

**IN THE HIGH COURT OF SOUTH AFRICA  
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

**CASE NO. 5899/2018**

In the matter between:

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|------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------|
| <b>SANDI DAMBUZA</b>                                                                                                                           | <b>1<sup>st</sup> Applicant</b>  |
| <b>MLAMLI KWATSHA</b>                                                                                                                          | <b>2<sup>nd</sup> Applicant</b>  |
| <b>PETER DAMBUZA</b>                                                                                                                           | <b>3<sup>rd</sup> Applicant</b>  |
| <b>LWAZI NGXABANI</b>                                                                                                                          | <b>4<sup>th</sup> Applicant</b>  |
| <b>ABONGILE SIKITI</b>                                                                                                                         | <b>5<sup>th</sup> Applicant</b>  |
| <b>SOBHUZA MSIKINYA</b>                                                                                                                        | <b>6<sup>th</sup> Applicant</b>  |
| <b>VELILE VINCENT DAMBUZA</b>                                                                                                                  | <b>7<sup>th</sup> Applicant</b>  |
| <b>THANDUXOLO GODLO</b>                                                                                                                        | <b>8<sup>th</sup> Applicant</b>  |
| <b>DODO MSIKINYA</b>                                                                                                                           | <b>9<sup>th</sup> Applicant</b>  |
| <b>SANDILE MKHUZANGWE</b>                                                                                                                      | <b>10<sup>th</sup> Applicant</b> |
| <b>And</b>                                                                                                                                     |                                  |
| <b>MTHUNZI MVANDABA</b>                                                                                                                        | <b>1<sup>st</sup> Respondent</b> |
| <b>MBASA SIPHUKA</b>                                                                                                                           | <b>2<sup>nd</sup> Respondent</b> |
| <b>SIKHUMBULE XABANISA</b>                                                                                                                     | <b>3<sup>rd</sup> Respondent</b> |
| <b>VUYOLWETHU HANI</b>                                                                                                                         | <b>4<sup>th</sup> Respondent</b> |
| <b>MR DYUBELE</b>                                                                                                                              | <b>5<sup>th</sup> Respondent</b> |
| <b>OTHER PERSONS WHOSE IDENTITIES ARE TO THE<br/>APPLICANTS UNKNOWN AND WHO HAVE ATTEMPTED<br/>OR ARE THREATENING TO UNLAWFULLY OCCUPY THE</b> |                                  |

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JUDGMENT

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JOLWANA J

[1] The applicants approached this court on an urgent basis and a rule nisi was issued with an interim interdict on 13 November 2018. The interim interdict is couched in the following terms:

“2. A Rule Nisi is hereby issued directing the respondents to show cause, if any, before this Honourable Court on 11 December 2018 at 09:30 or so soon thereafter as the matter may be heard why a final order should not be granted in the following terms:

2.1 The respondents are interdicted and restrained from entering upon or commencing to occupy and/or permitting to be occupied on their behalf any part or portion of the immovable property of the applicants, being the Commonage owned by the applicants (“*hereinafter referred to as the immovable property*”), which covers a large area stretching from the St Johns Church and Nxusani B & B on the North, bordering the Walter Sisulu University (WSU) and King Hintsa FET on the South; stretching from the Roman Catholic Church, along Cuba, Mcubakazi, Vuli Valley and Extension 15 on the East and bordering on the N2 National Road on the West;

2.2 The respondents are hereby *interdicted* and *restrained* from commencing and/or continuing to erect and/or occupy and/or permit to be erected or occupied any structure or fencing on the abovementioned immovable property;

2.3 The respondents pay costs of the application.

3. It is ordered that the *rule nisi* issued in the terms set out in paragraphs 2.1 and 2.2 above shall operate as an *interim interdict* and *mandamus* pending the return date of these proceedings.”

[2] They now seek confirmation of the *rule nisi*.

[3] The legal position regarding final interdicts is that the court can only grant the final relief if the facts alleged by the applicants which are admitted by the respondents in the answering affidavits together with the facts alleged by the respondents justify the granting of such relief. In *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*<sup>1</sup> this legal position was clarified and developed by Corbett JA 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 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 882D-H).

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 (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at 1164) 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 (see eg. *Rikhoto v East Rand Administration Board and Another* 1983(4) SA 278 (W) at 283E-H). 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.”

[4] This matter is, in essence for the consideration of the granting of a final interdict and therefore the application for the confirmation of the *rule nisi* can only be granted if the applicants establish the requirements for a final interdict as set out long ago in *Setlogelo*

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<sup>1</sup> *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 - 635

*v Setlogelo*<sup>2</sup>. In *Setlogelo v Setlogelo* Lord De Villiers CJ stated the requirements for final interdicts as follows:

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

[5] The applicants are residents of Zazulwana Administrative Area in Butterworth and all of them claim to be owners and lawful occupiers of a certain piece of land at Mcubakazi Township, Zazulwana Administrative Area in Butterworth. They claim to hold title to the land by virtue of deeds of transfer and/or certificates of occupation. The 1<sup>st</sup> to 4<sup>th</sup> respondents, who are the only respondents opposing this application are also from the same area of Mcubakazi save for the 4<sup>th</sup> respondent who resides at Scanlen Street in Butterworth and save for the respondents referred to as other respondents whose details are unknown. The latter are described as other persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy the commonage owned by the applicants. I shall henceforth collectively refer to these other respondents as the 6<sup>th</sup> respondent for the sake of brevity.

[6] The applicants allege that they became aware of the 1<sup>st</sup> to 4<sup>th</sup> respondents and the 6<sup>th</sup> respondent's activities of clearing bushes in their land, demarcating sites, others driving poles into the ground to mark boundaries for sites on or about the 20 October 2018. They attempted to reason with the respondents and to seek police assistance but all was in vain. It was because of these alleged activities that the applicants sought and obtained the *rule nisi*, with an interim interdict which they now seek to have confirmed.

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<sup>2</sup> *Setlogelo v Setlogelo* 1914 AD 221 at 227

[7] The 1<sup>st</sup> to 4<sup>th</sup> respondents, in a rather terse answering affidavit, deny all these alleged activities of demarcating or threatening to demarcate sites on that land, driving poles into the ground or even being on the land in question on or about that day. They allege that they were found by the applicants and/or their representatives as well as the police in an adjacent park belonging to the Municipality. They were there to have a meeting to discuss societal issues including lack of land in the township.

[8] The respondents are surprisingly vague about the geographical location of this municipal park in relation to applicants' land. I do not see how the applicants would confuse people who were driving poles into the ground, using a tractor to demarcate sites and clearing bushes with the respondents who were having a meeting in an adjacent municipal park. This, in circumstances in which the applicants know the 1<sup>st</sup> to 4<sup>th</sup> respondents and even know their homes. I accept the inherent credibility of the applicants' factual averments. It follows that I must reject the respondents' denials which do not raise a real, genuine or *bona fide* dispute of fact and are clearly far-fetched and even fictional, to put it mildly.

[9] In his heads of argument and in court, counsel for the 1<sup>st</sup> to 4<sup>th</sup> respondents made the following submission:

“On a balance of probabilities, and in light of no evidence provided by applicants and the denial thereof of such invasion by respondents, there is no credibility on the applicant's allegations. Applicants only made bold allegations with no evidence to back them.”

[10] This brings me to the *Plascon-Evans* rule on motion proceedings and on my understanding thereof I must decline the invitation to determine this matter on

probabilities. This rule was eruditely further summarized as follows in *National Director of Public Prosecutions v Zuma*<sup>3</sup> and I do not think that I need to say more:

“[26] Motion proceedings, unless concerned with interim relief are all about resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in applicant’s (Mzuma’s) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such an order. It may be different if the respondent’s version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, is palpably impossible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP’s version.

[27] The court below imposed an onus on the NDPP to prove a negative. This appears from the finding that it was not convinced that [Mr Zuma] was incorrect in relation to political meddling (para 216). It reasoned that the question whether there had been political meddling fell within the peculiar knowledge of the NDPP and was difficult for Mr Zuma to prove; and so, it held, less evidence would suffice to establish a *prima facie* case (para 168-169). This rule of evidence namely that if the facts are peculiarly within the knowledge of a defendant the plaintiff needs less evidence to establish a *prima facie* case, applies to trials. In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph governs irrespective of where the legal or evidential onus lies. In applying the ‘rule’ the court omitted to determine whether the NDPP had failed to adduce evidence on the particular issues; it used the ‘rule’ in spite of evidence to the contrary, and it did so in instances where no answer was called for because the allegations were either not incorporated into the founding affidavit or were inadmissible. Finally, the court failed to have regard to another principle, namely that the more serious the allegation or its

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<sup>3</sup> National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)

consequences, the stronger must be the evidence before a court will find the allegation established.”

[11] For reasons that are not altogether clear the 1<sup>st</sup> to 4<sup>th</sup> respondents did on the one hand submit that their opposition to this application is only because there was an order for costs made against them in the interim relief and therefore oppose this application to prevent the financial implications of the said costs order. On the other hand these respondents opposed the application on the merits. This is how this averment is made in the answering affidavit:

“5.3 Be that as it may as first, second, third and fourth respondents, we are opposing this application in so far as it seeks a costs order against us, and we state that there is no reason why a costs order is necessary against us. In particular, on reading the founding papers, no case for a costs order is made against us in the event we do not oppose the application.

5.4 Therefore, in the main, the costs order sought against us, has (My Emphasis) caused first, second, third and fourth respondents and myself to oppose this application to an extent that it has financial implications against us albeit we oppose the proceedings or not.

5.5 Below herein, I also deal with the merits of this matter to an extent that they have implications on us, and to show that in any event applicants have failed to prove their case for a final interdict that they seek.

5.6 Further, in making out a case for the above honourable court to consider the costs order sought against us, I am advised that it is also prudent to demonstrate that in any event applicants are not entitled to the interdict sought against us for the following reasons:

5.6.1 Parties with substantial interest have not been cited.

5.6.2 Failure to prove requisites for a final interdict.”

[12] Despite these averments it was submitted during argument that the opposition was now not so much on how the respondents should not be held liable for costs but on the

merits as well. How the opposition should be on the merits when clearly in the answering affidavit the main reason cited for the opposition is costs is difficult to understand.

[13] Even on the issue of costs there are two fundamental flaws in the above submission. The first one is that clearly paragraph 2.3 of the *Rule Nisi* was deliberately not made part of the interim relief. The basis on which it is suggested that costs were awarded against these respondents is without merit.

[14] The second flaw is in the submission that the applicants' papers were couched in such a manner that whether the respondents opposed the application or not a costs order was sought against them. This submission seems to be based on the fundamental mistake that a respondent who does not oppose an application may not be ordered to pay costs of the said application. In all applications as it is in civil litigation in general the general rule is that costs follow the results. The exceptions to this general rule are unlimited and those exceptions are based on another general rule which is that a court has a discretion on how and when to award costs against any of the parties.

[15] In *Intercontinental Exports (Pty) Ltd v Fowles*<sup>4</sup> Smalberger JA stated the legal position as follows:

"[25] The basic rule is that, statutory limitations apart, all costs awards are in the discretion of the court (*Kruger Bros & Wasserman v Ruskin* 1918 AD 63 at 69, a decision which has consistently been followed). The court's discretion is a wide, unfettered and equitable one. It is a facet of the court's control over proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature

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<sup>4</sup> *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) para 25.

of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party's conduct in relation to the litigation. Is it to be precluded by agreement from doing so? A court should not be obliged to give its imprimatur to an order of costs which, in the circumstances, it considers entirely inappropriate or underserved. In my view, as a matter of policy and principle, a court should not, and must not, permit the ouster of its discretion because of agreement between the parties with regard to costs."

[16] The 1<sup>st</sup> to 4<sup>th</sup> respondents hoist their case on the merits on two main legal arguments. The first one is that parties with substantial interest are not cited in these proceedings; the second one is that the requisites for a final interdict have not been established. The third point though not raised in the answering affidavit directly but is raised in the heads of argument is that the applicants have no *locus standi* to launch these proceedings.

### **The applicant's lack of *locus standi***

[17] Briefly, the 1<sup>st</sup> to 4<sup>th</sup> respondents' challenge on this ground is that even though in the founding affidavit the applicants have alleged ownership of the property the documents attached are permissions to occupy (the PTOs) granted over 100 years ago in terms of section 11 of Proclamation No. 227 of 1898. Those PTOs are not automatically transferrable to the descendants of the original holders. Therefore ownership was not proved, and therefore the ownership of the land in question vests on the state, so went the submissions.

[18] The respondents' contentions in regard to *locus standi* are somewhat contradictory. Firstly, the respondents do not dispute the applicants' historical familial ties to the land.

All they are saying is that the rights which accrued to the original holders of the PTOs were not and are not automatically transferrable to the applicants. This is not to say that there are no rights accruing to the descendants of the original grantees of the PTOs. The point being made by these respondents, as I understand it, is that ownership rights are not automatically transferrable.

[19] What the respondents do not deal with is how the applicants lost their rights to the land which should ordinarily accrue to them by virtue of them being descendants of the original holders of those rights. Secondly, the fact that ownership rights have not yet been transferred as alleged more than a 100 years later, even if it is true, does not mean that such rights should be automatically lost to the descendants of the holders of the PTOs or that they can never be transferred if one accepts that they are not automatically transferrable but are transferable nonetheless.

[20] This court has had occasion to deal with an important part of this country's relics of our colonial legacy as it relates to land. In *Nandipha NO v Irfani Traders cc*<sup>5</sup> Kunju AJ quoted certain provisions of section 25 of the Constitution<sup>6</sup> as follows:

“[31] Section 25(1), (5), (6) and (9) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) provides thus:

25(1) no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(5) The state must take reasonable legislative and other measures within available resources to foster conditions which enable citizens to gain access to land on an equitable basis.

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<sup>5</sup> *Nandipha NO v Irfani Traders CC t/a Jabulani Hardware and Another* (4654/2017) [2018] ZA ECMHC 50 (21 August 2018)

<sup>6</sup> Constitution of the Republic of south Africa, 1996.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament either to tenure which is legally secure or to comparable redress.

(9) Parliament must enact the legislation referred to in subsection 6.”

[21] He went on to make the following observations with which in principle I am in respectful agreement:

“[46] Through my engagement with this matter few observations have occurred to me. The following are worth recording, namely:

- (a) It is concerning, if not disturbing, that the majority of rural communities are still not the owners of their land. Like the applicant they rely on the mercy of the Minister for Rural Development and Land Reform by signing the Interim Protection Act for them to remain in occupation of their land legally.
- (b) No doubt such Communities are not aware that they are not permanent owners of the land they occupy.
- (c) Interestingly, the provisions of section 25, (5), (6) and (9) of the Constitution are there for the Parliament to correct the anomalies created by apartheid laws.”

[22] The essence of the respondents’ argument is that because government may have failed since the advent of the Constitution to upgrade tenure rights of the applicants, the applicants have no *locus standi* to protect the land that their families have owned and used under insecure tenure for over a century. The respondents are with respect, either woefully oblivious of this country’s colonial and apartheid history as it relates to land or are disingenuous in the extreme. This is more so that they are not claiming to have a better title to that land than the applicants have nor are they claiming that the land has since been transferred to them. I have no doubt that persons in insecure tenure like the applicants do have a constitutional right to protect their land rights from being usurped

by others or the state for that matter. Even a cursory reading of section 25 of the Constitution makes that clear.

[23] At the risk of digressing from the issues in this matter I do need to make certain observations about the history of this country on land. I do think that South Africans must not allow themselves to make light of the troubled history of this country on issues of land. It is also very important that the oppressive legacy of both colonialism and apartheid should never be forgotten, for it may never be addressed if we allow ourselves to forget it. If we do so the next generations will be entitled to doubt, if not question our fidelity to the Constitution. The history of this country tells us that colonialism and land dispossession started long before the 1913 Land Act and some of its effects may never be redressed. However, what can be done to provide appropriate redress within the constitutional framework must be done with urgency.

[24] In *Graham Robert Herbert N.O. and Others v Senqu Municipality & Others*<sup>7</sup> the Constitutional Court unanimously expressed the following sentiments with which I am in respectful agreement:

“[37] In the former homelands access to land and occupation of land are still regulated by legislation that was passed by Parliament and other legislative bodies of the apartheid era. Many people continue to be denied secure land tenure rights. They are not afforded rights better than occupational rights in land which may be terminated in terms of the old order laws. As noted here the continuing operation of laws that deny black people secure rights in land is inconsistent with the Constitution, our supreme law. The dignity of the affected people is persistently impaired by the enforcement of those laws. The victims of the unfair differentiation brought about by these laws have become second class citizens to whom the fruits of the Constitution remain a dream, deliberately kept out of their reach. ”

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<sup>7</sup> *Graham Robert Herbert N.O. and Others v Senqu Municipality and Others* [2019] ZACC 31

[25] The documents on which the applicants sought to establish their right to the land in question chronicle the colonial history of this country and is indisputable evidence of the failure of the government to redress it. The land which the 1<sup>st</sup> applicant seeks to protect through these proceedings was allocated to Ludewick Dambuza by King Edward the Seventh of the United Kingdom of Great Britain in June 1903 under Section 11 of Proclamation No. 227 of 1898. In 1964 the Chief Magistrate reallocated the said land to the 1<sup>st</sup> applicant in terms of Section 10(1) of Proclamation NO. 142 of 1910 as amended.

[26] Lot No.47 was allocated by King Edward the Seventh to Felix Mahlangeni in July 1908. The said piece of land was transferred by Qunta Mahlangeni with the approval of the Chief Magistrate to the 6<sup>th</sup> applicant in 1957.

[27] Lot No.51 was allocated to Mrebelele Gxabaza in 1903 and in 1963 the Chief Magistrate approved the transfer of all right, title and interest to the said land to David Ngxabani described in the certificate of title to the land as son and heir.

[28] It is clear that the applicants are either direct holders of the titles to possession of this land or others are the descendants of people such as the applicants mentioned in the above examples. What is also clear is that all the applicants have rights, titles and interests to the various pieces of land directly or through their forefathers from whom they derive such rights and interests. The basis on which the respondents claim that the applicants lack *locus standi* is devoid of merit and must therefore be rejected.

[29] Even if it were to be so that the applicants' title or interest to the land was subject to challenge, that would not entitle anyone including the respondents to unlawfully occupy

the land or invade it. Therefore the applicants are perfectly entitled to protect their interest to the land that accrued to them through family lineage from their forefathers and within the available constitutional framework, fight for the security of their tenure to their land. It is to be hoped that now that the Constitutional Court in *Herbert N.O.* has declared the government's failure to upgrade the land rights of people such as the applicants into full ownership of their land unconstitutional, government will indeed do what it should have done a long time ago.

[30] The other point of the respondents' contestation is that of the applicants' alleged failure to cite parties with substantial interest in the matter. This submission is made in relation to the fact that the applicants did not cite Chief Bikitsha and Mr Mbadlanyana as parties in these proceedings. This submission can be easily disposed of by pointing out that the applicants seek no remedy against both Chief Bikitsha and Mr Mbadlanyana. Secondly it is not the applicants' case that either Chief Bikitsha or Mr Mbadlanyana participated in the land invasion. In fact Chief Bikitsha is alleged to have reported the unlawful invasion of this land to the police and has deposed to a confirmatory affidavit in support of the applicants' case. Mr Mbadlanyana used his tractor having been hired by the respondents or some of them to demarcate the sites. That does not make him a participant in the land invasion that is said to have taken place. He is no different from anybody who could have been asked or hired by the respondents to clear the bush on their behalf. The content of the alleged substantial interest of any of the parties that are alleged to have a substantial interest including the departments mentioned has not been described.

[31] The applicants have clearly established all the requirements for the granting of a final interdict. They clearly have protectable rights accruing to them by virtue of their uncontested PTOs. The applicants have also established on the papers before me that the respondents unlawfully conducted themselves in a manner that amounted to illegal land invasion with regards to applicants' land. In so doing the respondents caused the applicants to have a reasonable apprehension of harm with no other satisfactory remedy in the circumstances.

[32] The question of an alternative to claim damages cannot arise in this case. I cannot see how it can ever be argued with any degree of cogency that one should allow his land to be invaded and/or unlawfully occupied on the basis of a possible alternative remedy such as a claim for damages against respondents who may be impecunious. I did not understand the respondents to be saying so. It can never be that ownership or interests in land should be allowed to be unlawfully usurped or threatened bearing in mind the emotional attachment to land especially land that has devolved over generations.

[33] The facts of this matter, especially the history of people such as the applicants and the respondents' challenge to applicants rights are reminiscent of what the court said long ago. Some 80 years long before our revered Constitution came to be, during the height of the colonial era, courts have at times understood and upheld land rights and protected them even under that insecure dispensation as it applied to black people.

Lord De Villiers CJ applied what we would now call the rule of law in *Setlogelo v Setlogelo*<sup>8</sup>. He said:

“Now the right of the applicant is perfectly clear. He is a possessor; he is in actual occupation of the land and holds it for himself. And he is entitled to be protected against any person who against his will forcibly ousts him from such possession. True, the law does not allow him to buy land, or to lease it, or to take transfer of it. But it does not forbid him from occupying it, more especially as it would seem to have devolved upon him by way of inheritance. It would indeed be a remarkable state of things if a native could be deprived of his right of occupation of land which he had honestly come by at the instance of any person who took a fancy to it, merely because he was not and could not become the registered owner. And yet that would be the result of the order appealed from if it were allowed to stand.”

[34] The applicants were late in filing their replying affidavit. They have given a satisfactory explanation in their condonation application. Their explanation is that they needed to raise funds for this litigation and even contemplated using the legal services of Legal Aid South Africa. This, together with an attempt to find an amicable resolution of this matter contributed to the delay. The 1<sup>st</sup> to 4<sup>th</sup> respondents, having filed a notice to oppose, did not file an opposing affidavit. The opposition was based on submissions from the bar by their counsel, an untenable situation. The application for condonation is granted with costs. The applicants succeed in their application.

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

1. The applicants' late filing of the replying affidavit is condoned.
2. The rule nisi is confirmed.
3. The first, second, third and fourth respondents are ordered to pay costs.

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<sup>8</sup> See note 2 supra at page 227

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**M.S. JOLWANA**

**JUDGE OF THE HIGH COURT**

Appearances

Counsel for the Applicant: T.M. JIKWANA

Instructed by: M NOHESI ATTORNEYS

c/o POTELWA & CO.

Mthatha

Counsel for the 1<sup>st</sup> to 4<sup>th</sup> Respondents: S. MPAKANE

Instructed by: BALA MZILENI ATTORNEYS

Mthatha

Heard on: 05 SEPTEMBER 2019

Delivered on: 15 OCTOBER 2019