



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

Case No.: CA&R18/2022

In the matter between:

MZINGISI FENI

APPELLANT

and

XOLISA KHUNGEKILE

RESPONDENT

JUDGMENT

ZONO AJ:

Introduction

- [1] This appeal emanates from Middledrift Magistrates Court, the court *a quo*. The appellant approached the court *a quo* on urgent basis for an interlocutory relief which reads as follows:

- “1. *This application be heard as a matter of urgency, and that the forms and service provided for in the Rules of this Honourable Court be dispensed with;*
2. *That a rule nisi do hereby issue calling upon the Respondent to show cause, if any, on 28/07/2021 at 09:00 hours or so soon thereafter as the matter may be heard, why;*
3. *Interdicting and restraining the respondent or any person acting under his direction and instructions from occupying the immovable property and demolishing the boundary fence of the immovable property of the late Nkwenkwana Mqabula that is now owned by the applicant;*
4. *Ordering the respondent to erect the applicant’s boundary fence which the respondent demolished illegally at the immovable property of the late Nkwenkwana Mqabula’s immovable property that is now owned by the applicant;*
5. *Authorising and empowering the sheriff or his deputy or the members of the South African Police Service at Nchungwa Police Station in Debe Nek, Middledrift to give effect to the terms of this order;*
6. *Order the respondent to pay the costs of this application and such costs to include costs occasioned by the employment of counsel;*
7. *Further and/or alternative relief.”¹*

[2] The application was opposed by the respondent. In so doing the respondent delivered his notice to oppose and its opposing affidavit to which the appellant replied. The court a quo, after having heard argument for final relief, delivered its judgment on 25th May 2022. Aggrieved by the judgment, the appellant

¹ Sic.

delivered his notice of appeal to the Clerk of the Criminal Court on 17th June 2022.

- [3] Having realised that the appeal had lapsed, the appellant launched an application for the reinstatement of the appeal on 5th October 2022. The respondent reacted by delivering only a notice in terms of Rule 30(1). Neither notice to oppose the reinstatement application, nor answering affidavit was filed by the respondent. The matter was ultimately heard on appeal on 20th September 2024.

In the court a quo

- [4] In support of his application for interdictory relief, the appellant states in his founding affidavit that his mother, Nosayini Mqabula, was staying with her brother, Nkwenkwana Mqabula, at their family home at Ntonga Village in Middledrift. The appellant is the only one available and present of children born of his mother. Two of his three siblings are deceased, and the third has been missing without a trace since 1965. His uncle had a daughter, Nomfazi Mqabula.
- [5] The appellant grew up under his uncle, who treated him like his own son. Appellant's mother and her brother (appellant's uncle) respectively passed on in 1974 and 1976. When they passed on, they left the homestead to the appellant and his cousin, Nomfazi. The applicant took care of the homestead. Nomfazi passed away in 2015.
- [6] It came to appellant's attention that the homestead, which he calls the family home, had been sold. The appellant enquired about this rumour from the traditional authorities. The sale was unknown as it was not reported to them.
- [7] Most importantly the appellant contends in his founding affidavit as follows:

"13. After the passing on of Nomfazi Mqabula, I became the only rightful owner of my uncle's family home and nobody else. If the sale had

taken place before the passing of Nomfazi Mqabula both of us had to consent to such sale. Nomfazi did not sell my uncle's family home.

14. *In the circumstances, I submit that the purported sale of my uncle's family home to the respondent during 2018 or 2019 is unlawful.*
15. *On 18 July 2021 during the morning, I found Messers Xolile James and Unathi Beni destroying my fence at my uncle's family home. I confronted them and asked them who instructed them to destroyed fence in my property and they told me that they were hired to do so by the respondent.*
16. *I told them to stop as the fence they were destroying belongs to me and that I am the rightful owner of that property and stopped.*
17. *Shortly thereafter, I saw Messer's Xolile James and Unathi Beni returning to the site accompanied by Mr Xelile Khungekile, the respondent's brother to continue with the destruction of my fencing.*
18. *Mr Xelile Khungekile informed that they have been sent by his brother, the respondent who had allegedly bought the property, to remove my fencing. I again told them to stop destroying my fence forthwith as the respondent is not the owner of that property. They agreed and stopped.*
19. *At about 02:00 pm on 18 July 2021, I then went to the Nchungwa Police Station to lay a charge of unlawful destruction of my property. However, the police officer who attended to me refused to open a charge and told me to approach the above Honourable Court for an interdict and that they will only act once they are instructed by the court.”²*

² Sic.

- [8] The respondent raised in the court *a quo* a series of points in *limine* relating to self-created urgency, non-joinder and *locus standi*. The respondent contended that he bought the immovable property from Ms Vuyiswa Dliwayo, who inherited the property from her mother who passed away in 2015. According to the appellant Nomfazi Mqabula passed away in 2015. In the course of time, the respondent commenced with the renovations of the same property. This is alleged probably to show that the respondent took occupation and control of the property.
- [9] As proof of the sale of the property, the respondent annexed a document titled '*Register / duplicate register of permission to occupy an allotment*'. It pertains to allotment No 2[...], Ntonga Location, Middledrift District, and purports to show that a decision to transfer the rights on the property was made in favour of the respondent. It appears *ex facie* the document that the respondent was granted a right to occupy [permission to occupy] and the right to graze the stock. It further appears that the respondent was granted permission to occupy for arable or residential purposes. The confirmation of transfer of rights is dated 09th July 2021. The appellant does not dispute the fact that a proof of transfer of rights on the land relates to the same land. The register is alleged to be referring to the property in question, which the appellant did not deny in his replying affidavit.
- [10] The court *a quo* dismissed the appellant's application on the basis that he lacked *locus standi* to apply for an interdict. The court *a quo* found that the appellant had failed to show that there was any legal connection between him and the subject matter of the interdict, which is the property in question. The connection constitutes an essential element of *locus standi* in an application for an interdict, so it was found.

In this court

- [11] Antecedent to the appeal itself, the appellant sought, in a notice of motion, the reinstatement of the lapsed appeal. The application presupposes that an appeal had lapsed.

[12] The appellant contends that he delayed in the prosecution of the appeal by 14 days and further stated that the degree of lateness was not so severe and excessive and accordingly condonable. The appellant contends that he delivered the notice of appeal on 17th June 2022 and the notice was filed or served upon the offices of the Clerk of the Criminal Court.

[13] The appellant sought from the Magistrate the following information in terms of Rule 51(8) of the Magistrates Court Rules:

“(i) the facts she found to be proved,

(ii) the grounds upon which she arrived at any finding of fact specified in the notice of appeal as appealed against; and

(iii) her reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.”

[14] The information sought was not delivered by the Magistrate and for that reason the appellant enquired from the Clerk of the Civil Court. The appellant further states that he was admitted on 25 August 2022 at Life Beacon Bay Hospital in East London for a major operation; he was incapacitated until 26th September 2022.

[15] The reason provided by the appellant for the delivery of the notice of appeal to the Clerk of the Criminal Court is that the office of the Clerk of the Civil Court was locked on appellant's arrival. The Clerk of the Criminal Court undertook to forward it to the Clerk of the Civil Court. The appellant concludes that the delay in the prosecution of the appeal was caused, firstly, by the failure of the Magistrate to furnish the information required in terms of Rule 51(8) of the Magistrate's Court Rules. Secondly, the prosecution was delayed as a result of his admission to hospital.

Discussion and analysis

Reinstatement of lapsed appeal

[16] Magistrate's Court Rule 51(9) provides:

"(9) A party noting an appeal or a cross-appeal shall prosecute the same within such time as may be prescribed by rule of the court of appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary."

[17] Rule 50(1) of the Uniform Rules of Court ('URC') is worded as follows:

"(1) An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed."

This rule must clearly be read with Rule 51(9) of the Magistrate's Court Rules. The provisions are interrelated.

[18] Rule 50(4) of the URC of court provides:

"(a) The appellant shall, within 40 days of noting the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented."

.....

(c) Upon receipt of such an application from appellant or respondent, the appeal shall be deemed to have been duly prosecuted."

[19] It is plain from these provisions that an appeal must be prosecuted within the stated times of noting thereof. By prosecution of an appeal is meant applying

in writing to the registrar on notice to all other parties for a date of hearing.³ It is not clear from the record as to when a written application for hearing was made to the registrar of this court. However, it is common cause that the appeal has lapsed due to the non-prosecution thereof.

[20] Failure to timeously prosecute the appeal is a contravention of Rule 50(1) of the URC, which stipulates the period in question. I have alluded above to the fact that there is a connection between Rule 50(1) of the URC and Rule 51(9) of the Magistrate's Court Rules. They should be dealt with and interpreted juxtapositionally. Accordingly, failure to prosecute the appeal within the prescribed time means that the appeal has lapsed.

[21] However, Rule 51(9) of the Magistrate's Court Rules contains a proviso to the effect that "*unless the court of appeal shall see fit to make an order to the contrary.*" This provision confers a discretionary power on the appeal court to make an order of reinstatement if satisfied by the explanation. The words "*shall see fit*" in the provision presupposes that there is an explanation or application made to court that would persuade the court to reinstate the lapsed appeal. An explanation or application to reinstate the lapsed appeal must be made in terms of this subrule.

[22] The appellant made the explanation in his founding affidavit. The upshot thereof is that the delay in the prosecution of the appeal was caused by circumstances beyond his control. I am inclined to grant an order reinstating the appeal. A pragmatic approach would be to deal with the matter and dispose of it on its real merits.

[23] For an order reinstating the appeal I considered the following:

- (i) The possible prejudice to the parties. No party would suffer any prejudice as a result of the reinstatement of the appeal. No party complained of prejudice in the event that the appeal was reinstated.

³ *Hall v Van Tonder* 1980 (1) SA 908 (C) at 910.

- (ii) The stage at which this litigation has reached. I considered this together with the fact that there is general need for finality in judicial proceedings. It is in the interests of all the parties and of justice that this appeal be dealt with to finality.
- (iii) It would generally be important to consider the costs of the matter, coupled with the inconvenience suffered by the court. This court has read the appeal record. It would be a waste of scarce judicial resources for another court to have to consider afresh the same record.
- (iv) The healing balm of an appropriate order of costs. What the appellant sought in this matter is not a right but an indulgence. The respondent will be assuaged by a costs order in his favour in respect of an application for reinstatement.

[24] The object of the rules is to secure the inexpensive and expeditious completion of litigation before courts: they are not an end in themselves⁴. Rules are designed to ensure the right to a fair hearing and should be interpreted in such a way as to advance and not reduce, the scope of the right to fair trial entrenched in section 34 of the Constitution of the Republic of South Africa⁵. The reinstatement application succeeds.

Appeal

[25] A very good starting point is paragraph 21 of the founding affidavit for the application for reinstatement of the appeal which reads as follows:

“21. On 19 September 2022, the respondent working together with Xolile and another person removed the applicant’s fence at the Mqabula homestead and he started erecting his fence”.⁶

⁴Hudson v Hudson 1927 AD 259, at 267.

⁵ **D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket** 2005 (6) SA 297 (SCA), at 301 G-H.

⁶ Sic.

[27] The appellant sought in the court *a quo* the following relief, *inter alia*,

- “3. *Interdicting and restraining the respondent or any person under his direction and instructions from occupying the immovable property and demolishing the boundary fence of the immovable property of the late Nkwenkwana Mqabula that is now owned by the applicant;*
4. *Ordering the respondent to erect the applicant’s boundary fence which the respondent demolished illegally at the immovable property of the late Nkwenkwana Mqabula’s immovable property that is now owned by the applicant.”*

[28] Paragraph 3 of the notice of motion seeks an interdict against occupation of the property and demolition of the boundary fence of the property. I will deal later with the occupation. In what follows I deal with the demolition of the boundary fence.

[29] In addition to paragraph 19 of the founding affidavit for the reinstatement application, paragraph 4 of the notice of motion implies that demolition of the boundary fence had already occurred hence the relief sought for the erection of the demolished fence. The appellant seeks interdictory relief for something that has already been done.

[30] An interdict is not a remedy for past invasion of rights, but is concerned with present or future infringements⁷. A prohibitory interdict is described as an order requiring a person to abstain from committing a threatened wrong or from continuing an existing one⁸. It is plain from the facts of this matter as adumbrated above that the demolition of the boundary fence of the immovable property has been carried out to a finish. Accordingly, it cannot be

⁷ *National Council for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA), at 349 H-I; *Global Environment Trust v Tendele Coal Mining (Pty) Ltd* 2021 (2) All SA 1 (SCA), at para 125.

⁸ *Natures Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Municipality* 2010 (3) SA 581 (SCA), at 588 B-D.

interdicted. The appellant is at liberty to pursue a remedy for damages if time allows for that; and if so advised.

[31] In paragraph 4 of the notice of motion the appellant seeks an order directing the erection of the boundary fence. The rationale behind this relief is illusory, especially in the light of paragraph 21 of the founding affidavit for the reinstatement application. That paragraph is quoted in full in paragraph [25] above. The essence of paragraph 21 referred to above is that after the respondent had caused the boundary fence to be destroyed or demolished, he started erecting his own fence. The practicality of this relief is doubtful as it is clear from the appellant himself that a fence was rebuilt after the first or old one was demolished. No assistance was received from appellant's counsel in this regard. There is no practical value of granting that relief if what is sought is already there. That relief must fail on this basis.

[32] With regard to an interdict against occupation of the property the respondent asserts as follows in his answering affidavit to the application for interdictory relief:

“40. On or about 23rd September 2019, the applicant⁹ bought an immovable property situated at Ntonga Administrative Area in Middledrift. The seller of the property is Ms Vuyiswa Dliwayo, who inherited the property from her mother who passed away in 2015. Sometime this year, the respondent commenced with renovations on his new property...”

41. Following the respondent's attempts in renovating his newly bought immovable property, the applicant brought an urgent application against the respondent seeking essentially the restraining order, prohibiting applicant from the property and also claiming damages for the fence, in one perplexing application ...”¹⁰

⁹ From the allegations of fact and arguments made in the answering affidavit, it is apparent that the deponent intended to refer to 'the respondent'.

¹⁰ Sic.

[33] The assertions are not gainsaid. The essence of the respondent's assertions is that the respondent is in charge or control of the property. The respondent has taken control of the property, and accordingly is in possession of the property. The physical element of possession (*corpus* or *dentio*)¹¹ implies physical control rather than physical prehension¹². During the hearing of this appeal, appellant's counsel iterated and confirmed that the appellant was locked out by the respondent. The net effect of all this is that the respondent is already in possession, which implies occupation of the property. Accordingly, an event of occupation, which is an incident of possession, cannot be interdicted as it constitutes past invasion of the rights. The applicant misconceived his remedy in this regard. A *mandament van spolie* would have been more appropriate, depending on whether, when the respondent was taking occupation or possession of the property, the appellant enjoyed undisturbed possession of the property.

Section 16 (2) (a) (i) of the Superior Courts Act 10 of 2013

[34] Section 16 deals with appeals generally. Subsection (2) thereof provides as follows:

“(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone”.

[35] On the facts of this case the horse has bolted. There would be no practical effect to grant orders sought in paragraphs 3 and 4 of the notice of motion, which paragraphs forms the gravamen of appellant's relief. The occupation and demolition by the respondent have already occurred. They are past events and cannot be interdicted. The erection of the fence has already been done by the respondent. It serves no practical purpose to direct the

¹¹ *Dennegeur Estate Homeowners Association v Telkom SA Soc Ltd* 2019 (4) SA 451 (SCA), at 455 A-B.

¹² *Mbuku v Mdinwa* 1982 (1) SA 219 (TKS), at 221.

respondent to erect the boundary fence because it has already been erected. On this basis appellant's appeal cannot succeed and must therefore fail with costs.

- [36] Even if I am wrong on the above finding, the appeal would still fail on different grounds. The requisites of the final interdict are not satisfied.

Final Interdict

- [37] The appellant approached the court *a quo* for a final interdict. In his papers, the appellant sought mandatory and prohibitory interdicts. That is so in light of the relief sought in the notice of motion referred to above. The relief sought in paragraph 3 of the notice of motion is in the nature of a prohibitory interdict, whereas in paragraph 4 the appellant seeks a mandatory interdict against the respondent.

- [39] A prohibitory interdict is an interdict in the more restricted sense and may be described as an order requiring a person to abstain from committing a threatened wrong or from continuing an existing one¹³. On the other hand a mandatory interdict¹⁴ is an order requiring a person to do some positive act to remedy a wrongful state of affairs for which he is responsible, or to do something which he ought to if the complainant is to be able to exercise his rights. It has been said that a mandatory interdict can serve to compel the performance of a specific statutory duty, and to remedy the effects of unlawful action already taken¹⁵. A mandatory order can only be granted if all the requisites of an interdict have been established¹⁶.

- [40] A final interdict, sometimes referred to as an absolute or perpetual interdict, is a final determination of the rights of the parties to the litigation¹⁷. I will deal

¹³ Erasmus : Superior Court Practice and Edition.... [TBC].

¹⁴ **Jordaan v Penmill Investments CC** 1991 (2) SA 430 (E), at 436 E.

¹⁵ Baxter: Administrative Law 690 [TBC].

¹⁶ **Kaputauza v Executive Committee of the Administration of Hereros** 1984 (4) SA 295 (SWA), at 317F-H.

¹⁷ John Meyer Interdicts and Related Orders Page 55 [TBC].

hereinafter with the right the appellant sought to enforce, and whether the appellant has proved the existence of that right.

[41] There are three requisites for the grant of a final interdict, all of which must be present¹⁸.

“(a) *A clear right on the appellant;*

(b) An injury actually committed or resonantly apprehended; and

(c) The absence of any other sastisfactory remedy available to the appellant”.

Clear right

[42] The appellant asserts himself as the owner of the immovable property in question. The essence of his contention is that he acquired the ownership of the land through inheritance. The following allegations contained in the founding affidavit are fundamentally important.

“5 *My mother’s brother Nkwenkwana Mqabula (my uncle) has his own child namely, Nomfazi Mqabula, born in 1945 and passed on about 2015.*

6. *I grew up at my uncle’s family home and my uncle acted as my father. Both my uncle and my mother died in 1976 and 1974 respectively. My uncle left the family home to me and Nomfazi. I continued to take care of my uncle’s home. The only house we had was destroyed by wind but I fenced the yard and securely all the remaining material of the house.*

.....

13. *After the passing on of Nomfazi Mqabula, I became the only rightful owner of my uncle’s family home and nobody else. If the sale had*

¹⁸ Prest: Interlocutory Interdicts Page 63-72 [TBC]; **Setlogelo v Setlogelo** 1914 AD 221, at 227.

taken place before the passing of Nomfazi Mqabula both of us had to consent to such sale. Nomfazi did not sell my uncle's family home.

.....

15. *On 18th July 2021 during the morning, I found Messrs Xolile James and Unathi Beni destroying my fence at my uncle's family home. I confronted them and asked them who instructed them to destroyed fence in my property and they told me that they were hired to do so by the respondent.*

16. *I told them to stop as the fence they were destroying belongs to me and that I am the rightful owner of that property and stopped.”¹⁹*

[43] I may mention in passing that the appellant is not, on his own version, a direct descendent of Nkwenkwana Mqabula, who is alleged to have been the owner of the immovable property or the land. Whether or not rural land can lawfully be owned by a private individual or a resident of that village is a topic for another day. That is not a matter before us. It does not appear that the land was acquired through a Will by the appellant. However, the appellant sought to enforce his alleged right of ownership.

[44] In dispelling the appellant's claim of ownership to the land or immovable property, the respondent asserts that on 23rd September 2019 he bought the said immovable property from Vuyiswa Dliwayo. The seller is alleged to have inherited the land from her mother, who passed on in 2015. According to the appellant, Nomfazi Mqabula passed on in 2015. Nomfazi Mqabula was the daughter of Nkwenkwana Mqabula, who was allegedly the owner or rightful occupant or possessor of the land or immovable property. It is reiterated that the appellant pertinently contended that *“my uncle left the family home to me and Nomfazi”*. This was said notwithstanding the fact that the appellant is not a direct descendent of Nkwenkwana, but Nomfazi.

¹⁹ Sic.

- [45] From the above scenario, it is inescapable that Vuyiswa is the daughter of Nomfazi and a grandchild of Nkwenkwana. Respondent's annexure "XK2" is written in Xhosa and no attempt was made to translate the Xhosa version into English for purposes of a proper record and for the benefit of the court. In court, the respondent's counsel was requested to ensure that an English version of all Xhosa written documents be made available. That appears not to have been done.
- [46] Annexure "XK2" appears to be a certificate by the Ntonga Residents Association, dated 08th February 2019, penned by its secretary K Mlambo. Its essence is to certify that Vuyiswa Dliwayo informed the local committee that she had sold her homestead to Xolisa Kungekile with their consent on 23rd September 2019. An association's stamp is appended, and the members of that local committee are listed therein. This was, however, denied in reply.
- [47] Annexure "XK1"²⁰ to the respondent's answering papers appears to be an extract from a register or duplicate register of permission to occupy allotment No 2[...]. There is no supporting or confirmatory affidavit from the author and its contents must be treated as hearsay. Nevertheless, from the appellant's replying affidavit, it seems to be common cause that the extract refers to the immovable property in question. It indicates that on 09 July 2021, the Office of the Director of Communication and Customer Care Services of the Department of Rural Development and Agrarian Reform, Eastern Cape registered a voluntary transfer of the immovable property and confirms the occupation of the property in favour of the respondent.
- [48] The Department registered the transfer of the immovable property to the respondent and at the same time granted the respondent permission to occupy that property for arable and residential purposes. The respondent, on the face of it, is the sole beneficiary of the process of the registration of immovable property and he appears to be the only one who has been granted a right to occupy the immovable property. He enjoys an exclusive right to

²⁰ This seems to have been marked in error. It follows existing annexures "XK 1" and "XK 2" and should probably have been described as "XK 3".

occupy and possess the immovable property. On this score, applying the principles of well-known case law, the respondent's allegations must be accepted. Both the local association and the Department seem to have confirmed that the respondent is the rightful occupier of the land.

[49] The extract from the Department's register appear to indicate that the respondent's permission to occupy is still extant. If the appellant was not happy with the decision taken in that regard, he should have applied for it to be set aside, otherwise it must be given effect.

[50] For, it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review, it exists in fact, it has legal consequences that cannot simply be overlooked.²¹ The respondent is validly occupying and possessing the property in question. His occupation of the property cannot be impugned. Occupation is a consequent act, dependant on the factual existence of the granting and registration of the right to occupy by the relevant government authorities or organs of state; the decision to grant and register the respondent's right is an initial act. In those circumstances the consequent act has legal effect so long as the initial act is not set aside by a competent court²². Accordingly, the relief sought in paragraph 3 of the notice of motion cannot succeed.

[51] Having found that the respondent has a right to occupy the immovable property for arable and residential purposes, it follows that the respondent has a contingent right to reside in a habitable, clean and secured residential place. It is so because section 12 of the Constitution guarantees a right to be free from all forms of violence. Section 24 of the Constitution guarantees a right to an environment that is not harmful to their health or well-being. He has a right to reside in a property free of nuisance. That is an incident of lawful possession and occupation. It fits comfortably with the fact that the respondent contended that he commenced with the renovations of his new

²¹ *South Africa Broadcasting Corporation Soc Ltd and others* 2015 (4) All SA 719 (SCA) [TBC]; 2016 (2) SA 522 (SCA), para 45; *Oudekraal Estates Pty Ltd v City of Cape Town and Others* 2004 (3) All SA 1 (SCA); 2004 (6) SA 222 (SCA), para 26.

²² *Oudekraal*, supra, para 31.

property. Renewing the fencing to make it secure and clearing the property is part and parcel of exercising a right to occupy. All of these are giving effect to the respondent's right to occupy.

[52] In conclusion, I find that the appellant has failed to establish that he has a clear right to the property. His version in this regard is palpably implausible, farfetched and clearly untenable and it cannot be accepted²³. Motion court proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts²⁴. The respondent's version prevails. It is accordingly not necessary to deal with the other requisites of a final interdict as the first one is not present. They must exist conjunctively. The absence thereof disentitles the appellant to the relief he is seeking.

[53] The court *a quo* dismissed the appellant's matter on the basis that the appellant lacked *locus standi* when applying for an interdict. The court *a quo* declined to deal with the merits of the case.

[54] I do not agree that the appellant lacked *locus standi* to institute the instant proceedings in the court *a quo*. I find solace for this finding on the pleaded case of the appellant that has not meaningfully been gainsaid by the respondent.

[55] The appellant asserts that he grew up in his homestead under his mother and uncle, who both died in 1974 and 1976 respectively, leaving the property to him and his cousin, Nomfazi. They stayed on the property until Nomfazi passed away in 2015. No evidence has been tendered that he never stayed there. It means that the appellant was, for some period at least, a *bona fide* possessor of the property. I am therefore satisfied that the appellant has a direct and substantial interest in the matter.

[56] *Locus standi* concerns the direct and material interest of a party in the matter. The appellant clearly has *locus standi* in the matter. He accordingly has a

²³ *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634-5.

²⁴ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), para 26.

right to sue and to be sued. For the reasons set out above, however, there was no merit to his application for interdictory relief.

[57] On the conspectus of all the above, I come to the conclusion that the appellant's appeal cannot succeed. I see no basis for costs not to follow the result.

[58] **In the result I make the following order:**

(a) **The appeal is dismissed with costs, such costs to include the costs of the reinstatement application.**

A S ZONO
ACTING JUDGE OF THE HIGH COURT

LAING J:

[59] A comprehensive description of the background facts and argument appears in the judgment of my brother, Zono AJ, which I have had the benefit of reading. In that regard, I agree with the conclusions reached and the order made but differ to some extent with the reasoning.

[60] The appellant sought final interdictory relief. As my brother pointed out, a fundamental shortcoming in the appellant's case was that he failed to establish a clear right to the property. He made repeated averments to 'my uncle's home' but provided no evidence whatsoever regarding how ownership consequently became vested in him. As a starting point, it is not apparent whether his uncle, the late Mr Nkwenkwana Mqabula, was previously the registered owner or whether he was the holder of an informal land right. If the former, then there was no indication that the property was ever transferred to the appellant. If the latter, then presumably the provisions of the Interim

Protection of Informal Land Rights Act 31 of 1996 ('IPILRA') would apply;²⁵ there was, however, simply no evidence of how the appellant could enforce the alleged right of ownership in terms thereof.

[61] Instead, the appellant seemed to rely loosely on the principles of succession to assert that he was owner. He alleged that his mother had stayed with his uncle on the property before passing away in 1974 and that he was her only known surviving child. His uncle passed away in 1976, leaving a daughter, Ms Nomfazi Mqabula ('Nomfazi'). She, in turn, passed away in 2015. The appellant appeared to base his case on the fact that he was the only surviving child of his extended family and that this somehow conferred ownership upon him.

[62] The argument completely ignores, however, the provisions of the Intestate Succession Act 81 of 1987 ('the Act'). In the absence of any evidence of a will or other indication to the contrary, it must be inferred that Mr Mqabula died intestate. If he had left a spouse and descendants, such as his daughter, then they would have inherited their respective shares of the estate in accordance with the not uncomplicated provisions of section 1(1) of the Act. If anyone had enjoyed a right to the property for purposes of the present application, then it would have been the estate of the late Mr Mqabula's daughter, Nomfazi, alternatively her beneficiaries if she had left a will, alternatively her descendants if she, too, had died intestate in 2015.

[63] There was, ultimately, no evidence whatsoever of the appellant's ownership or entitlement to the property. He also never averred that he had occupied or been in possession of the property at the time of the alleged unlawful conduct of the respondent. These factors, on their own, should have prevented the appellant from obtaining the final interdictory relief that he sought. In addition, the well-established principles set out in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*,²⁶ and later amplified in *Plascon-Evans Paints Ltd*

²⁵ An 'informal right to land' is clearly defined in terms of section 1 of IPILRA.

²⁶ 1957 (4) SA 234 (C), at 235. The decision has been followed on numerous occasions.

v Van Riebeeck Paints (Pty) Ltd,²⁷ militate against the appellant's case. These were neatly summarized by Van Loggerenberg as follows:

*'If the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order unless, of course, the court is satisfied that the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.'*²⁸

[64] If the fundamental shortcomings in the appellant's evidence, as well as the principles described above, are properly considered, then the conclusion that he was never entitled to the interdictory relief sought becomes irresistible. I am in full agreement with my brother, Zono AJ. The appeal cannot succeed.

LAING J
JUDGE OF THE HIGH COURT

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²⁷ 1984 (3) SA 623 (A), at 635C.

²⁸ DE van Loggerenberg, *Erasmus: Superior Court Practice* (Juta, 2ed, vol 2, service 20, 2022), at D1-70.

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Matter heard on : 20 September 2024
Delivered on : 22 January 2025