

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

Case no. 3351/18

Date heard: 29/1/19

Date delivered: 28/2/19

Not reportable

In the matter between:

Nomakhwezi Mthizana-Base

First Applicant

Buyiswa Zwedala

Second Applicant

Mbiko Lindiswa

Third Applicant

Nobelungu Lumkwana

Fourth Applicant

Lihleli Lumkwana

Fifth Applicant

Lelethu Lumkwana

Sixth Applicant

Mbambeleli Siwapi

Seventh Applicant

and

Nosizwe Maxhwele

First Respondent

Onke Nyathi

Second Respondent

Vuyani Madubela

Third Respondent

Thembisile Mkhanzi

Fourth Respondent

Mteteleli Mkhohli

Fifth Respondent

Sisa Manyadu

Sixth Respondent

King Sabata Dalindyebo Local Municipality

Seventh Respondent

JUDGMENT

Plasket J:

[1] This matter started life as an urgent application. A rule nisi was issued on 31 July 2018. It was extended from time to time. This judgment concerns the final relief sought by the applicants. That relief is set out as follows in the notice of motion:

‘1 . . .

2 That first, second, third, fourth, fifth and sixth respondents (“the respondents”) be and are hereby interdicted and restrained from intimidating, threatening and evicting the applicants from their homesteads and/or plots in Bhongweni Phase 1, Zimbane Administrative Area, Mthatha.

3 That first, second, third, fourth, fifth and sixth respondents (“the respondents”) be and are hereby interdicted and restrained from preventing the applicants access to their homesteads and/or plots in Bhongweni Phase 1, Zimbane Administrative Area, Mthatha.

4 That the respondents’ conduct described in prayers 2 and 3 above is hereby declared unlawful.

5 That the respondents be and are hereby directed to forthwith restore undisturbed possession to the applicants of their homesteads and/or plots in Bhongweni Phase 1, Zimbabwe Administrative Area, Mthatha.

6 That the respondents pay the costs of this application.’

[2] It will be noted that no relief is sought against the King Sabata Dalindyebo Local Municipality, the seventh respondent, which appears to have been joined at some time after the application had been initiated. It is cited as a respondent because of its interest in the matter as owner – as alleged by the applicants – of the land that forms the subject matter of this dispute. It has played no part in these proceedings.

[3] The applicants set out in detail a series of allegations against the first to sixth respondents, whom I shall refer to as ‘the respondents’. These allegations involve threats being made against them, the threatened dispossession of their homes and unlawful encroachments on their homes. If established, it seems to me, these allegations will justify the granting of the relief claimed by the applicants in their notice of motion.

[4] Those respondents who have opposed the application – the first to fifth respondents – have denied the allegations made by the applicants. On the face of it, therefore, a dispute of fact has been created. It is necessary, at the outset, to consider the law relating to disputes of fact in motion proceedings when final relief is sought. It will inform my dealing with the facts, and determine the outcome of this matter.

Factual disputes in motion proceedings

[5] In *National Director of Public Prosecutions v Zuma*¹ Harms DP observed that motion proceedings were really designed for the resolution of legal disputes based on common cause facts. In most applications, however, disputes of fact, whether minor or more substantial, arise. As a result, rules have been developed to

¹ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

determine the facts upon which matters must be decided where disputes of fact have arisen and the parties do not want a referral to oral evidence or trial.

[6] The approach to disputes of fact when interim relief is sought differs from that when final relief is sought: in effect, the former situation is the obverse of the latter situation.² In proceedings for final relief the approach to determining the facts was authoritatively set out by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*³ as follows:

‘It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers . . .’

[7] In other words, generally speaking, in motion proceedings in which final relief is sought, factual disputes are resolved on the papers by way of an acceptance of those facts put up by an applicant that are either common cause or are not denied as well as those facts put up by the respondent that are in dispute. I have said that this rule applies ‘generally speaking’ because there are exceptions to it, as already alluded to by Corbett JA. These are instances where despite denials by a respondent, no real, genuine or bona fide dispute of fact can be said to have been

² As to the former, see for example, *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189; *Gool v Minister of Justice & another* 1955 (2) SA 682 (C) at 688C-F; *Spur Steak Ranches Ltd & others v Saddles Steak Ranch, Claremont & another* 1996 (3) SA 706 (C) at 714E-F.

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C.

created. Harms DP said, in *National Director of Public Prosecutions v Zuma*,⁴ that the general rule may not apply 'if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers'.

[8] *Wightman t/a JW Construction v Headfour (Pty) Ltd & another*⁵ considered this very issue. Heher JA dealt with how courts should decide on the adequacy of a respondent's denial in motion proceedings for purposes of determining whether a real, genuine or bona fide dispute of fact had been raised. He stated:

'[11] The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I respectfully agree with the learned judge.

[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers . . .

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able

⁴ Note 1 para 26. See too *Plascon-Evans* (note 3) at 634I-635D.

⁵ *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) paras 11-13.

to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.’

[9] In *Naidoo & another v Sunker & others*⁶ Heher JA held that what he had said in *Wightman* about the adequacy of allegations in answering affidavits for purposes of the *Plascon-Evans* rule ‘applies with equal force to a respondent who endeavours to raise a special defence’.

Background

[10] The first applicant stated in her founding affidavit that in the early 1990s, people began to occupy land in what is now known as Bhongweni Phase 1 of the Zimbabwe administrative area near Mthatha. They did so with the blessing of the traditional leader, Chief Baleni, who is now deceased. The first applicant bought her first plot in 1992 and built a home on it. She stated that while she had no written record of the purchase of the plot, she still lives there. She claimed that she had enjoyed undisturbed use and enjoyment of the plot until recently. In 2008, she acquired a second plot from her sister-in-law.

[11] The plots in Bhongwani Phase 1 have not been properly sub-divided and so plots have not been registered in the Deeds Office. The area, known as Erf 912, Mthatha, belongs to the King Sabata Dalindyebo Local Municipality, the seventh

⁶ *Naidoo & another v Sunker & others* [2011] ZASCA 216 para 23.

respondent. In proof of this fact, which was denied by the first to fifth respondents, the first applicant attached a copy of the title deed. This constitutes sufficient proof and displaces the bare denial raised by the respondents.

[12] The first applicant's plots are adjacent to each other. The plot she acquired in 2008 had on it a two-roomed 'half structure with no roof, doors or fences'. Within four years of acquiring the plot, the first applicant fenced the property, erected a gate and completed the building. She decided to let the property to the fourth and fifth applicants, together with their minor children, and the sixth applicant.

[13] The second applicant acquired a plot in Bhongweni Phase 1 in 1995. She paid the local headman R2 500, a case of beer, a case of Coca Cola and a bottle of brandy for it. She built two structures on it: a dwelling, where she lived, and a shebeen. Both structures on the plot were destroyed by a storm in 2004. In 1997, she moved temporarily to Grahamstown. When she returned in 2012, she found that her property had been fenced by a Ms Thobakazi Joyini, who claimed to have purchased the plot from the second respondent. Despite this, in May 2018, the second applicant began to build a two-roomed flat on the property.

[14] The third applicant acquired a plot in Bhongweni Phase 1 in 2017. She moved into a three-roomed house on the property where she then lived.

[15] The first respondent is the local headman. Her late husband was previously the headman for the area in which Bhongweni Phase 1 falls. On his death, the first respondent was appointed as regent to her son. The second, third, fourth and fifth respondents are members of a committee formed by the first respondent. The sixth respondent, who has not filed any opposing papers, is described in the founding papers as a 'project manager performing various construction projects under the first respondent's authority'.

[16] All of the allegations concerning the respondents, save for the allegation that the first respondent is regent to her son, were admitted in the answering affidavit. The allegation that is denied is gainsaid by a letter attached to the first applicant's replying affidavit. It is dated 15 August 2018 and is signed by the Head of the

Department of Cooperative Governance and Traditional Affairs in the provincial government. It was addressed to the first respondent and confirmed that she had been appointed as 'the regent inkosana/headman of Zimbane administrative area' in May 2008. It gave her notice of the review of her appointment as regent and afforded her an opportunity to make representations as to why her regency should not be reviewed. This letter trumps the bare denial, given by the second respondent on behalf of the first respondent, that she was appointed as regent to her son.

The dispute

[17] The first applicant alleged that since the first respondent was appointed as acting headman (which the first appellant erroneously said was in 2011/2012), she 'has gradually been taking land from the people in the area of Bhongweni, claiming that it belongs to the Chieftdom' and that she has 'claimed various sites in the area and has sold them to rich buyers who use the land for property development'. For what it is worth, the second respondent, who deposed to the answering affidavit, denied the contents of this paragraph 'vehemently', adding the meaningless phrase in motion proceedings that is all too often encountered, that the first applicant 'is put to proof thereof'. The basis of the denial then follows: the first respondent 'came to power officially in 2008, not 2011/2012 as stated herein'.

[18] The first applicant then moved from the general to the specific. She stated that in January 2018, she received a message from a sub-headman, a Mr Mkhohli, (whom I assume is the fifth respondent) to inform her that she had to vacate her house, and that her tenants also had to leave her second property, because the land belonged to the first respondent. She contacted Mr Mkhohli who told her the first respondent's committee wanted the land. She refused to vacate the properties.

[19] In the following month she received a letter from the first respondent 'advising' her to evict her tenants. She and her tenants went to the first respondent's great place where they was told by the first respondent and her committee that the site (where her tenants live) belongs to the chieftdom. She said that she had acquired the site from her sister-in-law. (She no longer has the letter as the committee members took it from her.)

[20] The second respondent's answer to these allegations is the following.

'Contents hereof are denied, first Applicant was officially called to first Respondent's place and after sometime she heed that called hence minutes annexed hereto marked "O.N.4" in which first Applicant apologized under Duress but freely after deliberations were made.'

[21] The minutes referred to concern a meeting on 14 April 2018. Whether this is the meeting referred to by the first applicant is not clear. It is not apparent that the second respondent was present in the meeting. The minutes are cryptic and difficult to comprehend.⁷ If anything, however, they tend to support the first applicant's version. First, it is recorded in the minutes that she said she had received a telephone call from the fifth respondent who told her that someone was interested in her site; and that her children had had told her of a letter from the great place saying that her tenants were required to vacate the property they occupied. Secondly, it is recorded that the fourth respondent said that 'the land is left with the Great Place' and that the 'Great Place called the meeting for all people from phase 1, it was explained to them that they have nothing to do with this land because they left it behind'.

[22] The first applicant proceeded to say that in March 2018, Mr Mkhanzi, who I presume is the fourth respondent and who she described as the chairperson of the committee, told her to pay R10 000 to the first respondent, as *ubusa eNkosini*,⁸ in order to keep the plot. She did not pay.

[23] The second respondent's answer to these allegations is this:

'Contents of this paragraph are vehemently and emphatically denied as if specifically traversed.

In amplification it would be impossible for any person including Mr Mkhohli to claim payment for **UBUSA ENKOSINI** as first Applicant was not a resident in the area and the said "**UBUSA**

⁷ I am indebted to Ms Norma Ntliziyana, researcher in the Eastern Cape High Court, Grahamstown for translating the minutes from isiXhosa to English.

⁸ As I understand the position, *ubusa eNkosini* is an unsolicited gift given by a subject to a traditional leader, with no strings attached, as a sign of respect and allegiance.

ENKOSINI” is only paid by person new in looking for a vacant plots/sites that have been earmarked by the council.’

[24] Tellingly, no specific denial on oath is made by the fourth respondent and no version of what, if anything, transpired is deposed to by him. Whether the amount allegedly claimed was said to be *ubusa eNkosini* or not, no specific denial had been made by anyone of the demand for the payment of R10 000 in order for the first applicant to keep her plot. All that the denial really amounts to is that the fifth respondent should not, in the circumstances, have asked for a payment for the purpose alleged. His confirmation of the contents of the answering affidavit takes the matter no further.

[25] The first applicant spent time in hospital in Johannesburg in June 2018. On her return, the fourth applicant advised her that the second, third and fourth respondents had told her to vacate the plot where she, the fifth applicant, their children and the sixth applicant lived because it belonged to the chiefdom. She had refused to do so. On 10 June 2018, however, ‘a contractor led by the sixth respondent’ arrived at the site and began earthmoving operations. The sixth respondent informed the first applicant that he had been ‘employed by the first respondent to build a project for her’. (The first applicant reported the matter to the police but received no help.)

[26] She continued to say that the sixth respondent busied himself building a structure on the site. Bricks, cement and sand was off-loaded into the yard and work began on the erection of a wall around the site, during which a water pipe was damaged resulting in a water outage to the house. A photograph of the site, depicting the wall, was attached to the first applicant’s founding affidavit. The fourth, fifth and sixth applicants were threatened in order to force them to vacate the site, on the basis of the first respondent’s claim that it belonged to the chiefdom. As the property was enclosed by the sixth respondent, and the gates were locked by him, their freedom of movement was violated.

[27] The sixth applicant continued with the work and, on 6 July 2018, he barricaded the gate to the site with concrete blocks, cut the fence surrounding the

property and destroyed the gate that had provided access to the site. The fourth, fifth and sixth applicants and the children were unable to leave their home. When the first applicant arrived she was met with what she described as 'incredible' hostility from the contractors on site: she was told to leave as it was not her site and that they were working on the instructions of the first respondent. Once again, she contacted the police but received no assistance. She approached the police again. A case was registered but nothing was done.

[28] Which regard to the allegation that the second, third and fourth respondents ordered the fourth applicant to vacate the plot, and that the sixth respondent, on the instructions of the first respondent, moved onto it and commenced building operations, the second respondent stated:

'Contents of this paragraph are vehemently denied as if specifically traversed and first Applicant is put to proof thereof. Further that some of the allegations in this paragraph are not with my personal knowledge, consequently can neither deny not admit same.'

[29] The allegations against the sixth respondent are not denied as he has not filed opposing papers. (In addition, the third respondent did not depose to a supporting affidavit, so the allegations made by the second respondent in respect of conduct attributed to the third respondent constitutes inadmissible hearsay evidence. The second respondent's answer to the allegations concerning the sixth respondent's work on the site is:

'Contents herein are denied and first Applicant is put to proof thereof. First Respondent have instructed no contractors as she have no power or authority to do so, save to note "**MBM2**" which deponent does not know which house or yard it belonged or it was just taken for the purpose of bolstering first Applicant's case which is weak/or non-existent at all against all Respondents.'

[30] In answer to the allegations that the fourth, fifth and sixth applicants were threatened in order to force them to vacate the site, as the first respondent said it belonged to the chiefdom, and that their right to freedom of movement was violated, the second respondent said:

'Contents herein are denied first Respondent knows the procedure of dealing with her subjects as it was done to first Applicant called to first Respondent's place, minutes made and a decision is reached not the way it is portrayed in this paragraph, first Applicant is put to proof thereof.

First Applicant's place is situated at Langa Street, Mxhwele Locality, in this regard reference to her place is shown on these photos annexed hereto marked.'

'O.N.9' to the answering affidavit appears to be copies of two pages of Google Maps, or something similar. It is not clear what it depicts. It is entirely meaningless. It is probably the unnamed annexure referred to above.

[31] In answer to the allegations that the sixth respondent closed off access to the plot with concrete blocks, prevented the fourth, fifth and sixth applicants from leaving, displayed hostility towards the first applicant and confirmed that they worked on the instructions of the first respondent, the second respondent said:

'Contents in these paragraphs are not within my personal knowledge, consequently can neither deny nor admit same and first Applicant is put to proof thereof.

In amplification, first Respondent is just a headman who does not take decisions alone but assisted by a council in which I am a member, therefore the issue of intimidation tactics uses people by first Respondent powerful in the area is foreign to me, clearly first Applicant does not know first Respondent, a very sweet, dedicated and hard-working woman.'

[32] The travails of the second and third applicants are similar to what befell the first, fourth, fifth and sixth applicants.

[33] The second applicant was called to the first respondent's homestead on 13 May 2018 and told by the first respondent that her site no longer belongs to her, having been sold to Ms Joyini. On 26 May 2018, the second, third and fourth respondents visited her site (where building operations were in progress) and instructed the workers to stop working, telling them that, if they did not, blood would be spilt. When the second applicant reported what had happened to a Chief Sangoni, he advised her to either go to the Magistrate's Court or to instruct an attorney. He told her that as the land belonged to the State, he had no authority over it.

[34] On 18 June 2018 at about 13h00, the second and third respondents arrived at the second applicant's property and destroyed what had been built up to then: they broke the walls and destroyed building materials.

[35] In answer to these allegations, the second respondent said:

'All contents of these paragraphs are vehemently and emphatically denied as if specifically traversed.

In amplification of such a denial, I did not sell any property to anybody first Applicant ought to have submitted a receipt as proof or a confirmatory affidavit, no first Respondent's committee in which I am a member ever did what is alleged here, again no proof but **BARE** allegations, unsubstantiated with any fact, no confirmatory affidavit, Sangoni filed in these proceedings.

Other facts in these paragraphs about Buyiswa approaching Legal Aid South Africa, Mthatha and destruction of Buyiswa's site are vehemently denied again no proof by first Applicants and other facts are not within my personal knowledge consequently can neither deny nor admit same and first Applicant is put to proof thereof.'

[36] In June 2018, when the second and fifth respondents saw the third applicant on her property, they asked her where her husband was. When she told them he had died the previous year, they told her that her land belonged to the chieftdom and that if she wished to continue to live there she would have to pay the first respondent R10 000 as *ukubusa eNkosini*. She did not do so.

[37] In late June 2018, the second respondent advised the third applicant's mother that she should tell her daughter to leave her property, that a purchaser for the property was being sought and that the third applicant was being stubborn.

[38] In the light of these facts and the third applicant's knowledge of what has happened to the other applicants, she fears that the same fate that befell them may befall her.

[39] In answer to these allegations, the second respondent said:

'Contents of these paragraphs emphatically and specifically denied as if specifically traversed and first Applicant is put to proof thereof.

In amplification of such a denial, Lindiswa Mbiko bought a property/site from first Applicant according to the records of headman's place of which I am a council committee member.

No ukubusa was ever requested from her, no confirmatory affidavit regarding that no second to fifth Respondent telling Lindiswa land belongs to chieftdom, it is hearsay and falley (sic) build by first Applicant. I must mention clearly that at no stage did I ever say to Lindiswa, I am looking for a land belonging to Lindiswa and that I ever say she was stubborn hearsay, unsubstantially falley (sic) by first Applicant.'

[40] The first applicant, as I have said, obtained no help from the police. She was represented by an attorney for a while, but that produced little in the way of legal protection. During the course of July 2018, the first applicant found her way to the Legal Resources Centre (in Grahamstown) – the LRC. It was ascertained by her new legal representatives that the land did not belong to the chieftdom but to the King Sabata Dalindyebo Local Municipality, with the result that the respondents had 'no authority over the property and cannot evict people, build on the properties, or intimidate and threaten the occupants of the properties'.

[41] The allegations in relation to the second, third and fourth applicants that are made in the first applicant's founding affidavit are confirmed in supporting affidavits deposed to by those applicants. No supporting affidavits were deposed to by the fifth and sixth applicants who live with the fourth applicant and whose circumstances are identical to hers. I am, in the circumstances, prepared to accept that the public interest standing claimed by the first applicant is sufficient to justify the grant of relief in respect of these applicant, if I conclude that a proper case has been made out.

[42] The seventh applicant is in a different position. He is mentioned in one sentence in the founding affidavit. Paragraph 10 stated simply that the seventh applicant was 'Mbambeleli Siwampi, an adult male'. He deposed to a supporting affidavit in which he confirmed certain paragraphs of the founding affidavit that do not mention him at all. In these circumstances, his application must fail, with costs. On the positive side for the seventh applicant, the costs will be limited to one sentence in the founding affidavit, a four paragraph supporting affidavit and nothing

in respect of the answering affidavit because it purports to answer an 11 paragraph affidavit that is not part of the papers.

Conclusion

[43] I have cited fully and verbatim the second respondent's answers to the relevant allegations made by the first, second, third and fourth applicants. The first, fourth and fifth respondents deposed to supporting affidavits in which they confirmed the contents of the second respondent's answering affidavit in relation to them.

[44] In the first respondent's affidavit, she said that she had read the affidavit of the second respondent and confirmed that 'all what he said is true in relation to me and my subjects'. No confirming affidavit was deposed to by the third respondent.

[45] The allegations made in respect of the sixth respondent could not be disputed by the second respondent and have not been disputed by the sixth respondent because he has not opposed the application. The allegations against him are thus not disputed.

[46] What of the denials contained in the answering affidavit of the second respondent? I am of the view that, for the reasons that follow, no real, genuine or bona fide dispute of fact has been created by them.

[47] It cannot be said that the second respondent 'seriously and unambiguously addressed' the facts in dispute.⁹ One would have expected an engagement with the material facts deposed to by the first applicant. Instead, the second respondent resorted ritualistically to meaningless statements that the facts alleged were 'vehemently' or even 'vehemently and emphatically' denied 'as if specifically traversed' and that the first applicant was 'put to proof thereof'.

[48] Furthermore, in instances in which allegations were made against the first respondent – the central figure in this case – the denials made by the second

⁹ *Wightman* (note 5) para 13.

respondent were anything but unambiguous. In instances in which the facts must have fallen within the specific knowledge of the first respondent, her confirmation of the vague and unspecific allegations of the second respondent did not succeed in creating as real, genuine or bona fide dispute of fact.

[49] I shall set out examples of the difficulties I have with the respondents' answers to the allegations against them. First, when the first applicant made serious allegations that the first respondent had been taking land from residents of Bhongweni phase 1 and selling that land, the only fact that was denied was that the first respondent was appointed as (acting) headman in '2011/2012' (rather than in 2008). There was no engagement with the material facts.

[50] Secondly, as I have stated, it does not appear from the minutes of the meeting at the great place that the second respondent was present, and he did not allege that he was. I would have expected the first respondent to have taken the court into her confidence, and to have explained clearly and unambiguously why the meeting took place, what the letter sent to the first applicant said and what the outcome of the meeting was. The second respondent's apparently hearsay version is so vague that little sense can be made of it. What precisely the first applicant apologised for is not explained and how she did so 'under Duress but freely' is baffling. Instead, I was left to try to make sense of cryptic minutes, the relevance of which was never explained, and to do so with little or no background. All of this can hardly be said to have been a serious and unambiguous engagement with the disputed facts.

[51] Thirdly, the first applicant stated that she had been told by the sixth respondent, when he invaded her property, that he had been employed by the first respondent to do so. This allegation, according to the first applicant, was repeated by the sixth respondent on a few occasions. These and the allegations that the second, third and fourth respondents ordered the fourth applicant to vacate the plot where she lived were met with a bare, albeit 'vehement', denial: the second respondent said that these facts were not within his personal knowledge. Consequently, the second applicant has not denied the allegations properly and, given the terms of the supporting affidavits of the first and fourth respondents, these facts stand

undisputed. In addition, as no opposing papers were filed on behalf of the sixth respondent, there is no denial, whether adequate or inadequate, of the conduct attributed to him, as well as his statement that he was acting on the instructions of the first respondent.

[52] Fourthly, the second respondent's statement that the first respondent 'instructed no contractors' does not appear to be within his personal knowledge. It is also ambivalent in the sense that it is based on the assertion that the first respondent would not have done such a thing because she had 'no power or authority to do so'. I would have expected the first respondent, and not her mouthpiece, to have engaged seriously and unambiguously with these allegations, especially if their import is that the first respondent was guilty of gross abuses of her power.

[53] Fifthly, in dealing with the allegations that the fourth, fifth and sixth applicants were threatened to force them to vacate their home, as the first respondent had claimed that it belonged to the chieftom, the second respondent's denial again fell far short of what is required to create a real, genuine or bona fide dispute of fact: all he said, and all the first respondent confirmed, was that the first respondent 'knows the procedure of dealing with her subjects'.

[54] Finally, in answer to the facts that the sixth respondent closed off access to the fourth, fifth and sixth applicant's plot and the allegation that he confirmed once again that he worked for the first respondent, the second respondent's denial again left much to be desired. In effect, he said that he had no personal knowledge of these allegations, that the first respondent takes decisions with her council and that the first applicant obviously does not know the first respondent who, I read in, would not intimidate people because she is a 'very sweet, dedicated and hard-working woman'.

[55] I am satisfied of the inherent credibility of the applicants' version, bolstered as it is by the fact that the conduct attributed to the sixth respondent, and the utterances attributed to him, stand undisputed. For the reasons I have given, the denials of the second respondent, together with the supporting affidavits of the first, fourth and fifth respondents are woefully inadequate. Indeed, so inadequate are they that they fail to

create a real, genuine or bona fide dispute of fact. In the result, I accept the facts alleged by the applicants.

[56] Those facts establish the elements of a final interdict in respect of the first, second, third, fourth, fifth and sixth applicants. The seventh applicant's application must fail for the reasons I have cited in paragraph 42.

The order

[57] A final order in the following terms is issued.

- 1 The first, second, third, fourth, fifth and sixth respondents (the respondents) are interdicted and restrained from intimidating, threatening and evicting from their home or plots in Bhongweni Phase 1, Zimbane Administrative Area, Mthatha the first, second, third, fourth, fifth and sixth applicants (the applicants).
- 2 The respondents are interdicted and restrained from preventing the applicants from access to their homes or plots in Bhongweni Phase 1, Zimbane Administrative Area, Mthatha.
- 3 The respondents are directed to forthwith restore undisturbed possession to the applicants of their homes or plots in Bhongweni Phase 1, Zimbane Administrative Area, Mthatha.
- 4 The respondents are directed to pay the applicants' costs of this application.
- 5 The application of the seventh applicant is dismissed with costs.

C Plasket

Judge of the High Court

APPEARANCES

For the applicants:

L Sambudla and Y S Ntloko

Instructed by:

Potelwa Attorneys, Mthatha

Legal Resources Centre,
Grahamstown

For the respondents:

T R Qina

Instructed by:

T Qina & Sons, Mthatha