

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

CASE NO.: 2502/2023

In the matter between:

CHIEF KUTALA JUMBA

Applicant

and

LWAZI JUMBA

1st Respondent

PREMIER OF THE EASTERN CAPE

2nd Respondent

JUDGMENT

MQOBI AJ

Introduction.

[1] This is an opposed application in which the applicant, a senior traditional leader and head of the Jumba Traditional Council, in Tabase Administrative Area, Mthatha seeks a final interdict to restrain the first respondent from holding himself out as the headman of the same administrative area when he has not been appointed as such and from interrupting and interfering with the programs of the Jumba Traditional Council.

Facts.

[2] The applicant alleges that the first respondent holds himself out as headman of Tabase Administrative Area and continues to harm the community of that area in the following respects:

- (a) he issues out letters meant for initiation of boys from the administrative area.
- (b) he issues letters as if he is a headman and has created for himself headman's official stamp.
- (c) he continues to give instructions to the sub-headman and is obstructing them from communicating with the applicant regarding traditional affairs of the area.
- (d) he demarcates and allocates sites to people in the area.
- (e) he charges a sum of R100.00 for each service that he renders to community members.
- (f) he interrupts whatever program the applicant plans for the benefit of the people of Tabase Administrative Area, no4, for example the applicant planned for the office of the Community Safety of South African Police Service (SAPS) to address the issue of the prevalence of drugs and the danger they cause to the youth in the area. The first respondent approached the SAPS sector manager, warrant officer Bebeza to cancel that arrangement on the basis that he is the headman of the area and such program never took effect.

[3] The first respondent claims that he is the legitimate person to be appointed as the headman and that he was identified as such by the Royal Family. It is on this basis that the members of the community approach him for advice.

[4] He states that the applicant blocked his appointment when she objected to his recognition as headman of Tabase Administrative Area, in response to a notice issued by the second respondent on 15 October 2021.

[5] He further states that the applicant was never accepted as a wife by his family and her recognition as the chief was rejected by the members of the community.

[6] The first respondent does not dispute:

- 6.1 that the applicant is a recognised senior traditional leader and head of Jumba Traditional Council.
- 6.2 that he was never recognized as the headman of Tabase Administrative Area.
- 6.3 that he made and uses a headman's stamp but contends that he did so on the advice of a delegation from Cogta.
- 6.4 that he completed circumcision letters and appended a headman's stamp upon request by Mr Ngcali of Cogta.

[7] The first respondent, however, denies that:

- 7.1 he continues to give instructions to the sub-headman not to communicate with the applicant regarding traditional affairs of the area.
- 7.2 he demarcates and allocates sites to people.
- 7.3 he charges a sum of R100.00 for each service that he renders to community members.
- 7.4 he interrupts whatever program the applicant plans for the benefit of the people of Tabase Administrative Area as alleged.

[8] In his heads of argument and in court the applicant submitted that the first respondent has not seriously and vigorously addressed the allegations made by the applicant against him and has failed to raise a real, genuine and *bona -fide* dispute of fact.

[9] The applicant further submitted that the matter should be decided based on the application of the *Plascon-Evans*¹ principles in her favour.

¹ Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A),

[10] The first respondent denies that any injury was committed to the applicant and that there is no suitable alternative remedy.

[11] He submitted that the criminal prosecution may be a suitable alternative remedy and that it was also open to the applicant to report his alleged conduct to the Royal Family.

Issues.

[12] Whether the first respondent is holding himself out as the headman of the Tabase Administrative Area in circumstances in which he has not been recognised as such in accordance with the law. If so, whether the requirements for a final interdict have been met.

The Law.

[13] 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.

[14] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*² 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*

² 1984 (3) SA 623 (A) at 9-10

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."

[15] For the applicant to succeed in her application, she has to satisfy the requirements of a final interdict.

[16] In *Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited*³, Froneman J, confirmed the requirements of a final interdict as follows, (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy⁴.

[17] In *Levi and Another v Blankitny and Another*⁵, the court held:

"[63] The granting of an interdict is discretionary⁶ and the remedy of the interdict itself has been described as unusual⁷. The remedy of an

³2017 (1) SA 613 (CC) at para 8.

⁴ See also *Setlogelo v Setlogelo* 1914 AD 221 at 227. These requisites have been restated countless times by this court, most recently in *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) [2014] ZASCA 169 para 26, and *Red Dunes of Africa v Masingita Property Investment Holdings* [2015] ZASCA 99 at para 19. They were affirmed by the Constitutional Court. *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (Pilane) at para 38.

⁵[2023] ZAWCHC 149.

interdict is termed discretionary in the sense that a court may not grant an interdict in circumstances where there is an alternative remedy available to an applicant for an interdict and which may satisfactorily safeguard the right sought to be protected. Put differently, the discretion of the court is bound up with the question whether the rights of the party complaining can be protected by an alternative and ordinary remedy⁸.”

[18] In *Madikizela v Nkosi and Another*⁹, the court stated:

“[9] A respondent’s denial of a fact alleged by applicant may not be such as to raise a real genuine or *bona-fide* dispute of fact. Furthermore, a bare denial of applicant’s material averments cannot be regarded as sufficient to defeat the applicant’s right to secure relief by motion proceedings in appropriate cases.”

[19] The first respondent, notwithstanding his allegation that there are material disputes of fact, did not make an application to refer the matter for oral evidence. Thus, as far as the disputes are concerned, this matter falls to be determined on the basis of what is stated in the first respondent’s answering affidavit.

[20] In any event my view is that the first respondent has not seriously and unambiguously addressed the facts said to be disputed, consequently he has failed to raise a real, genuine and *bona-fide* dispute of fact.

Clear right.

[21] In the case of *Levi, supra*, the court stated:

“[61] To determine whether an applicant has a clear right is a matter of substantive law¹⁰. Whether that right is clear is a matter of evidence. In order therefore to establish a clear right, the applicant has to prove on a

⁶ United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T); Burger v Rautenbach 1980 (4) SA 650 (C) and Grundling v Beyers 1967 (2) SA 131 (W).

⁷ Transvaal Property Investment Co v SA Townships Mining and Finance Corp 1938 TPD 521.

⁸ Transvaal Property Investment Co at 351.

⁹ 19408/2021) [2023] ZAGPJHC 322.

¹⁰ 1994 (3) SA 89 (BG) at 97–98.

balance of probability, facts which in terms of substantive law establish the right relied on¹¹.”

[22] It is common cause that the applicant was recognised as a senior traditional leader and head of Jumba Traditional Council in Tabase Administrative Area. In terms of the relevant regulatory framework,¹² she is vested with a responsibility to oversee the institution of headmanship within her area of jurisdiction.

[23] It follows therefore that the applicant has established a clear right.

An injury actually committed or reasonably apprehended.

[24] An injury actually committed or reasonably apprehended would justify the granting of the relief sought by the applicant.

[25] The first respondent disputes that the applicant has established that an injury was actually committed or reasonably apprehended.

[26] The applicant, in her founding affidavit sets out the harm committed by the first respondent in holding himself out as a headman of Tabase Administrative Area, without having been recognised as such in terms of the law.

[27] Notwithstanding the admissions he made¹³, the first respondent persists in denying having held himself out as a headman of Tabase Administrative Area.

[28] Based on the first respondent’s aforementioned admissions and his continued possession and use of the headman’s stamp, I find that the first respondent through his conduct did hold himself out as a headman of Tabase Administrative Area thereby committing an injury to the rights of the applicant and those of the community of Tabase Administrative Area.

¹¹ LAWSA Vol. 11, 2nd Ed. 397.

¹² Section 1 of the Traditional and the Khoisan Leadership Act 3 of 2019 and Eastern Cape and Traditional Leadership and Governance Act 1 of 2017.

¹³ Paragraph 6 above

[29] The applicant is apprehensive of the first respondent continuing to hold himself out as a headman of Tabase Administrative Area and interfering with the programs of the Jumba Traditional Council.

[30] It is common cause that the first respondent has a headman's stamp which he believes he is entitled to have based on the advice of the officials of COGTA and is clearly intending to continue using it.

[31] I am of the view that, unless interdicted, the first respondent will continue to hold himself out as a headman of Tabase Administrative Area and continue to interfere with the programs of Jumba Traditional Council.

[32] In the absence of an undertaking by the first respondent to either discontinue using the headman's stamp or destroy it, I am satisfied that there is a reasonable apprehension of a further injury or breach of the applicant's rights in this regard.

Absence of an adequate alternative remedy.

[33] The final question for consideration is whether there is any similar protection by any other ordinary remedy through which the applicant can protect the institution of headmanship within her area of jurisdiction and correct any irregularities which harm the community members and the constitutionally recognised institution of traditional leadership.

[34] It is trite that the existence of another remedy will preclude the grant of an interdict where the proposed remedy will afford to the injured party, a remedy that gives similar protection to an interdict against the injury that is occurring or is apprehended.¹⁴

[35] The applicant makes the following allegations in her founding affidavit:

35.1 that she approached Mthatha Central Police Station, to report the conduct of the first respondent after she was advised that the first

¹⁴ Hotz vs UCT (730/2016) 2016 ZASCA 159 (20 October 2016) at para 36.

respondent's conduct amounts to an offence in terms of the Eastern Cape Traditional Leadership and Governance Act.???

35.2 a criminal case was opened under CAS No: 128/03/2023, and an investigator, Sgt Zonele was assigned to handle the matter.

35.3 she was later advised by Sgt Zonele that the police are not equipped to handle a case of that nature.

[36] The first respondent merely denies knowledge of the aforesaid allegations and states that he was never called by the police regarding the allegations that a criminal case was opened against him by the applicant.

[37] In court, the first respondent submitted that criminal prosecution constituted an alternative remedy, but was not pursued by the applicant.

[38] He does not seriously dispute that the applicant approached the police and opened a criminal case against him and that she was advised that the police were not equipped to handle her complaint.

[39] Based on the detail provided by the applicant, I am satisfied that she indeed opened the criminal case against the first respondent and was advised as stated in her affidavit. In any event opening a criminal case against any person ordinarily results in prosecution, which does not prevent the ongoing threat to the applicant's rights.

[40] Consequently, I find that the laying of the criminal charges against the first respondent does not and did not constitute an alternative and ordinary remedy to the applicant.

[41] The first respondent further submitted that reporting his conduct to the Royal Family would have constituted an alternative remedy for the applicant. I disagree. Besides, the first respondent has not explained how referring the matter would have been an effective remedy.

[42] I agree with the applicant that there is no satisfactory alternative remedy which can afford her the similar protection to that afforded by an interdict.

[43] I am of the view that the granting of the final interdict will not infringe on any of the first respondent's constitutional rights neither has the first respondent alleged that there would be such an infringement. Instead, the interdict will restrain the first respondent from discharging responsibilities which lawfully vest in a traditional leader.

[44] I am satisfied that the applicant has made out a case for the grant of a final interdict against the first respondent.

Costs.

[45] I find no basis for departing from the general rule that costs follow the result.

Order.

[46] In the result, I make the following order:

1. The first respondent is interdicted and restrained from holding himself out as a headman of Tabase Administrative Area and interfering with the programs of the Jumba Traditional Council.
2. The first respondent is ordered to stop discharging any functions of a headman, including the following:
 - (a) using a headman's stamp for any purpose.
 - (b) completing forms and/or issuing any letters which ought to be issued by a headman.
3. The first respondent is directed to pay costs of this application.

MQOBI
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant	:	<i>Mr Msindo</i>
Instructed by	:	V. V. Msindo & Associates Inc Mthatha
For the Respondents	:	<i>Mr Mantyi</i>
Instructed by	:	Mantyi Attorneys Mthatha
Heard on	:	15 August 2024
Delivered on	:	24 October 2024