

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

CASE NO: 2244/2010

Delivered on: 02/04/2015

In the matter between:

LUNGISILE SALIWA

Applicant

and

MEC FOR LOCAL GOVERNMENT & TRADITIONAL

AFFAIRS, EASTERN CAPE

1st Respondent

INKOSI ZWELIDUMILE NDARALA

2nd Respondent

NDARALA TRADITIONAL COUNCIL

3rd Respondent

JUDGMENT

NHLANGULELA ADJP:

[1] In these application proceedings the applicant seeks an order directing the first respondent to recognise him as the Headman over the people of

Amanywabe who are resident in Keilands Administrative Area No. 41, Cofimvaba. It is common cause that the recognition sought in the proceedings that is provided for in s18 of the Traditional Leadership and Governance Act, 2005 (Eastern Cape) (Act No. 4 of 2005).

[2] The applicant does not seek any substantive relief against the second and third respondents, they having been cited in the papers by reason that they might have an interest in the relief sought. In point of fact the second respondent is the Chief and the head of Ndavula Traditional Council through which the traditional affairs of the Amanywabe people are administered.

[3] The grounds upon which the applicant seeks recognition as the duly identified headman by Amanywabe Royal Family through this court is because the first respondent ignored the applicant's lawful request from until in October 2011 when the applicant resorted to bring this application.

[4] It appears from the evidence that the social status of the applicant was considered prior to him being identified as the headman. He is proved to be the descendant of the Saliwa family tree and relations from which his predecessors were appointed headman going back to many years before one Richard Saliwa

died in 1984 whilst on the seat as the headman. Richard was immediately succeeded by Ntanase Dlubom who was later on followed by Zihlalele Saliwa in 1991. Zihlalele reigned as the headman until year 1995 when he was brutally murdered by some unknown persons. For some reasons not apparent from the record, the successor to Zihlalele was never appointed with the result that the post of headmanship remained vacant for approximately 14 years. To break the void and fill the post the Royal Family directed to identify the applicant as the next appropriate incumbent for appointment as the headmen.

[5] Mr Mongezi Cyprian Giyose, the manager in the office of the first respondent and who deposed in the answering affidavit on behalf of the first respondent does not contest the facts stated in the affidavits of the applicant and his witnesses that the applicant is the suitable person for the appointment. The respondents did not file affidavits, yet in terms of the notice to oppose filed by the State Attorney they oppose the relief sought by the applicant. In the event it may safely be assumed in favour of the applicant that his case is admitted by the co-respondents. The opposition against the relief sought is premised on the assertion that Kielands Administrative Area No. 41 (Keilands) ceased to exist and, for that reason, ordering the first respondent to recognise the applicant as the headman for an administrative area that does not exist is not feasible. Mr Giyose goes further to state that the applicant belongs to

Amanywabe tribe which had been settled in Keilands. Amanywabe tribe was caused to move from Keilands and settled at Boomplaas Locality, which is one of three localities of Zigudu Administrative Area No. 40 (Zigudu). Amanywabe people had to co-exist with Amandungwana tribe of Sentile Locality, and subjected to the rule of Xhanti Sentile in such a way that even Richard Saliwa had to agree with Sentile that he, Richard, would not have a successor after his death. In essence the first respondent contends that Amanywabe Royal Family cannot decide the fate of headmanship of Zigudu without the involvement of Amandungwana Royal Family. Mr Giyose states further that the complaint that Amanywabe tribe wished to be freed from Sentile rule was received by Chief Ngangomhlaba Matanzima, Xhanti Sentile and Paramount Chief Zwelenkosi Matanzima at meetings that were held in 2005, 2006 and 2009. In all those meetings Amanywabe people were advised that they should seek allocation of residential and arable land from agricultural officers that is separate from Sentile Locality so that a headman may be appointed.

[6] The applicant contends that Keilands does exist, Amanywabe people were re-settled in Boomplaas which is within Keilands, and that Zigudu where Sentile rules as the headman is a completely separate land from Keilands. This being the real disputed issue, on 16 September 2011 the parties sought and they were granted an order referring the dispute to hearing of oral evidence as

envisaged in Rule 6 (5) (g) of the Rules of this Court. Pursuant thereto a trial court was convened at various times for oral evidence of witnesses and documents to be received. The issue for decision was framed in the following terms:

“Whether Keilands Administrative Area No. 41 in the district of Cofimvaba exists, and if it does exist whether the place called Boomplaas Location is in Keilands Administrative Area No. 41 or not.”

[7] Although the trial process was a protracted business spanning three years which were punctuated by long adjournments, the Court finally obtained the necessary evidence. I re-count that evidence in its truncated form in the following manner. Two expert witnesses were subpoenaed to testify. The first was Mr Colin Davies, and the second was Mr Skobi Cossie. Both witnesses are qualified land surveyors who are possessed of appropriate skills and experience in land surveying and are involved in private practice respectively. Mr Davies testified in support of the applicant’s case. He told the Court that during 2011 the land surveyor by the name of Mr J.A. Nelson had surveyed the land in Cofimvaba, posted his survey on written plans and submitted them to the office of the Surveyor General in Cape Town for registration according to law. It would appear that the plans were drawn in accordance with the Government

Gazette No. G9262 dated 15 February 2010 and duly published as a public official record. In my view the plans of Mr Nelson are *prima facie* valid and correct records of survey information that was supplied by him.

[8] Mr Davies testified that, based on the official record, Keilands and Zigudu Administrative Area No. 40 are two separate areas which are referred to as Farm 116 and Farm 115 respectively. He also confirmed that Boomplaas Locality is a place which is situated within Farm 116. Mr Davies pointed the boundary line appearing on the map, the line separating the two farms, and stated that the boundary line was justified by the information as extracted from the Government Gazette.

[9] When Mr Cossie testified in support of the respondent's case. He conceded that Farms 116 and Farm 115 are two separate pieces of land. That is, Keilands does exist as a separate piece of land in Cofimvaba. However, he disagreed with the information contained in the official records that Boomplaas Locality is situated within Keilands. In his opinion, based on physical survey he performed and the reading of Government Gazette No. G9262 and the Proclamation in terms of which the government had established the two farms, Mr Nelson did not locate the boundary line that divides the farms correctly with

the result that the official plans situate Boomplaas Locality in Keilands instead of Zigudu. According to Mr Cossie, Mr Nelson's survey plans were wrong because he failed to identify the curvilinear boundary as described by existing beacons situated at Nquna Stream and Wagon Road.

[10] The fact that the survey plans drawn by Mr Cossie are not official records is a significant one. I will revert to this point later on.

[11] The submissions made on behalf of the parties during arguments mirror the versions as presented through evidence that I must now evaluate.

[12] The common cause facts outlined earlier on with regard to the suitability of the applicant for appointment as the headman is the starting point. The next point to deal with is the meaning of oral evidence that was adduced.

[13] The upshot of the oral evidence and the plans/maps referred to by the witnesses is that Keilands does exist. It is now described as Farm 116. I accept the credible evidence emanating from the official record that Boomplaas Locality is situated within Keilands. To that extent the version of the applicant

is true. I reject the evidence adduced on behalf of the first respondent in so far as it is at variance with the version of the applicant. Consequently, there is no need for the people of Amanywabe tribe to be provided with another land because they are still in occupation of Boomplaas.

[14] The finding that Keilands does exist is re-inforced by the order issued by this Court, differently constituted, on 03 December 2012 under Case No. 1707/92. The order in question is annexed to the applicant's replying affidavit as annexure "LJS 16". The parties involved in that matter were Zihlalele Saliwa, the headman, as the applicant. The respondents were Zwelidumile Ndarala, (the second respondent in this case), Keke Sentile, The Office of the Military Council and Ndarala Traditional Council. That is a final order interdicting the respondents from, *inter alia*, interfering with the authority of Zihlalele Saliwa in Keilands. Therefore, there is no reason to doubt the fact that Keilands does exist and that Mr Giyose and the second respondent misled the Court in saying that no person took over the reigns of headmanship from Richard Saliwa in 1978.

[15] In my finding, the applicant has made out a case for the relief sought with costs.

[16] In the result the following order shall issue:

1. That the first respondent be and is hereby directed to consider the applicant's request for recognition as Inkosana of Keilands Admininstrative Area No. 41 in the district of Cofimvaba.
2. That the first respondent pays the costs of this application.

Z. M. NHLANGULELA
ACTING DEPUTY JUDGE PRESIDENT

Attorney for the applicant : Mr V.M. Sapulana
c/o D Z Dukada & Co Inc
MTHATHA.

Counsel for the respondent : Adv. K.D. Qitsi
Instructed by : Office of the State Attorney
MTHATHA.