



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

CASE NO: 5243/2024

In the matter between:

MBASHE DIOCESE OF THE ANGLICAN CHURCH

Applicant

and

NKULULEKO MAYAPI

First Respondent

DAVID MAQHEKEZA

Second Respondent

GCOBISA MAYAPI

Third Respondent

**COMMUNITY MEMBERS OF LOWER GWADU
LOCALITY PRESENT AT THE MEETING
OF 02 MARCH 2023 HELD AT THE GREAT PLACE OF
LOWER GWADU ADMINISTRATIVE AREA**

Fourth Respondent

CHIEF NTABOZUKO SIPHUNZI

Fifth Respondent

JUDGMENT

RUSI J

[1] Mbashe Diocese of the Anglican Church (the applicant or Diocese) is an administrative structure of the Anglican Church whose overall leader is its Bishop. It has under its governance various parishes which are each under the tutelage of a pastor. The Lower Gwadu Parish (the parish) is one of them. It holds its church services at a property situated in Lower Gwadu Administrative Area. The applicant describes this property as ‘the Site of Anglican Church/Anglican Church Gwadu Parish’. For convenience, I will refer to the property so described as “the property.”

[2] The property comprises a building which the parish uses for church services, as well as other adjoining buildings. One of those adjoining buildings is used to accommodate the Reverends who oversee the parish from time to time.

[3] This application was brought on semi-urgent basis, on 23 November 2024. It concerns a *mandament van spolie* and other ancillary interdictory relief that the applicant seeks against the first to fifth respondents, namely, that the respondents be interdicted from interfering with its use and/or occupation of the property including use and/or occupation by any of its officially recognized congregants. The applicant alleges that it has previously been in peaceful and undisturbed possession of the property, and the first to fifth respondents, acting in concert, unlawfully dispossessed it thereof.

[4] The applicant also seeks a declarator that it is the lawful possessor and occupier of the property; and that it is entitled to the lawful use and enjoyment of the property in terms of the Interim Protection of Land Rights Act 31 of 1996. The application is opposed only by the first, second and third respondents, and for convenience I will refer to them collectively as “the respondent”, or individually as meets the context in the course of this judgment.

[5] It bears mentioning that despite the lapse of time from the date of launching of this application to the date of its hearing on 18 March 2025, the parties argued the issue of its urgency.

[6] When regard is had to the fact that on 28 November 2024 when the application was launched, it was postponed to 18 January 2025 and further until 18 March 2025, it is axiomatic that whatever urgency there may have been, it had dissipated as of 18 March 2025 when the application was heard. The parties had adequate opportunity to file their respective papers between 28 November 2024 and 18 March 2025 when it was heard for final determination. Importantly, the postponement of the matter from 28 January 2025 to 18 March 2025 came about by agreement between the parties. No prejudice has ensued on the part of the respondents. For these reasons, I do not need to make any pronouncement on the issue of urgency.

Factual background

[7] In December 2022, a discord ensued within the parish resulting from the non-ordination of the first respondent by the Bishop of the Diocese as the Reverend of the parish. It is the prerogative of the Bishop of the Diocese to appoint senior members of the church as Reverends that will in turn oversee parishes that fall under the Diocese. Bishop Fikizolo (the Bishop or Bishop Fikizolo) is the current Bishop of the Diocese. An ordination of ten Reverends of the Diocese was scheduled to take place in December 2022. However, the Bishop took a decision to ordain only five Reverends with the intention of ordaining the other five in the subsequent cycle of ordination. The first respondent was not among those who were ordained on 11 December 2022, and he did not receive his non-ordination well.

[8] Reverend Ngubo was appointed by the Bishop as the pastor responsible for the parish and he was to assume his duties in January 2023. He could not do so as it happened that no congregants turned out for church services on several consecutive occasions. At the instance of the Bishop, an investigation was undertaken by Reverend

Sifuba, another religious leader in the Diocese, into the possible cause of the persistent non-attendance of church services by the members of the congregation of the parish.

[9] A report that Reverend Sifuba made to the Bishop revealed that the congregants of the parish stayed away from church services as a way of showing discontent with his failure to ordain the first respondent as Reverend for the parish. The congregants and certain members of the community allegedly stood in solidarity with the first respondent. Reverend Ngubo's services at the parish were withdrawn by the Bishop, and Reverend Sifuba was assigned as its caretaker Reverend.

[10] A meeting was subsequently held at the homestead of the fifth respondent on 02 March 2023 and its purpose was to resolve the impasse that had arisen and in which the Lower Gwadu community members had apparently become involved. It was at this meeting that Reverend Sifuba who attended it on behalf of Bishop Fikizolo was caused to hand the keys to the property over to the fifth respondent. According to the applicant, the keys to the property were unlawfully taken away from Reverend Sifuba, thus, dispossessing it of the property without its consent.

The applicant's case

[11] In the applicant's founding affidavit, Bishop Fikizolo states that the property has been used and occupied by the applicant; and it has been in its control since time immemorial. Before 02 March 2023, the property was in its peaceful and undisturbed possession. This is where the parish has always held its church services. According to Bishop Fikizolo, the applicant is the owner or bona fide possessor of the property, and the respondents have no title, right or authority to use the 'church building' without its consent.

[12] The applicant further states that the property was allocated to it by means of a permission to occupy which was issued to it in terms of 'the regulations promulgated under the 'Land Act of 1936.' This, says the applicant, is the basis of the informal right

that it asserts, to occupy the property, and which this Court ought to protect by granting the relief sought.¹ Regarding the permission to occupy, the applicant states that it could not be found after a diligent search. It further states that the officials of the Department of Agriculture, Land Reform and Rural Development were requested to provide a copy of the permission to occupy. In a letter dated 02 September 2024, the department's relevant official reported that no records of such permission to occupy could be found in its offices.

[13] Bishop Fikizolo goes on to state that after he received the investigation report from Reverend Sifuba he received a call from the fifth respondent who demanded that Reverend Sifuba be removed from Lower Gwadu as the Reverend of the parish 'on pain of some bad consequences.' Upon receipt of this phone call, he requested Reverend Sifuba to attend at the homestead of the fifth respondent to ascertain more facts regarding the fifth respondent's demand.

[14] When Reverend Sifuba went to the homestead of the fifth respondent he was in the company of two members of the SAPS and Archdeacon Bekwa, a local church leader. They were invited to the meeting of 02 March 2023 (the meeting) which was also attended by a large crowd of members of the community. Those members of the community have been cited in this application as the fourth respondent.

[15] There was no amicable resolution of the matter at the meeting. Instead, the fifth respondent demanded the keys to the property from Reverend Sifuba who resisted the demand. The attendees of the meeting reacted to his resistance with threats of harm

¹ It was unclear from the facts of this application whether the applicant based its cause of action on the Native Trust and Land Act 18 of 1936, or other similar old order legislation. The Native and Trust Land Act has as its object, inter alia, 'the provision of a South African Native Trust and to make provision for the acquisition and occupation of land by 'natives' and other persons'. Due to the applicant's failure to provide a clear citation of the relevant legislation, it became necessary, after hearing argument, to invite the parties to file supplementary heads of argument on the legal framework that the applicant relies on as the basis for the declarator that it seeks. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004), at para 27, it was emphasized that where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. (My own emphasis)

and insults directed at him. When Reverend Sifuba and his company attempted to leave the premises of the fifth respondent, one of the community members, went to close the gate, preventing them from leaving. He handed the property keys over to the fifth respondent under protest because of the threats and insults. Since this dispossession of the keys the members of the parish have not been able to access the property.

[16] The applicant subsequently instituted proceedings in the Willowvale Magistrates' Court in which it successfully claimed ownership of the property by way of acquisitive prescription. Despite this success, the respondents did not restore the property's possession to the applicant. It later occurred to the applicant that the proceedings in the Willowvale Magistrate's Court were ill-conceived and could not have afforded it the required redress. Resulting from this realization, the applicant resolved to abandon the judgment of the Willowvale Magistrates' Court by notice dated 15 November 2024.

[17] The facts that Bishop Fikizolo states concerning Reverend Sifuba's report on his investigation of the discord within the parish, and the circumstances under which he was dispossessed of the keys to the property at the meeting are confirmed in similar detail by Reverend Sifuba in his confirmatory affidavit. It is therefore not necessary to repeat them.

[18] As regards the ancillary interdictory relief, the applicant states that it has a clear right of use and enjoyment of the property which the respondents are usurping by their conduct. It further states that it has no other alternative remedy available to it since the proceedings of the Willowvale Magistrate's Court would not afford it appropriate relief. The applicant further states that if the relief that it seeks is not granted, it will suffer harm in the form of loss of the property.

The first and second respondents' case

[19] Apart from disputing that the applicant is the owner of the property, the first and second respondents allege in their answering affidavit, which the first respondent

deposed to, that it is not correct that the applicant had peaceful and undisturbed possession of the property before the keys were handed to the fifth respondent. In this regard they allege that the property has always been jointly used by the community and the parish for their various and respective purposes.

[20] The first and second respondents further deny that the applicant was unlawfully dispossessed of the keys under threats of violence. According to them, Reverend Sifuba consented to the handing over of the keys to the fifth respondent. For these reasons, they state that the applicant has not established its entitlement to the relief that it seeks.

[21] The rest of the allegations that the applicant makes regarding what caused the standoff between the first respondent and the parish is confirmed by the first and second respondents. They deny, however, that they solicited the solidarity of the members of the community cited in this application as the fourth respondent.

The third respondent's case

[22] The third respondent raised a point in limine of lack of locus standi on the part of the applicant in the light of the fact that it did not produce the permission to occupy that it relies on to prove its ownership of the property.

[23] While no point in limine of misjoinder has pertinently been raised by the third respondent, she alleges in her answering affidavit that she was not part of the meeting at which the alleged dispossession took place, and she does not know what the resolution of that meeting was. For these reasons, the third respondent contends that there is no basis why the applicant alleges that she is part of the persons who dispossessed it of the property.

[24] That being the case, the third respondent goes on to set out facts which, according to her, represent the correct state of affairs concerning who has the title to

possess the property. In this regard, the third respondent states, in essence, that the buildings that are on property are owned by the community of Lower Gwadu and that this application is the applicant's attempt to dispossess the community of Lower Gwadu of the property. She further states that the community of Lower Gwadu of which she is a member, uses the property for various functions including funerals and political meetings. The third respondent further states that since the applicant has failed to adduce proof of ownership of the property, it has no right of claim to it. On these grounds, the third respondents contends that the applicant has failed to discharge the onus of proving the requisites for the grant of the possessory interdict.

The fifth respondent's confirmatory affidavit

[25] The fifth respondent, who is the traditional leader (iNkosana) of Lower Gwadu Administrative Area, filed a confirmatory affidavit. It is unclear which facts he is confirming and in which affidavit those facts are stated among the affidavits that have been filed in this application. In the so-called confirmatory affidavit, the fifth respondent states that he does not oppose the application. There is indeed no notice of intention to oppose that was filed on behalf of the fifth respondent.

[26] In his affidavit, the fifth respondent states facts which, according to him, portray the accurate position regarding the ownership of the property forming the subject of this application. However, despite stating that he does not oppose the application, the fifth respondent goes further and states that no permission to occupy the property forming the subject of this application was ever issued to anyone or any organization or church.

[27] The fifth respondent further states that the property is owned by the community of Lower Gwadu Administrative area and was built with its own resources. According to the fifth respondent, Reverend Sifuba voluntarily handed over the keys to the property to him so that anyone in the community who wished to use the property could have access to it.

[28] Further according to the fifth respondent, it is the Reverends of the applicant, including Reverend Sifuba, who came to his homestead on 02 March 2023 to apologize for locking the community hall thereby denying the community access to it. He denied that the applicant was unlawfully dispossessed of the property. He describes the actions of the applicant in seeking to vindicate its alleged title or right to claim the property as *“arrogant and an act of looking down on all of them.”*

[29] I must interpose at this point to mention that despite the glaring irregularity in the filing of the fifth respondent’s confirmatory affidavit and the scandalous matter that it contains, no application was made for its striking out or setting aside as well as the striking out of the scandalous matter. Moreover, the tone used by the fifth respondent in expressing his views of the applicant’s alleged motives offends decorum.

[30] With this said, the fifth respondent is clearly not deposing to the affidavit as a neutral person whose aim is to place material facts before this Court for the just decision of this case. He deposed to the affidavit in order to rebut the averments made by the applicant regarding the relief that it seeks. This is manifest from the content of his affidavit.

[31] Rule 6 of the Uniform Rules of this Court sets out the sequence and timing for the filing of the affidavits by the respective parties in application proceedings, and it is accepted that the affidavits are limited to three sets.² This notwithstanding, the applicant elected to reply to the fifth respondent’s confirmatory affidavit. The essence of that reply is that the fifth respondent has not disputed the unlawful dispossession of the property by threats of violence and harassment directed at its Reverends.

[32] It is the view I hold that the affidavit of the fifth respondent relates to crucial issues that arise in this application. I must nonetheless have regard to it.

² *Hano Trading CC v J R 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA); *James Brown & Hammer (Pty) (Previously named Gilbert Hamer & Co Ltd) Ltd v Simmons*, NO 1963 (4) (SA) 656 at 660E-G).

The parties' submissions

[33] On behalf of the applicant Mr *Maswazi* submitted that Reverend Sifuba could not have validly consented to the handing over of the keys when regard is had to the fact that the Bishop, on whose behalf he attended the meeting, did not authorize such an act which was not in their contemplation when he was requested to attend the meeting. It was Mr *Maswazi's* submission further that the applicant has established its entitlement to the final interdict that it seeks. He emphasized the fact that none of the respondents opposed this application as representatives of the community whose right of ownership of the property they seek to assert. For this reason, he submitted that their assertion of any title to the property is unsustainable.

[34] Concerning the declarator that the applicant seeks, Mr *Maswazi* submitted that its title to possess the property as the beneficial occupant is protected in terms of the already mentioned Interim Protection of Land Rights Act whose object, is inter alia, to provide temporary protection of certain rights and interests in land which are not otherwise adequately protected by law.

[35] In the applicant's supplementary heads of argument filed upon this Court's invitation for further legal argument on the legislative framework on which the applicant bases its entitlement to the declaratory relief that it seeks, it was submitted on behalf of the applicant that it obtained the permission to occupy the property in terms of Proclamation 26 of 1936. The relevant portion of the Proclamation, section 4, in particular, reads:

"Permission to Occupy Homesteads and Arable Allotments

- (1) The Native Commissioner may grant permission –
 - (i) to any Native to remain in occupation of such homestead and arable allotments as were in his lawful but unregistered occupation immediately prior to the commencement of the Transkei Land Amendment Act, 1968;

- (ii) to any Native domiciled in the district to occupy a homestead or arable allotment for domestic and agricultural purposes respectively;
 - (iii) to any missionary society or educational authority to hold a homestead or arable allotment in a residential area or an arable allotment for occupation by paid Native Ministers, preachers or evangelist, or teachers in its employ.
- (2) . . .”

[36] Mr *Dyantyi* who represented the first and second respondents, submitted that the applicant failed to prove ownership of the property by means of a permission to occupy. Mr *Dyantyi* took the view that since the applicant was never the sole possessor of the property it did not have peaceful and undisturbed possession of the property. On these grounds he submitted that the applicant has not satisfied the requirements of spoliatory relief. Regarding the applicant’s entitlement to the additional interdictory relief, Mr *Dyantyi* submitted that the applicant had an alternative relief in the form of the claim for acquisitive ownership that it abandoned in the Willowvale Magistrates’ Court.

[37] Mr *Hinxha* submitted, on behalf of the third respondent that since the applicant was not present in the meeting of 02 March 2023 where the alleged unlawful dispossession took place, she ought not have been joined in these proceedings. In similar vein, Mr *Hinxha* submitted that the third respondent opposed this application as a member of the community who has also used the property that the applicant wants to claim as its own.

[38] I must interpose to state that if this is accepted as the third respondent’s stance in this application, she has a direct and substantial interest in the outcome of these proceedings as a community member that this Court’s order would adversely affect. The test for a misjoinder or non-joinder is whether the party has a direct and substantial interest in the subject matter of the litigation.³ A direct and substantial interest in the

³ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA); *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA).

subject matter of the litigation has been held to mean a legal interest in the subject matter of the litigation which may be affected by the decision of the court, and which must not be remote or hypothetical.⁴ The point raised, of misjoinder is therefore ill-contrived.

[39] It was Mr *Hinx*a's submission further that in as much as the applicant was in possession of the property before the keys were handed to the fifth respondent, such possession was never a peaceful and undisturbed one by reason of the joint use of the property by the applicant and the community of Lower Gwadu for various purposes. Despite the handing over of the keys to the fifth respondent, so the submission continued, the applicant was never denied access to the property. For this reason, Mr *Hinx*a argued, the application for spoliatory relief must fail. Regarding the additional interdictory relief that the applicant seeks, Mr *Hinx*a submitted that the applicant has not established the requirements for the grant of such interdictory relief.

[40] It was further submitted on behalf of the first, second and third respondents, in their respective supplementary heads of arguments that were filed, as mentioned, upon the invitation of the court, that neither the 'Land Act of 1936' nor Proclamation 26 of 1936 assist the applicant in its quest. In this regard, Mr *Dyanty*i and Mr *Hinx*a both submitted, in the respective supplementary heads of argument, that the reasons for this view are two pronged – the first prong is that the applicant has not produced evidence of the permission to occupy which is provided for in terms of the two legislations; the second is that the applicant is not "a native" that the two legislations envisage.

The law

⁴ *National Union of Metalworkers of South Africa v Intervale (Pty) Ltd and Others* 2015 (2) BCLR 182 (CC); *International Trade Administration Commission SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC); *Ex parte Body Corporate of Caroline Court* 2001 (4) SA 1230 (SCA); *Pheko and Others v. Ekurhuleni City* 2015 (5) SA 600 (CC).

[41] The foundational principles of the spoliatory relief were enunciated in *Nino Bonino v De Lange*⁵ where Innes, CJ said:

‘It is a fundamental principle that no man is allowed to take the law into his own hands. No one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does so the court will summarily restore the status quo ante and will do that as a preliminary to any enquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear.’

[42] The relief of the possessory interdict is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands and by inducing them to submit the matter to the jurisdiction of the courts.⁶ It is trite that the essence of the spoliation remedy is that the person who has been deprived of his or her possession must first be restored to his or her former possession before the merits of the case can be considered.⁷

[43] Two requirements must be met before the spoliation remedy may be granted. There must, firstly, be clear proof of peaceful and undisturbed possession of the property. Secondly, unlawful dispossession (or deprivation) by the spoliator must be proven.⁸ Once the two requirements have been proven by the applicant, she is entitled to a *mandament van spolie* restoring the status quo ante.

[44] It is not sufficient for the applicant merely to make out a prima facie case, he must prove his case on a balance of probabilities as in any other civil case.⁹ The basis

⁵ 1906 TS 120 at 122.

⁶ *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* [2007] ZASCA 70; 2007 (6) SA 511 (SCA) para 22; *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) paras 10-12; LAWSA, second Edition, volume 27 para 93.

⁷ *Ngqukumba*, footnote 7 supra, para 10.

⁸ *Nino Bonino* footnote 6, supra; *Yeko v Qana* 1973 4 SA 735 (A) 739; *Blendrite (Pty) Ltd and Another v Moonisami and Another* (case no 227/2020) [2021] ZASCA 77 (10 June 2021); *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co* 1948 (1) SA 91 (W) at page 98.

⁹ *Mankowitz v Loewenthal* 1982 (3) SA 758 (A) at 767 F-H.

(causa) for possession, or whether possession is wrongful or illegal, is irrelevant, as that would go to the merits of the dispute.¹⁰

[45] An applicant for a final interdict must establish three requisites, namely, a clear right which he seeks to protect by means of the interdict; actual injury or a well-grounded apprehension of injury if the interdict sought is not granted; and that there is no other alternative appropriate relief available to him. This is settled law.¹¹

[46] With these legal principles in mind, in the discussion that follows I consider whether the applicant has made out a case for the relief that it seeks.

Discussion

[47] It is common cause that before the discord that emerged within the parish, both parties made use of and occupied the property for their various respective purposes peacefully and without disturbance. Indeed, this meant that there was a multiplicity of the persons who, at different points in time, used and occupied the property for various purposes as mentioned.

[48] The effect of the contention that the first, second, third and fifth respondent make is that the applicant had mere access to the property which cannot amount to the sort of possession that the law protects. However, from the fact the applicant has held the keys to the property until the fifth respondent took possession of them, it ought to follow that in that way it was in physical control of the property.

[49] I hold the view that the applicant's possession of the property has not been diluted to a point of being mere access that it cannot be regarded by the law as sufficient to attain the protection of the possessory interdict. Joint possession of the

¹⁰ *Ivanov v Northwest Gambling Board and Others* (312/2011) [2012] ZASCA 92; 2012 (6) SA 67 (SCA)2012 (2) SACR 404 (SCA) [2012] 4 All SA 1 (SCA) (31 May 2012), para 19.

¹¹ *Setlogelo v Setlogelo* 1914 AD 221 at 227; see also *Dyalo v Mnquma Local Municipality and Another* (8490/2016) [2016] ZAECHMHC 36.

property has been accorded protection where one of the joint possessors takes exclusive possession of that property against the will of the possessor by illicit means.¹² Therefore, the contention made by the first, second, third and fifth respondents that the applicant was never in peaceful and undisturbed possession of the property, by reason of the joint use of the property in the manner already mentioned, cannot be sustained.

[50] The respondents place heavy reliance on the fact that the ownership of the property vests in the community of which the fifth respondent is the traditional leader. This reliance on the ownership of the property is misplaced. The essential character of possessory remedy is that the legal process whereby the possession of a party is protected is kept strictly separate from the process whereby a party's right to ownership or of the right to property in dispute is determined.¹³

[52] Before the title to possess is determined, possession must be restored where the possessor has illicitly been disposed of the property, provided that previous peaceful and undisturbed possession has been proved. As held in *Street Pole Ads Durban (Pty) Ltd v Ethekwini Municipality*, good title is irrelevant in a spoliation application.¹⁴ This simultaneously addresses the point in limine that the third respondent raised, of the applicant's lack of locus standi.

Should the asserted defence of consent prevail?

[53] Consent is indeed one of the recognized defences to spoliatory relief. But such consent will be valid if it was given genuinely, freely and voluntarily. As Heher JA held in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*,¹⁵ both the giving and receiving (of possession) must be considered in context. Rose Innes J enunciated the

¹² *Denneguer Est Homeoners Association v Telkom SA Ltd* 2019 (4) SA 451 (SCA) para 9.

¹³ Erasmus, *Superior Court Practice*, Volume 2 Service 15, 2019 at D7-1; *Ivanov* footnote 11 supra, para 19.

¹⁴ 2008 (5) SA 290 (SCA), para 15.

¹⁵ 2008 (3) SA 371 at 381 para 27.

legal position in *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Culture Services, and Others*¹⁶ as follows:

‘[T]he cardinal enquiry is whether the person in in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be unlawful because it was by force, or by threat of force, or by stealth, deceit or theft, but in all cases spoliation is unlawful when the dispossession is without the consent of the person deprived of, since consent to the giving up of possession of possession of property, if the consent is genuinely and freely given, negates the unlawfulness of the dispossession.¹⁷

[54] These being application proceedings, final relief will be granted if the facts alleged by the applicant, which the respondent admits, together with the facts alleged by the respondent justify the granting of such a final order.¹⁸ Furthermore, this Court will be entitled to accept the facts alleged by the applicant in so far as they are admitted by the respondent, and those alleged by the respondent in so far as his version is plausible and credible.¹⁹ And, where the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court would be justified in rejecting them merely on the papers.²⁰

[55] The first and second respondents who were among the persons that attended the meeting of 02 March 2023 denied and put the applicant to the proof of the alleged dispossession of the keys under threats of harm and insults. They did not, however, dispute the applicant’s allegation that he handed the keys to the fifth respondent under protest. According to the first and second respondents, Reverend Sifuba was merely asked about the fact that ‘his church’ had locked the property, and he apologized.

¹⁶ 1996 (4) SA 231 (C).

¹⁷ At page 240B-D.

¹⁸ *Plascon- Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984(3) SA 620 (SCA) (“*Plascon-Evans*”).

¹⁹ *Airports Company South Africa Soc Ltd v Airports Bookshop (Pty) Ltd t/a Exclusive Books*, 2017 (3) SA 128 (SCA) para 26.

²⁰ *Plascon-Evans*, supra, at 634-5; *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) (12 January 2009), para 26.

[56] The fifth respondent, on the other hand, denied in his so-called confirmatory affidavit any knowledge of facts relating to the meeting of 02 March 2023 and of the alleged dispossession by threats. Yet, nowhere in the said confirmatory affidavit does he specifically deny being present at the meeting. In fact, the contrary is true. He states in his affidavit that he took the keys from Reverend Sifuba in his capacity as the traditional leader of the lower Gwadu Community in whom the ownership of the property vests, in order to facilitate free access of everyone who wished to utilize the property, including the applicant. I need only emphasize that it is to the manner in which the dispossession took place that the element of unlawfulness of dispossession relates, not the alleged title or right of the spoliator to claim possession.²¹

[57] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*²², in which Heher JA said:

‘[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied.’

²¹*Stocks Housing*, footnote 17, supra at 240A-B.

²² Footnote 15 supra, at 375G-H.

[58] It can hardly be said that the allegations that the applicant makes in its founding affidavit, that the keys to the property were forcefully dispossessed from Reverend Sifuba, has been seriously disputed by any of the opposing respondents. As already mentioned, the first, second, third and fifth respondents placed great store in the fact that the property is owned by the community. I have already mentioned that ownership is not a consideration in spoliatory relief.

[59] On the common cause facts of this application I am satisfied that the applicant's version is credible – the keys to the property were forcefully taken from Reverend Sifuba. Therefore, the applicant has proven that it was unlawfully dispossessed of the property. I turn to deal with whether the applicant has established its entitlement to the additional interdictory relief that it seeks.

Clear right

[60] The meaning of 'clear right' in relation to an application for a final interdict relates to the degree of proof required to establish the right. Two aspects are of relevance on this score – the first is that the existence of a right is a matter of substantive law. This means that the right must be one that is recognized by law. The second aspect relates to whether the right is clearly established, and this is a matter of evidence.²³

[61] There can hardly be controversy regarding the fact that the applicant has the protection of section 25 of the Constitution against arbitrary deprivation of property. This is the legal interest it seeks to protect in relation to the property that forms the subject of this application. I make the finding that the applicant has established a clear right which it seeks to protect by the interdictory relief.

Irreparable harm

²³ Erasmus, Superior Court Practice, Volume 2 Service 15, 2020 at D6-13; *Dyalo*, footnote 12, *supra*.

[62] The applicant must establish a reasonable apprehension of injury in that a reasonable person faced with certain facts would entertain such apprehension of injury. While the applicant is not required to prove that on a balance of probabilities of undisputed facts that he will suffer harm, he must show that objectively his fear of harm is well grounded in the sense that it is reasonable to apprehend that injury will result.²⁴

[63] The applicant's attempts to reach an amicable resolution of the matter with the respondent failed. Its representatives (Reverend Sifuba and his fellow church leaders) were brazenly terrorized at the meeting. Regard also being had to the finding I made that the keys to the property were forcefully taken from Reverend Sifuba on the watch of the fifth respondent, it is reasonable for the applicant to comprehend that if this Court does not grant the interdictory relief sought, the respondents would continue to harass the members of the parish thereby thwarting its possession, use and enjoyment of the property.

Alternative remedy

[64] In determining what an appropriate alternative remedy is, the circumstances of each case must be considered. In *Hotz and Others v University of Cape Town*²⁵, the following was said of the requisite of absence of an alternative remedy:

'[T]he existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended. . . The fact that one of the parties, or even the judge, may think

²⁴ *Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd* 1961 (2) SA 505 (W) at 515; *Minister of Law and Order and Others v Nordien and Another* 1987 (2) 894 (AD) at 896F-I (and all authorities cited therein); *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* (462/07) [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) (30 May 2008), para 21.

²⁵ *Hotz and Others v University of Cape Town* (730/2016) [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) (20 October 2016).

that the problem would be better resolved, or can ultimately only be resolved, by extra-curial means, is not a justification for refusing to grant an interdict.’²⁶

[65] On the applicant’s own showing, the property was allocated to it by means of permission to occupy which, as is trite, does not confer ownership of the property. Therefore, if its possession and occupation of the property came about with the permission of the ‘owner’ of the land, the claim of prescriptive acquisition would indeed have been ill-conceived. One of the requisites for such a claim is that the property must be occupied without the permission of the true owner.

[66] It ought to follow from this, that a claim of prescriptive acquisition would still not be appropriate remedy to protect the right that the applicant now asserts. I have already mentioned that the applicant’s attempts to reach an amicable resolution of the matter with the respondent were in vain. The applicant’s version that it has no other alternative remedy available to it must therefore prevail. This brings me to the determination of the declarator that the applicant seeks.

The declarator

[67] This Court’s discretionary power to grant the declarator sought is governed by section 21(1)(c) of the Superior Courts Act 10 of 2013 which provides that it may, at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.²⁷

²⁶ *Op cit*, para 36.

²⁷ Section 21(1) provides reads:

‘21 *Persons over whom and matters in relation to which Divisions have jurisdiction:*

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –

(a) to hear and determine appeals from all Magistrates’ Courts within its area of jurisdiction;

(b) to review the proceedings of all such courts;

(c) in its discretion, and it may, at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.’

[68] Declaratory relief will be granted if the applicant satisfies the court of no more than the fact that he or she is a person interested in an “existing, future or contingent right or obligation.”²⁸ In determining whether or not a declaratory order should be made the court must first be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation’, and if so satisfied, it must decide whether the case is a proper one for the exercise of the discretion conferred on it.²⁹

[69] There is, in the present case, undeniably strenuous contestation of the title to the property, or the right to claim its possession. I am not unmindful of the fact that, ordinarily, in determining the spoliatory relief, the fact of who has a stronger right or claim to possession is irrelevant. However, in *Street Pole Ads Durban (Pty) Ltd and Another v Ethekwini Municipality*³⁰, Cameron JA stated:

‘[G]ood title is irrelevant: the claim to spoliatory relief arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case, ‘the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims’. This is because such an applicant “in effect forces an investigation of the issues relevant to the further relief he claims”. Once he does this, the respondent's defence in regard thereto has to be considered.’

[70] Regrettably, the first, second and third respondents; and the fifth respondent, though firmly asserting the Lower Gwadu community's ownership of the property, have not established the necessary legal standing, at least in this case, to oppose this

²⁸ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005(6) SA 205(SCA) at para17 and 18.

²⁹ *Durban City Council v Association of Building Societies* 1942 AD 27; *Reinecke v Incorporated General Insurances Ltd* 1974(2) SA 84 (A) at 95C.

³⁰ *Supra*, footnote 15 at para 15.

application on behalf of the said community. The fifth respondent makes this position clear in paragraph 4 of the so-called confirmatory affidavit when he states as follows:

“I am not opposing the Applicant’s application but I am only explaining that which is known to me not only as iNkosana of the area but as the resident and witness who has seen so many things unfolding before my eyes in the area some brought to me as complaints.”

[71] The effect of this is that the entirety of the Lower Gwadu community, except the unspecified members of the community who attended the meeting of 02 March 2023 and cited in this case as the fourth respondent, is not a party to these proceedings and has not fully placed its defence to the ownership right or title to possess the property which the applicant also asserts.

[72] Over and above the Interim Protection of Land Rights Act as the basis for the declarator that it seeks, the applicant also relied on the provisions of ‘the Land Act of 1936’ as the regime in terms of which it was issued with a permission to the property. However, in the supplementary heads of argument that were filed on its behalf, a different contention is made that the permission to occupy was issued under Proclamation 26 of 1936. This is compounded by the fact that the applicant could not produce the permission to occupy, which it alleges is the basis for the right of ownership that it asserts.

[73] It is not open to the applicant to present argument on legislation different from that on which based its cause of action. An applicant must stand or fall by its founding affidavit,³¹ and facts relevant to relief must be set out simply, clearly and in chronological sequence in the affidavits which support the notice of motion.³²

³¹ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635 – 6; *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327.

³² *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78.

[74] For the foregoing reasons, the present application is not a proper case for the exercise of the discretion to grant the declarator sought by the applicant as to its title to possess (or own) the property.

Costs

[75] The general rule is that a successful litigant must be awarded its costs unless there are grounds which justify a deviation from this rule. The applicant has attained substantial success in so far as the spoliation relief and the additional interdictory relief are concerned. There is no reason why it should not be awarded costs.

[76] A proposition was made on behalf of the applicant that the respondents who opposed this application ought to be mulcted with punitive costs. I disagree with this proposition. I am not satisfied that the first, second and third respondents' opposition of this application, albeit manifestly ill-contrived, went beyond protecting what they conceived was their legal interests.

[77] Something must be said about the fifth respondent's liability for costs. I have already mentioned that when regard is had to the substance of his so-called confirmatory affidavit, it was intended to rebut the applicant's allegation of unlawful dispossession of the property and the claim it makes to its title to possess or own the property.

[78] The filing of the fifth respondent's so-called confirmatory affidavit is a clear instance of flouting procedure in order to escape the heralded liability for costs in the event of opposition of this application, and it should not be countenanced. There is no reason why the fifth respondent should not be ordered to pay the applicant's costs.

Order

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

1. The fifth respondent is hereby directed to release the keys to the property known as the Site of Anglican Church/Anglican Church Gwadu Parish (“the property”) to the applicant forthwith, by handing them over to Mluleki Fikizolo, currently the Bishop of the applicant, or a person nominated by him.
2. The first to fifth respondents and/or anyone acting under their direct or indirect instruction and/or mandate, are hereby interdicted from interfering, in any way, with the use and/or occupation of the property by the applicant and any of its officially recognized congregants.
3. In the event that the fifth respondent fails and/or refuses to release the keys to the property in the manner specified in paragraph 1 of this order, the Sheriff of this Court, duly assisted by the members of the South African Police Service, is authorized to remove the keys from the fifth respondent’s possession and hand them over to the applicant’s Bishop Mluleki Fikizolo or a person nominated by him.
4. The first, second, third and fifth respondents shall pay the costs of this application, which costs shall include costs of two counsel where so employed.

L. RUSI
JUDGE OF THE HIGH COURT

Appearances

For the Applicant : *Adv. B Maswazi*
Adv. L Ndinisa

(Instructed by Mtshengu Rozani Attorneys Inc, Mthatha)

For the first and second respondents : *Mr S Dyantyi*
(Legal Aid South Africa, c/o Mthatha Local Office)

For the third respondent : *Mr M D Hinx*
(N. S. Nombambela Attorneys, Mthatha)

Date heard : 18 March 2025

Date delivered : 22 April 2025