



Reportable:	Yes/No
Circulate to Judges:	Yes/No
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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO.: 2585/2019
Date heard: 11-06-2021
Date delivered: 23-07-2021

In the matter between:

Pniel Communal Property Association
and

Applicant

The Pniel Youth Agricultural Co-operative
Isaac Gillian April
The MEC: Department of Agriculture,
Land Reform & Rural Development:
Northern Cape Province

1st Respondent
2nd Respondent
3rd Respondent

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. As far back as 28 November 2019 the applicant, the Pniel Communal Property Association (the CPA) brought an urgent application in which a *rule nisi* to serve as interim relief pending the finalization of the application, was issued in the following terms:

- “2.1 That the 1st RESPONDENT and the members of the 1st RESPONDENT are interdicted from utilizing for whatever purpose, the 2 (two) pivots belonging to the APPLICANT which pivots are currently set up at the irrigation areas marked “B” and “C” on the aerial photograph attached hereto as **Annexure “X”**”*
- 2.2 That the 1st RESPONDENT and the members of the 1st RESPONDENT are interdicted from causing in any way, any other person from utilizing, for whatever purpose, the 2 (two) pivots belonging the APPLICANT, without the prior obtained written authorization of the APPLICANT;*
- 2.3 That the 1st RESPONDENT and its members are interdicted from working any land on the property known as Pniel Farm 281, district of Barkly-West, Northern Cape Province other than the irrigation area currently underneath the 1 (one) pivot belonging to the 1st RESPONDENT and marked as “A” on the attached **Annexure “X”** without the prior obtained written authorization of the APPLICANT;*
- 2.4 That the 1st RESPONDENT and its members are interdicted from causing, in any way, any other person to work the afore-said land without the prior obtained written authorization of the APPLICANT;”*
2. The 1st and 2nd respondents are respectively the Pniel Youth Agricultural Co-operative and its chairperson Mr Isaac Gillian April. The 3rd respondent is the MEC: Department of Agriculture, Land Reform and Rural Development: Northern

Cape Province. The 3rd respondent is cited only in so far as she may have an interest in the matter.

3. The return day of the *rule nisi* was extended on numerous occasions, *inter alia* as a result of the Covid 19 lockdown and an attempt at negotiating a settlement between the parties. The settlement negotiations having been unsuccessful, the application was argued before me on 11 June 2021 after which I extended the *rule nisi* in order to prepare a judgment in this matter.
4. The common cause background to this application can be summarized as follows:
 - 4.1 The property described in paragraph 2.3 of the order above was awarded to the CPA and its members by the Public Shared Services Commission: Northern Cape, after a successful land claim during 2006. The property is however still registered in the name of the 3rd respondent, with the CPA being the *bona fide* possessor and/or occupier of the property.
 - 4.2 During 2015 the 1st respondent approached the CPA with a request to install a pivot it had received as a donation from the 3rd respondent on the property in order to grow maize and wheat for its own account. The CPA acceded to this request.

- 4.3 During 2017 the CPA bought its own two pivots which it also installed on the property.
- 4.4 On 9 November 2019 the chairperson of the CPA and deponent to its affidavit, Mr Cornelius Franklin Solomons drove past the property and noticed that the irrigation areas underneath the two pivots belonging to the CPA were being burnt by certain members of the 1st respondent, ostensibly for purposes of preparing for the establishment of new crops on those particular areas.
- 4.5 This application was brought in order to prevent the 1st respondent and its members from establishing new crops under the pivots belonging to the CPA or to work any other area of the property, except for the irrigation area underneath the 1st respondent's own pivot, without prior permission being obtained from the CPA.
5. The 1st and 2nd respondents oppose the application on the basis that:
 - 5.1 The 1st respondent and its members are members of the CPA and are entitled to utilize the property (the CPA denies this allegation);
 - 5.2 The CPA does not conduct agricultural activities on the property, but rather mining and gaming operations;

- 5.3 The CPA bought two pivots during 2017 at the request of the 1st respondent and that in terms of an agreement between the parties and as compensation for the purchase price of the pivots, the CPA would be entitled to 20% of the 1st respondent's farming activities. In this regard the 1st respondent has paid over to the CPA 20% of its proceeds on two occasions;
- 5.4 The 1st respondent has since 2017 been using the land under the two pivots for agricultural purposes, which included the burning of the land to establish new crops and that the deponent to the CPA's founding affidavit, Mr Solomons, was aware of this process and knew that it would happen; and
- 5.5 That Mr Solomons is not authorized to bring the application on behalf of the CPA and that the resolution attached is not a resolution from the CPA's executive committee which has been disbanded since 2016/2017.
6. The disputes mentioned above, argues Ms Tyuthuza, who appears for the 1st and 2nd respondent, are material disputes of fact which can not be determined on the papers. She contends therefore that the application be dismissed with costs, alternatively that the issues be referred for oral evidence.
7. It is trite that the general rule is that where there is a dispute of fact, 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 (see *Plascon – Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634).

8. In determining whether the disputes raised by the respondents are real, genuine or *bona fide* disputes which cannot be determined on the papers, I now turn to analysing the disputes so raised.

9. The respondents allege that they are members of the CPA because they are beneficiaries in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and claimants in terms of the Restitution of Land Rights Act 22 of 1994. The CPA denies that they are members. The respondents do not explain how, by virtue of their being ESTA beneficiaries, which provides for protection of tenure for certain occupiers of land, they would also be members of the CPA, which quite distinct from ESTA beneficiaries and in terms of the Communal Property Associations Act 28 of 1996 comprises of a community entitled to *inter alia* restitution of land rights, as has been awarded the CPA, or entitled to receiving property or other assistance from the State, or approved by the Minister to acquire land or rights as set out in s2 of the CPA Act.

10. The respondents' allegation that they are claimants in terms of Act 22 of 1994 takes the matter no further. In terms of this Act a

"claimant" is defined in s1 thereof as any person who has lodged a claim. *"Claim"* means (a) any claim for restitution of a right in land lodged with the Commission in terms of the Act; or (b) any application lodged with the Registrar of the Court in terms of Chapter III A for the purposes of claiming restitution of a right in land. The respondents do not even state that they are or were claimants as a part of the community represented by the CPA.

11. Significantly the CPA and its members have been successful with their land claim during 2006 already. I need not detain myself any further with the allegations relating to the respondents' membership of the CPA however, since on their own version they had to obtain permission from the CPA to install their pivot on the property and to work the irrigated land thereunder against payment to the CPA, which is contrary to their allegation that as members of the CPA they are entitled to utilize the property.
12. I now turn to the respondents' allegations that the CPA does not conduct agricultural activities on the property. I fail to see how this allegation can give rise to a dispute of fact as to who has the right to work the land under the two pivots bought by the CPA. In any event the CPA averred that it intended to establish crops under its two pivots and to that end had started the process of selling off some of its game in order to finance the project. This averment has not been refuted by the respondent.
13. The disputes of fact referred to in paragraphs 5.3 and 5.4 herein can be dealt with simultaneously. It is trite that a party who

alleges an agreement has to prove the terms of the agreement. The respondents have failed to do so except in the cryptic way as described in paragraph 5.3 hereof. The CPA on the other hand has attached to its replying affidavit the minutes of a meeting held on 10 January 2018 between the CPA and the 1st respondent in which the agreement relating to the pivots was reached. The relevant portion of the minutes reads as follows:

"1. Pivots

The Pniel Agri-Cultural Youth Co-opt has one pivot bought by the Dept: Agriculture, Land Reform and Rural Development-NC.

Steff Pniel bought 2 pivots for the Pniel C.P.A

The P.A.Y Co-opt was given permission to operate their one pivot, on the Pniel Estate.

2. MARNUS DE BEER

It was further resolved that Mr. Marnus De Beer neighboring farmer will assist the Pniel C.P.A and the P.A.Y Co-opt in their crop farming project.

3. SALARIES

It was further resolved that the P.A.Y. Co-op must pay 20% of their netto income from the crops to the Pniel C.P.A.

It was also resolved that the Pniel C.P.A pays the P.A.Y. Co-op, their salaries for maintenance and work to be done on the pivots of the Pniel C.P.A. The Pniel C.P.A. would pay R55000.00 pm to the P.A.Y. Co-op for the salaries, as follows. .

. . "

14. What is clear from the extract of the minutes of the meeting quoted above is that; (i) the 1st respondent was given permission to operate its one pivot on the property; (ii) the 1st respondent must pay 20% of its income from the crops to the CPA; and (iii) the CPA would pay certain members of the 1st respondent salaries for maintenance and work to be done on the pivots of the CPA. Nowhere in these minutes does it state that the 1st respondent is given permission to plant its crops under the pivots of the CPA, or that 20% of the proceeds of the 1st respondent's crops planted under the pivots of the CPA would go to the CPA as payment for the two pivots bought by the CPA.
15. The minutes of the meeting of 10 January 2018 featured prominently in a prior application brought by the CPA against *inter alia* the 1st and 2nd respondents and which served before Sieberhagen AJ on 16 August 2019 under case no 510/19 and as such the respondent would have been aware of the contents of the minutes. To make allegations regarding an agreement which is not supported by the evidence is in my view inexcusable.
16. I now turn to the issue of Mr Solomon's authority to bring the application on behalf of the CPA. The respondents have alleged that the CPA's executive committee has been disbanded since about 2016 and that a new executive committee has not been elected by the members of the CPA. The CPA denies this allegation. The respondents proceed to allege that since the CPA does not have an executive committee, a resolution to

authorize Mr Solomons to bring the application could not have been passed by the executive committee. At this stage it is necessary to mention that the CPA's constitution, which is attached to the replying affidavit and of which a copy was in the possession of the respondents prior to the filing of their answering affidavit, does not mention that a resolution by the executive committee is required before legal proceedings may be instituted. Mr Solomons also does not state in the founding affidavit that he was so authorized by a resolution of the executive committee. The CPA refers in its founding affidavit to a resolution passed at a meeting of the CPA held on 11 November 2019 and attaches a letter written to the respondents to inform them of the resolution so taken to authorize Mr Solomons to proceed with any remedial action at his disposal to *inter alia* protect the property of the CPA. This letter is signed by Mr Solomons in his capacity as chairperson of the CPA and its executive committee and a Mr R A Krotz as secretary of the CPA and its executive committee. Mr Krotz has deposed to a confirmatory affidavit in this regard.

17. In any event, when it comes to issues of authority to institute and prosecute proceedings on behalf of a party, it is the attorney who must be authorized to institute such proceedings. Mr Solomons as a deponent to the CPA's affidavits does not need such authorisation. The respondents have not challenged the authority of the CPA's attorneys to institute the application in terms of Rule 7 and as such it must be accepted that the institution of the application was authorized. See in this regard

Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624F to 625 A.

18. In my view the disputes of fact raised by the respondents are not genuine and *bona fide* and can be rejected merely on the papers (See *Plascon-Evans* at 635C).
19. In my view the CPA as lawful possessor of the property has succeeded in showing its entitlement to the relief sought.
20. The only remaining issue to be determined is that of the costs of the application. Ms Tyuthuza for the respondents and Mr Olivier for the CPA have agreed that the costs of the postponements of the application should be costs in the application. Ms Tyuthuza has argued however that should the CPA be successful in the application that costs of the application be borne only by the 1st respondent and not the 2nd respondent, whose involvement in this matter is purely as chairperson of the 1st respondent. I do not agree with this contention. Mr Solomons has stated in the founding affidavit that he had identified the 2nd respondent as the person responsible for burning the land under the CPA's pivots. This allegation was not denied by the 2nd respondent. I see no reason why the 2nd respondent should be absolved from bearing the costs of this application.

In the circumstances the following order is made.

- a) The *rule nisi* issued on 28 November 2019 is confirmed and a final order is granted.
- b) The 1st and 2nd respondents are to pay the costs of the application jointly and severally, the one paying, the other to be absolved.



CC WILLIAMS
JUDGE

For Applicant: Adv. A D Olivier
Van de Wall Inc

For Respondent: Adv Tyuthuza
Matlejoane Attorneys