those reasons there was no necessity to join Hlangani Traditional Council in these proceedings.

The applicants further contend that it has established a clear right and denies existence of a dispute between the parties that requires the intervention by a Traditional Council. It further refuses the allegation of the dispute of facts as alleged by the respondents. The applicants insist in their contention that Waterfall exists separately from Hlangani

[26] The applicants further raised the point that the respondents have despite their unhappiness with the report of the Surveyor General failed to take steps to challenge it instead the respondents, so it was contended, whilst questioning the report where it relates to Waterfall, they do not question it when it pertains to Hlangani.

[27] The essence of the application is for the granting of a final interdict. It therefore follows that it may only be granted if the applicant succeeds in establishing the requirements for a final interdict. Those requirements are crystallized in *Setlogela vs Setlogelo*³ as the following:

(i) a clear right

³ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

- (ii) Injury actually committed or reasonably apprehended and
- (iii) The absence of similar protection by any other remedy.

Regarding the first requirement it follows that a court must be satisfied that the right to be protected is a clear right. This requires of the applicant to identify such right and prove its existence. The existence of a right is a matter of substantive law.

[28] In **Plascon- Evans Paints (Pty) Ltd**⁴ the legal position regarding final interdicts was stated as follows:

“It is correct that where 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 covered 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 bona fide dispute of fact (See in this regard **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155 (T) at 1163-5, Da Mata v Otto No 1972(3) SA 858 (A) at 882 D-H**).

[29] Regarding a real, genuine or bona fide dispute of fact in **Wightman J W Construction v Headfour (Pty) Ltd**⁵ Heher JA stated:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports whether that right is clearly established is a matter of evidence. In order to establish a clear right an applicant has to prove on a balance of probability the right which he seeks to protect (See **Nienaber v Stuckey 1946 AD at 1053-40**)”

⁴ Plascon – Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd Limited 1984 (3) SA 623 (A) at 634-635.

⁵ 2008 (3) SA 371 (SCA) para 13.

[30] The applicants' deponent has positively identified herself as a resident of Waterfall. She together with members of the community of Waterfall have an interest in the land of Waterfall which was previously occupied by their forefathers and left to them for their use.

The applicants have proved without any doubt that they have established themselves as a community that share the interest of developing the Waterfall Community. What I gleaned from the respondents objection to the applicants right to the land is the activity to demarcate the land but not their right to occupy it, though it is patently clear from the evidence that the applicants enjoy occupational rights in their land of Waterfall. Nonetheless deserving of protection albeit not a better right as envisaged in the Constitution⁶. This is further evidenced in the historical demarcation of their localities of Waterfall and Hlangani which were identified as per the report of the Surveyor – General as neighboring farms 68 and 68 respectively. I am therefore satisfied that the applicants have succeeded in identifying their right to the land they occupy, and have proved the existence thereof.

[31] The respondents have not denied that their purpose to attend the gathering of the applicants was to stop them in their activity of demarcating sites. They characterized the applicants' conduct as unlawful. However, in so doing, they did so at the risk of creating tensions that would play out. They nevertheless chose to do it their own way without involving any legal process. That conduct of the respondents lends credence to the averments that they went to the applicants' meeting with the purpose of disrupting it regardless of any conflict or violence that was likely to break out. The injury alleged by the applicants and their apprehension therefor, more particularly if regard is had to the description given to them of being refugees is a real apprehension. I am therefore satisfied that the applicants have met this second requirement for an interdict.

[32] The respondents suggest that the applicants' other remedy was to escalate their differences to the Senior Traditional Leader up to the level of the King. What however is lacking in their submission is why they never took steps to invite the

⁶ See section 25 (6) of the Constitution of the Republic of South Africa.

applicants to a meeting of the Traditional Council or the Senior Traditional Leader or better still to report the conduct of the applicants to the King for purposes of intervention. Instead, the respondents laid the onus to do so, notwithstanding the claim that the applicants are their subjects, at the doorstep of the applicants. In light thereof the applicants cannot be faulted for approaching this court for relief. The respondents' defence on this aspect has no merit and falls to be dismissed. Similarly, the points in limine that the applicants have not met the requirements for final interdict falls to be dismissed.

[33] Relying on the authorities above and what was stated in **Rippol Dansa v Middleton and Others**, that a hallow denial or a fanciful untenable version does not create a dispute of fact. The denials of the respondents' in the attempt to avoid the granting of the relief sought are far – fetched and untenable. They cannot be considered as genuine to disqualify the court from determining the application on the papers before it.

[34] The next issue that can be disposed of quickly is the issue of the non- joinder of Hlangani Traditional Council. In **Absa Bank Ltd v Nande**⁷ the test for non-joinder was set out by the Supreme Court of Appeal as follows:

“[10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, Kwazulu-Natal* it was held that If an order or judgement cannot be sustained without necessarily by prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined “[footnotes omitted In **Judicial Services Commission and Another v Cape Bar Council and Another**⁸ the Court held:

“It has now become settled law that the joinder of a party is only required as a matter of necessity –as opposed to a matter of convenience. If the party has a direct and

⁷ 20264/2014 [2015] ZASCA 97 (1 June 2015)

⁸ 2013 (1) SA 170 (SCA) para 12.

substantial interest which may be affected prejudicially by the judgement of the court in the proceedings concerned (See **Bowring NO v Vrededorp Properties CC 2007(5) SA 391 (SCA) para 21**). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one”.

[35] The first hurdle faced by the respondents in their submission for a non-joinder of Hlangani Traditional Council is that applicants do not seek any relief against the Traditional Council. On that score alone I am unable to find in what way will the Traditional Council be affected prejudicially by the judgement in these proceedings. Further, nowhere in its answering affidavit is it shown by way of proof that the actions of the respondents were mandated by the Traditional Council and were acting on its behalf. This, the respondents could have done by producing a minute or resolution taken by the Traditional Council and their terms or conditions of what was expected of them when they find the applicants demarcating sites as per such a resolution.

[36] Instead, the court finds it difficult to understand, why the Traditional Council which is a legal entity will not exhaust legal remedies where its rights are adversely affected by the conduct of the applicants but choose to send its councilors to engage in any environment that was likely to be hostile and result in a conflict without the assistance of law enforcement agencies. In its heads of argument, the respondents relied on **Matjhabeng Local Municipality v Eskom Holdings Ltd**⁹ where the court held:

“The law on joinder is well settled. No court can make findings adverse to any person’s interest without that person first being a party to the proceedings before it”.

[37] Whilst it may be so that the Traditional Council may have an interest in the litigation against its counsellors, such interest in my view is a limited one. My view is further bolstered by the conduct of the respondents who chose to instruct an attorney in their personal capacity to dispatch a letter in which they were stopping the applicants

⁹ 2018 (1) SA 1 (CC) para 33E-F.

from threatening them or inviting them to their meetings. For sake of completeness, I reproduce the letter annexed as “VM7” in its entirety and it reads:

“THE HEADMAN

Waterfall Locality

Hlangani Administrative Area

TSOLO

14 MAY 2019

Dear Sir

RE: HLANGANI ADMINISTRATIVE AREA, TSOLO BOUNDARY DISPUTE.

We refer to the above subject.

We are acting on the instructions of our clients Hlangani Community.

We are instructed by our client to address this letter to you as we hereby do.

Our clients have given us copies of your letters addressed to them and inviting them into meetings at Waterfall on the 27th April 2019 and 11th May 2019 respectively to respond and reply.

Our clients have informed us that the dispute of authority and accountability of Waterfall locality and Hlangani Administrative Area has not been resolved up to this stage and therefore you do not have authority to invite them to your locality as your subjects instead you are their subject.

Kindly therefore refrain from inviting our clients and engaging yourself into unlawful activities in and around Waterfall locality until the dispute is resolved.

Kindly further refrain from threatening our clients and the anticipated demarcation and development of the vacant pieces of land situated in and around Waterfall locality.

We accordingly hope the above is clear for your co-operation in this regard.

Yours Faithfully

M.T. Mlola (Mr)”

[38] It is worth noting that nowhere in the letter is there any reference made to Hlangani Administrative Council, nor is there any reference made to iNkosana (Traditional Leader of Hlangani or iNkosi (Senior Traditional Leader of Hlangani). The letter is unambiguous that the clients of the attorney are the Hlangani summoned to

iNkosana /iNkosi (Traditional Leader or Senior Traditional Leader) as the first port of call, it would reasonably be expected that any litigation that arises out of the misbehavior or disloyalty by Waterfall Community would be at the instance of the Traditional Council and not individual counsellors acting in their personal capacities. The plausible explanation for the absence of the Traditional Council or its leader in the instructions given to the attorney is that they are not a party to the activities of the respondents:

[39] I am therefore not convinced that the respondents were acting in any other capacity other than their personal capacities. There is therefore no merit in their contention and submission regarding the non-joinder of the Traditional Council.

[40] In conclusion I find that the applicants have succeeded to establish all the requirements for the granting of a final interdict. They have a protectable right to the land they occupy. A right acquired from their forefathers from time immemorial. I am further satisfied that the respondents' conduct is unlawful and illegal, deserving of a court injunction. Their conduct is best described as bullying and an invasion of the applicants' right to their property which amounts to taking the law into their own hands.

[41] In the result the following order will issue:

1. That the 1st to 10th respondents are interdicted and prohibited from harassing, threatening and intimidating members of the applicant.
2. That the 1st to 10th respondents are hereby interdicted from interfering either directly or indirectly through incitement of their members or supporters, with the applicants' site demarcation process at Waterfall Community.
3. That the 12th respondent be and hereby authorized and directed to assist the Sheriff of the Court in the implementation and execution of the order of this court.
4. That the 1st to 10th respondents be and hereby ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

M.V NQUMSE
ACTING JUDGE OF THE HIGH COURT

Appearances

<u>Attorney</u> for the Applicants	:	Mr Z. Dotwana
Instructed by	:	Legal Aid South Africa MTHATHA
Counsel for the Respondents	:	Mr. M.C Manana
Instructed by	:	State Attorney EAST LONDON
Date of hearing	:	06 October 2022
Date of delivery	:	01 December 2022