IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD IN DURBAN CASE NUMBER: LCC125/2011

Before Sardiwalla AJ

Decided on: 19th October 2012

In the matter between:

CHRISTOPHER GERALD HLATSHWAYO	**1ST APPLICANT**
and	
ADRIAN WINGFIELD	**1ST RESPONDENT**
THE TRUSTEES FOR THE TIME BEING THE WINGFIELD FAMILY TRUST NO 5049/99	**2ND RESPONDENT**
THE DIRECTOR GENERAL FOR THE DEPARTMENT OF RURAL DEVELOPMENTAND LAND REFORM	**3RD RESPONDENT**

JUDGEMENT

SARDIWALLA AJ

[1] The applicant launched an urgent applicationseeking an interdict against the respondent from threatening, intimidating and harassing him in respect of his right to gain access to his home on farm Weldevreden No 1017 in Kwa Zulu Natal (commonly known as St Ives farm).

[2] Applicant alleges that the respondents have been continuouslyimpeding access to his home on the farm. He submitted that the respondents had dug two trenches

around his home depriving him of access.After the applicant's legal representative intervened one of the trenches filled. The applicant also alleged that a fence was placed around his house and locked without a key being handed to him.

[3] The matter was brought on an urgent basis before this Courton the 15th of September 2011.The applicant alleged that on the same day his wife, two minor children and himself were locked out and unable to gain access to their home. An interim order was granted by this Court interdicting the first and second respondents from threatening, harassing and intimidating the applicant and his family and directing the respondents to allow access to Applicants home. The Court also ordered that the right to use the driveway via the main road be reinstated and ordered the respondents to close the trench they dug in front of the applicant's house.

[4] Prior to the date of hearing applicants applied for an amendment of the original order which was not opposed. The following amendments were sought.

> "[4.1] that the order prayed include that the applicants labour tenancy status be confirmed by this honourable court.
>
> [4.2] that the order of the Honourable Judge Sardiwalla of 16th day of September 2011 be varied by inclusion of the following words in paragraph 3 thereof
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> **'through the access route to St Ives farm'** and '**R10'** so as to read
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> [4.3] that the applicants use of the driveway coming from and to the main road R103 through the access route to St Ives farm up to his home on the farm with his own transport be and is hereby reinstated forthwith, and the first respondent and second respondent are ordered not to terminate, in any manner whatsoever or through any persons whomsoever, the access rights so re instated, such orders to operate as an interim order pending the return date to be advised by the courts.
>
> [4.4] further and/or alternative relief."

[5] The first and second respondents also applied to strike out various parts of the applicant's replying affidavit and the applicant opposed this application.

[6] During a pre-trial conference an inspection *in loco* was conducted. The following was apparent from the inspection:

[6.1] that there was a route referred to as the “Sappi” entrance which was locked and access could be gained via a roundabout route through the property.

[6.2] the main entrance to the property that houses the St Ives facility provides a direct access from R103 into the property,however the applicant would travel on a route that is partially tarred and a section that is a make-do gravel track access to the Kraal.

[6.3] whilst there is a trench diagonally in front of the applicant’s homestead, it was evident that the trench had been constructed for dumping purposes some time ago and this was confirmed by the applicant’s wife. The trench did not impede access to the homestead.

[7] The applicant’s rights to access are based on him being a member of the family of labour tenants.Both his parents and grandparents had worked on the farm and he was born on the farm. The applicant alleges that he has lived on the farm his entire life and he and his family have always enjoyed the right to easy and convenient access to his home. These rights were acknowledged by all previous farm owners. He alleges that the respondent however began to deny him access to his home by fencing the property and locking the entrance gate. He was not provided with a key to the gate; digging a deep trench in front of his home and locking them out of the farm late at night.

[8] The respondent’s answered these allegations and set outa series of events and allege that they cannot comply with the order:

[8.1] the respondents raised a*point in limine*with regard to service. The respondent argues that the applicant served the urgent application

papers on the respondents' attorney and not the respondent. This, it is argued, is irregular as the respondent had not consented to service in this manner.

[8.2] that a trench was never dug and thus respondent cannot fill one.

[8.3] that the order is void for vagueness.

[9] The respondent's version is that 5 years ago the property was developed into St Ives restaurant. This new development necessitated an application to the roads authorities for a new access route. Such authority was granted on the basis that the old access route was closed off. This has been the status quo and the applicant was aware of it. The respondent alleges however, that after the applicant purchased a vehicle he was using the Sappi route for which he was given an access key. The respondent alleges that access has never been impaired or impeded. The old route which the applicant is claiming access through has been sealed off for years and the Sappi route is available. The route through the main entrance namely the R103 passes through the game reserve and all gates are locked to ensure that game does not escape. The respondent alleges that if the applicant was inconvenienced by the locking of the gate to the game area he could have approached the respondent for a key to the gate. He had not done so because he had unimpeded access via the Sappi road.

[10] The respondent alleges that the applicant has failed to meet the requirements for urgency in terms of Rule 34 as he has not set out the circumstances which he avers renders the matter urgent and he has simply makes general sweeping statements without furnishing any particulars. In addition the respondent's submit, in a supporting affidavit by their counsel that the entire application is a gross abuse of the process.

[11] In the replying affidavit the applicant continued with the claim that trenches were dug. He also avers that he was unaware that the old route had been sealed off

for the reasons that the respondents have advanced and that he ought to have been informed of the reasons for changing the route. He alleged that the old route had not been sealed off 5 years ago and a supporting affidavit confirms this. He avers that the respondents fenced the property during September 2011 and not five years ago as alleged by the respondents.

[12] The applicant also gave examples of other occupants of the farm whose homes had been demolished at the instance of the respondents to substantiate his claim that the respondents were intimidating and harassing occupants. This elicited an application by the respondent to strike out the relevant paragraphs in that they were scandalous, vexatious or irrelevant in terms of Rule 33(10). The respondent also argued they amounted to similar facts evidence which is inadmissible.

[13] The import of applicant's submission in the founding papers regarding the trench was that it impeded access. The respondents denied having dug a trench and suggested that no such trench existed. Neither of these versions the applicant submits is supported by the inspection *in loco.* The applicant argued that the respondent by virtue of the contradictions and bare denials,provided no factual submissions supporting its versions and therefore there was no*bona fide* dispute of fact.

[14] The applicant relied on *Plascon-Evans Paints (TVL) Ltd v Van Riebiek Paints (Pty) Ltd*[1]. The applicant averred that he satisfied all the requirements to bedeclared a labour tenant. The respondents' heads of arguments dealt with the issues individually by addressing the access and intimidation issues. The respondent averred that the applicant had unimpeded access to his home and that his allegations were blatantly false.

[15] The respondent argued that they could not answer to the allegation that there was intimidation as it was vague and embarrassing and made by way of general and

[1] [1984] 2 All SA 366 (A)

sweeping statements. No reference was made as to how, when and by whom the applicant was intimidated, no trenches were dug to impede access and argued that there was therefore a genuine dispute of fact.

[16] Counsel for the applicant made the following submissions at the hearing:

[16.1] There was nothing scandalous and vexatious within the meaning of Rule 23(2) of the Uniform Rules of Court.

[16.2] On the issue of improper service on the respondents, the respondents ought to have adhered to Rule 30 of the uniform rules which it had failed to do

[16.3] Thereare contradictions in the respondent's argument in that respondents allege they were required to close the alternate route but in correspondence from their attorneys to the applicant, respondent accuses the applicant of engaging in illegal activity and for this reason the respondent was forced to close off the route.

[17] The applicant argued that:

[17.1] This is a socio-economic case and the evidence of how the respondent deals with other occupants is relevant and admissible by virtue of it being similar facts evidence.

[17.2] The respondents failed to inform the applicant of the closure of the road and the reasons for that action.

[17.3] The respondents initially denied that there were trenches but this was contradicted by the respondent when it conceded that there was a trench that was being used as a rubbish dump.

[18] The respondent argued that:

[18.1] The applicant's case was that trenches were dug to impede access to his home. The inspection *in loco*revealed that this was not the case.

[18.2] The contention that applicant was locked out on the 15th of September 2011 is vague and embarrassing.If the order is amended then there is no basis for his claim; as the applicant did not ever have access through the (R103) and his allegation cannot stand.

[18.3] The respondents have done nothing since the interim order was granted and the applicant continues to have access to his home.

[18.4] The applicant failed to satisfy the requirements for Rule 34 with regard to intimidation and only made conclusions without any facts being presented.

[18.5] The applicant launched an urgent application on allegations that were blatantly false and in bad faith. And a punitive order would be appropriate.

[18.6] The applicant has not alleged any facts to prove that he is a labour tenant.

[18.7] The statement by the applicant regarding the respondent's conduct with other occupants is inadmissible as it constitutes similar facts evidence. The allegations are irrelevant, scandalous and vexatious and stand to be struck out.

[19] In response to a question by the Court applicant's attorney indicated that the applicant was seeking access through the old route.

[20] The applicant's presentation of its case was not structured however, the issues to be decided by the court may be summarised as follows:

Procedural issues

[20.1] did the applicant satisfy the service requirements?

[20.2] did the applicant satisfy Rule 34 with regard to the allegation of harassment and intimidation?

[20.3] does the application amount to an abuse of process?

[20.4] the application to strike out and resultant costs

[20.5] the amendment application

Factual Issues:

[20.6] was a trench dug to impede access?

[20.7] did the applicant have access to the farm through any of the various routes?

[21] Rule 24 of the Land Claims Court Rules provides that service must be served in accordance with the provisions of Rule 4 (1) of the Uniform Rules of Court unless otherwise stated. Rule 4 (1) (aA) of the Uniform Rules of Court provides that:

> "Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings."

In accordance with these rules service may be on the attorney of record if a litigant is represented. The respondent alleged that the applicant was never informed that the respondent's attorney, on whom the applicationwas served, was in fact the attorney of record. This is an allegation that is not denied. The respondent's attorney was however informed of the proceedings telephonically at inception of the proceedings when he spoke to the Judge's registrar and the Court requesting time to consult with his client and confirmed that he was the attorney of record. I am inclined to agree with the applicant's heads of argument that Rule 30 (2) (a) of the Uniform Rules of Court applies. This Rule provides:

> "(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;"

[22] The appropriate procedure for the respondents would have been to apply for a setting aside of the application on the grounds that there was not service in accordance with the rules. However, the respondent chose not to deal with this issue precluding the respondent from relying on the irregularity in terms of Rule 30 (2).

[23] The respondents allege that the applicant did not satisfy the urgency requirements in his averments that he had been harassed and intimidated. Rule 34(2) provides that the applicant must set out in his or her founding affidavit the circumstances which he or she avers render the matter urgent and the reasons why he or she cannot obtain substantial redress at a hearing in due course. The respondents state that the applicant by making broad, sweeping statements failed to do this and his statements were simply vague and embarrassing

[24] Rule 6 (12) (b) of the Uniform Rules of Courts is substantially similar to Rule 34 and it states:

> "In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstance which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course".

[25] The requirements for urgency were discussed in *Cape Town Tygerberg Football Association & Others v SA Football Association Western Province & Another*[2], in this matter it was held that there are two requirements that must be satisfied for a matter to be deemed urgent, these are:

(i) The applicant must explicitly set out the circumstances which render the matter urgent

[2] [2006] JOL 18182 (C)

(ii) The reasons why he cannot be afforded substantial redress at a hearing in due course

[26] In *Luna MeubelVervaardigers*(*Edms*) *Bpk v Makin and another* (*t/a Makin*'*s Furniture Manufacturers*)[3] the Court held that to meet the above requirements:

> "Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down".

[27] While the Uniform Rules of Court mention that the circumstances must be set out“explicitly”, the Rules of thisCourt do not use the same word however the circumstances must be”averred”. I am of the opinion that the applicant’s duty to aver the circumstances in his affidavit do not differ because of the omission of the word explicitly. It is not sufficient for the applicant to state the matter is urgent, they must state the reasons for the urgency.

[28] *In casu*the respondent submits that the applicant has not satisfied the first requirement in that there is no evidence of harassment or intimidation. In the founding affidavit the applicant set out a series of events which constituted harassment by the Respondent. Whilst the applicant merely stated that there was harassment and intimidation, these statements must be read in the context of the fact that a fence was constructed around the property and on applicant’s version respondent failed to provide him with a key resulting in the applicant and his family being locked out and prevented from access to their home. This in itself would amount to harassment and intimidation resulting in the urgency of the matter.

[29] One of the respondents’ supporting affidavits alleges that the entire application amounts to a gross abuse of the court’s process. This allegation is made with reference to the submission that the applicant had unimpeded access and the

[3] 1977 (4) SA 135 (W)

application was simply being brought to gain access to a more convenient route which had been sealed off for years.

[30] The concept of abuse of process is discussed in *Beinash v Wixley*[4], where Mahomed CJ stated there could not be an all-encompassing definition of "abuse of process" but that it could be said in general terms "that an abuse of process takes place where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for purposes extraneous to that objective." The Court held:

> "There can be no doubt that every court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside.
>
> What does constitute an abuse of the process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective."[5] [my emphasis]

[31] In *Bisset& Others v Boland Bank Ltd & Others*[6] the Court found that the Court has the inherent discretion to strike out or stay existing proceedings that are vexatious. The Court held as follows:

> "The court has an inherent power to strike out claims which are vexatious. Vexatious in this context means 'frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant'[7].

[4] 1997 (3) SA 721 (SCA)
[5] 1997 (3) SA 721 (SCA) at 734 D
[6] 1991 (4) SA 603 D
[7] 1991 (4) SA 603 D at 608 E-H

[32] However, the dicta in *Western Assurance Fisheries Co V Colderwall's Trustee*[8]*s* must be noted as it cautions against courts freely using the power to strike out. The dictum provides that the power to strike out is one which must be exercised with great caution, and only in a clear case;the reason being that courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon anyone who desires to prosecute an action.

[33] *In casu*the respondents merely mention that the application amounts to an abuse of process; the affidavit does not expound on how the abuse is being perpetrated, is the application frivolous or vexatious and if so what circumstances render it so.

[34] Having regard to the dictum of *Western Assurance Fisheries* and that of Mahomed CJ in the Supreme Court of Appeal that there cannot be an all-encompassing definition of the concept of abuse of process, it should be concluded that the respondent has not made out a clear case that this application is one that amounts to abuse of process.

<u>The applicationto strike out</u>

[35] The respondents in terms of Rule 33 (10) applied for paragraph 5.1 of the applicants replying affidavit to be struck out on the basis that it is scandalous, vexatious or irrelevant. The first respondent submits that the allegations that he destroyed two homes that belong to persons that are not a party to this litigation,is irrelevant. Further it is submitted thatthis amounts to similar fact evidence andispurely raised to attack his character,is scandalous and vexatious and is entirely inadmissible.

[8] 1918 AD 262 at 271

[36] The applicant's attorney argued that the allegations were not scandalous or vexatious within the meaning of these terms in Rule 23(2) of the Uniform Rules of Court. She relied on the dictum of *Gidenhuys J in BaphalaneRamakoa Community v the Minister of Agriculture and Land Affairs & Others*[9], where Rule 28 (2) of the Land Claims Court Rules states that where a rule is silent on any matter the Uniform Rules of Court shall apply. It is unclear why counsel decided to rely on Rule 23(2) as the Land Claims Court Rules are not silent on this matter; Rule 33 (10) is evidence of that.Gildenhuys J relied on Rule 23 (2) because the rules were silent on the striking out of matters in pleadings, however, in casu Rule 33 (10) provides for the striking out of the statements in an affidavit and the equivalent of this is Rule 6 (15) of the Uniform Rules of Courts and not Rule 23 (2) as relied on by applicant.

[37] Rule 6 (15) of the Uniform Rules is the same as Rule 33 (10) and it was dealt with in *Vaatz v The Law Society of Namibia*[10], where the Court held as follows:

> "The grounds for striking out as set out in the said Rule are, on a proper construction, in the alternative viz., scandalous, or, vexatious, or, irrelevant. Needless to say allegations may be irrelevant but not scandalous or vexatious. Even if the matter complained of is scandalous, or, vexatious, or, irrelevant, this Court may not strike out such matter unless Respondent would be prejudiced in its case if such matter were allowed to remain.
>
> All those words, "scandalous", "vexatious", "irrelevant" and "prejudice" are words used almost every day in courts of law. The context in which they are used can lead to variations of meaning but basically they have the meanings allotted to them by the Shorter Oxford English Dictionary.
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> In Rule 6(15) the meaning of these terms can be briefly stated as follows:
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> > Scandalous matter- allegations which may or may not be relevant but which are so worded to be abusive or defamatory
> >
> > Vexatious matter- allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

[9] (LCC 09/2007) [2010] ZALCC 29 (24 November)
[10] 1991 (3) SA 563 (NM)

> Irrelevant matter- allegations which do not apply to the matter in hand and do not contribute one way or another to a decision of such a matter"

These case aboveenunciatestwo requirements that must be met to render the allegation scandalous, vexatious or irrelevant and the first is that thealleged statement must meet the definition of one the above and secondly the court must be satisfied that the applicant will be prejudiced if the application is not granted.

[38] This principle is enunciated in *Webber vVermaak*[11] by the full bench, when it was stated that:

> "The Court shall not grant the application unless it is satisfied that the Applicant will be prejudiced in his case if it be not granted"

The respondents are seeking an order striking out the statements with regard to Mr.Ngobese and Mrs. Ndlovu on paragraph 5.1 of the replying affidavit. The replying affidavit provides as follows:

> "The respondents have dug such a trench close to another occupants home on the farm namely Mr Jeremiah BhezikithaNgobese home (sic), demolished the home and possessions which they buried in the trench without prior knowledge or consent of Mr Ngobese's (sic). The respondents have also demolished the home of another occupier of the farm namely Mrs Thabile Octavia Ndlovu [widow of Mr Ndlovu late occupier of the farm]. Both occupiers were also harassed, intimidated and unlawfully evicted by the respondents and will give evidence to the court when necessary"

Considering the case law above and the definitions, the allegations made stand to be deemed scandalous in that they are defamatory. The perception created is that the respondents serially dig trenches and destroy homes to harass and intimidate occupants. Such a perception will be of prejudice to the respondents in this case as it goes beyond the merits of this case and creates a perception in one's mind that the respondent is capable of such actions and is continually performing them. For these

[11] 1974 (3) SA 207 (O)

reasons paragraph 5.1 of the replying affidavit relating to the persons mentioned above should be struck out.

The amendment application

[39] The applicant applied for the amendment of the interim order granted on the 16th of September 2012. The first amendment being sought is that the applicant's labour tenancy be confirmed and the second that prayer 3 of the interim order be amended to include "through the access route to St Ives farm" and "R 103". The affidavit in support of this application made the case that the applicant only became aware of the respondents version that the old route was sealed off due to a requirement by the Department of Roads when it was raised in the pleadings. The applicant argues that since he only became aware of this when the respondents filed their answering affidavits, he could not apply for the prayer earlier.

[40] The difficulty with the amendment application is that the first relates to the amendment of prayer 3. For ease of reference I will refer to three routes to the applicant's home as firstly the Sappi route (around another property'), secondly the old route (which was sealed off) and the new route (which is constantly locked to protect game). In applicant's attorneys submissions from the bar she conceded that the applicant was trying to reinstate his access to the farm through the old route. This is contradictory to the amendment sought which clearly states that in light of the new information the applicant is seeking access to his home through the second route referred to above i.e. access from the main road. Applicant's written submissions and oral submissions are contradictory.

[41] The Court cannot grant the amendment when it is unclear what applicant is seeking, in any case prayer 3 as drafted may be interpreted to mean the new route.By the closure of the old route the applicant may only gain access to his home via the Sappi route or the R103.

[42] The second issue is that applicant seeks to have his labour tenancy confirmed. The founding states that applicant was born on the farms, his parents and grandparents were already residing on the farm pursuant to labour tenancy agreements. He started providing labour in exchange for the rights to reside and use the land; his children from a previous marriage also did the same. When farm owners changed they were no longer called on to provide labour, however they continued to enjoy their rights of use and residence. A labour tenant is defined in the Land Reform (Labour Tenants) Act 3 of 1996 in section 1 as:

> "labour tenant" means a person –
>
> (a) who is residing or has the right to reside on a farm;
>
> (b) who has or had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
>
> (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,
>
> including a person who has been appointed a successor to a labour tenant in accordance with the provisions of sections 3(4) and (5), but excluding a farm worker."

[43] This Court in *Mahlangu v De Jager*[12] held in regard to satisfying the Court that he/she is a labour tenant an applicant must:

> "To achieve that, the applicant must set out facts to establish every requirement of the definition, including the negative requirement that he must not be a farm worker"

[44] While it is not disputed that the applicant resides on the farm, the applicant is required to set out facts establishing every requirement of the definition including the negative one. The applicant alleges that his parents, grandparents and himself provided labour in exchange for rights to reside on and use the farm. However, it seems that the statement is paying lip service to part (b) of the definition; if it is

[12] [1996] 2 All SA 522 (LCC)

assumed that he satisfies this requirement, the applicant none the less has failed to deal with his rights after termination of his employment.

[45] The purpose of the application is to secure unimpeded access to his household whilst his attempt to confirm his labour tenancy attempts to combine proceedings for a declarator. In any event the affidavit of the applicant does not deal in detail with the requirements of labour tenancy to justify such an order. Interdicts are not designed for that purpose thus the amendment cannot be allowed.

Main Issues:

I. Was a trench dug to impede access?

[46] At the inspection *in loco*it was determined that while there was a ditch or trench near the applicant's property, it was not dug recently and it did not impede his access to his home. The applicant's counsel tried to argue that the terms "ditch", "pit" or "trench" were just semantics and it was agreed that there was a big hole. However, what she could not explain is why the applicant alleged that it impeded his access when it clearly did not. Based on the inspection *in loco* the respondents' version must be accepted as it is more probable, that no trench was dug to impede access and the trench that exists has been there and is used as a rubbish pit.

[47] Whilst the object of Land Reform legislation was introduced to address rights of owners and occupiers Section 10 of the Constitution dealing with human dignity must not be ignored. The digging of a trench closely in front of the family homestead, where children play around and with inadequate lighting at night,the respondent's actions, to say the least, were extremely undesirable.The respondent ought to have known that the trench would be unsafe and will be filled with squalor which would result in obnoxious smells, rodents and disease and injury. This action smacks of indignity towards the applicant. The applicants' rights to an environment that is not harmful to his health or wellbeing, in terms of Section 24 of the Constitution are being flouted. The respondent is urged to take immediate remedial steps.

II. Did the applicant have access to the farm through any of the various routes?

[48] The core issue before this Court is the depravation of access. The urgent application was launched on the 16th of September, after the applicant and his family were locked out of their home on the 15th of September. The respondents' submit in both oral and written argument that this allegation is vague and embarrassing as there is no substantiation as to how he was locked out and from where. The respondents aver that they cannot answer to this accusation as it is vague and in any case since the interim order was granted they have done nothing and the applicant has had access.

[49] The applicant alleges he was unable to access his home.What has been established is that there are three routes to the farm and the applicant's home. It is common cause that the new route was constantly locked for the protection of game and the applicant had no key and has never had access through this route. The old route was sealed off on a date of which is contested and the applicant no longer has access through it. The Sappi route is fenced and can be locked and indeed the inspection *in loco*revealed that it was locked; and the route traverses and adjoining property. The respondents allege that the applicant has unimpeded access.

[50] The farm manager, David Gerald Hoy alleges in paragraph 15 of his affidavit that the applicant gains access through the Sappi route using a key he was given. However, annexure "ARM1" of the respondent's supporting affidavit is a letter addressed to the applicant's attorneys at the time, and specifically at paragraph 3.3 states that the applicant was using the Sappi route unlawfully and it was then sealed off and the respondents allegedly assisted with an alternate route. There is a contradiction in the respondent's versionas the respondents allege that applicant has unimpeded access through the Sappi route. However, subsequently the respondents allege that the Sappi route was sealed off due to applicant's unlawful use of it. Given

the fact that there are only 3 routes and it is common cause the other two are inaccessible to applicant it is difficult to see on the respondent's version how the applicant had unimpeded access.

[51] The applicant's case is reliant on *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd*[13]; the reliance on this case is that the applicant contends that there is no *bona fide* dispute of facts between the applicant and respondent and that a base denial does not amount to a *bona fide* dispute of facts. This is looked at in context of *Stellenbosch Farmers' Winery Ltd* v *Stellenvale Winery* (*Pty*) *Ltd*[14] where the court held:

> ". . . . where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order . . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted".

It follows that if a dispute of fact exists then this Court would be unable to grant a final interdict in favour of the applicant.*Plascon-Evans* sought to qualify the above general rule and held that:

> "It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. 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 respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact"

[13] [1984] 2 All SA 366 (A)
[14] 1957 (4) SA 234 (C) at p 235 E-G

[52] The applicant submits on the Plascon-Evans formulation that the Court has the power to grant such final relief because the respondent failed to advance a *bona fide* dispute of facts. On the question of access the Court has to decide on whether there is a genuine *bona fide* dispute of facts?

In *Peterson v Cuthbert & Co. Ltd*[15] it was held that:

> 'In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence; if this is not done, the lessee, against whom the ejectment is sought, might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the lessor.'[16]

[53] Applying the dictum above to the present case, the Court must analyse the circumstances around the applicant's version alleging that he was denied access and the respondent's version that he has unimpeded access. The determination must be made on the veracity of the evidence if possible without the need for oral evidence.On the papers the respondents' version is contradictory, in that the respondent's claim the applicant had unimpeded access; they subsequently aver that such access is unavailable. The applicant avers that he has no access.The first respondent has admitted that access is sealed off on two routes and for the third there is a key; however contradicts himself by providing correspondence that states applicant's use of the third route was unlawful. It is submitted no genuine dispute of fact has been alleged, the contradiction of the respondents papers is indicative that the applicant's version is more probable. Thus relying on *Plascon-Evans,* the applicant is entitled to a final interdict with regard to the issue of access from the main road.

[54] In so far as the application for an amendment of the order is concerned I have dealt extensively with the matter and take the view that the order given on the 16th of September 2011should stand.

[15] 1945 AD 420
[16] 1945 AD 420 at 428

[55] A final interdict is a court order based upon the final determination of the rights of the parties to the litigation. In order for this Court to grant the applicant a final interdict to the applicant it should be satisfied that the applicant's right of access were impeded by the respondents. While certain aspects in the applicant's case have been proven to be unsustainable this does not detract from the fact that he made a case that his right of access to his home from the main road was impeded. The respondents failed to refute this and due to their contradictory statements, their version cannot be relied on. Thus the applicant should be granted a final interdict providing that he be allowed unimpeded access to his home from the main road.

Costs

[56] I find it necessary to specifically discuss the issue of costs in light of the respondents' prayer. The respondents are seeking a costs order in terms of Rule 33 (10) *de bonispropriis*. The respondents allege that the applicant's counsel should have advised his client that his statements in paragraph 5.1 of the founding affidavit were scandalous and sought to harm the first respondent's reputation. In*SA Liquor Trader's Association & others v Chairperson, Gauteng Liquor Board & others*[17]O'Reagan J held that:

> "An order of costs de bonispropriisis made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy."[18]

[57] In *Baphalane Ba Ramokoka Community v The Minister of Agriculture & Land Affairs*[19], Gildenhuys J held:

> "I conclude that, as a mark of the court's utmost displeasure, a de bonispropriiscosts order needs to be made against the plaintiff's counsel and attorney. The plaintiff itself adopted the offensive assertions. There will accordingly be an order against the counsel Mr Makhumbeni, the attorney Mr Matloga and the plaintiff to jointly and

[17] 2009 (1) SA 565 (CC)
[18] 2009 (1) SA 565 (CC) at 528F
[19] [2011] JOL 27937 (LCC)

> severally pay the second to seventy-fourth defendants' cost in the application to strike out. Because of the seriousness of the accusations, the costs will be awarded on an attorney and client scale, and will include the costs of two counsel. I intend, by this order, to send out a strong message that the court will not allow its process to be abused by legal practitioners hurling gratuitous insults at their colleagues."[20]

[58] Such an order is usually punitive to counsel who is deemed to have been negligent to a serious degree, in *Baphalane Ba Ramokoka Community* the order was granted against the plaintiff's legal representatives for statements that accused senior counsel of the opposition of breaching ethical duties, misleading the courts as well as trampling on the Constitutional duties of the plaintiff[21].

[59] This gives an indication of what is deemed to be serious enough to warrant such an order, *in casu,* applicant's remarks may be found to be scandalous but that may not justify the cost order sought. In mitigation the applicant was seemingly trying to explain his predicament and may have done so inappropriately, counsel should have advised him differently but her failure to do so cannot be deemed to be grave enough to warrant such an order.

[60] I must mention that although I have found in favour of the applicant with regard to the access issue a cost order will not follow the event. The applicant's counsel continuously insisted that a trench had been dug to impede access, despite the fact that the inspection *in loco*revealed that this was not so. Additionally counsel's oral submissions were contrary to the submissions in the founding affidavit for amendment application, causing uncertainty in the Court's mind as to what was being sought. Given the general conduct of applicant's counsel in presenting her case I cannot award the applicant costs.

[20] [2011] JOL 27937 (LCC) at para 41
[21] [2011] JOL 27937 (LCC) at para 30

[61] The respondents have clearly made out a case for the application to strike out, and for the resultant cost order and in this regard I agree with the respondents in their submissions.

ORDER

The following Order is made:

1. The first and second respondents and any persons through them are hereby interdicted from impeding the applicant and his family access to the applicant's home on the farm WELTEVREDEN NO 1017, registration division FT, Province of Kwa Zulu Natal, commonly known as St Ives Farm held by the second respondent in a trust.

2. Use of the driveway from the main road described as the R103 to the applicant's home on the farm by pedestrian and vehicular traffic be and is hereby reinstated.

3. First and second respondents are directed to fill/cause to be filled the trench opposite the applicant's household within sixty (60) days.

4. The respondents' application to strike out is granted with costs

5. Each party to pay its own costs for the main application

SARDIWALLA AJ

FOR APPLICANT

Attorney Shamila Singh assisted by *Attorney ShaheenSeedat*from *Sha Singh & Associates*, Durban

FOR RESPONDENTS

Advocate De Wet SC instructed by *McCarthy & Associates Attorneys,* Mount West