



**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Saakno: / Case number:	510/2019
Datum verhoor: / Date heard:	16/08/2019
Datum gelewer: / Date delivered:	30/08/2019

In the matter between:

PNIEL COMMUNAL PROPERTY ASSOCIATION	Applicant
and	
ISAAC GILLIAN APRIL	First Respondent
MESCHACK APRIL	Second Respondent
JAMES APRIL	Third Respondent
KAGISHO APRIL	Fourth Respondent
ISAAC SWARTZ	Fifth Respondent
LIZETTE ITUMELENG	Sixth Respondent
NORMAN ITUMELENG	Seventh Respondent
KENEILWA APRIL	Eighth Respondent
PASEKA WESI	Ninth Respondent
OU FIGHT APRIL	Tenth Respondent
TSHEPO WESI	Eleventh Respondent
ALL UNIDENTIFIED MEMBERS OF THE PNIEL AGRICULTURAL CO-OPERATIVE	Twelfth Respondent
THE PNIEL YOUTH AGRICULTURAL	

CO-OPERATIVE

Thirteenth Respondent

STEPHANIE ENGELA CORNS N.O.

Fourteenth Respondent

DEREK SOREN CORNS N.O.

Fifteenth Respondent

GUILLAUME JOHANNES OBERHOLSTER N.O.

Sixteenth Respondent

Coram: Sieberhagen, AJ

JUDGMENT

SIEBERHAGEN, AJ

Introduction

[1] The applicants lodged an urgent spoliation application seeking an order for the Respondents to return to the Applicant, its members, its employees and all persons so authorised by the Applicant, unhindered access to the Applicant's premises known as Pniel Farm 281, District of Barkly-West and an order that the Respondents be ordered to immediately return the Applicant's agricultural implements.

[2] The application served before Phatshoane, ADJP on 8 March 2019, when the First to Thirteenth Respondents appeared in person and the following order was made:

"2. That a rule nisi be issued calling on all RESPONDENTS to show cause, if any, on or before Friday 29 March 2019 at 9:30 as to why the following interim order should not be made a final order of Court:

2.1 That the 1st to 13th RESPONDENTS be ordered to return to the APPLICANT, its members, its employees and all persons so authorised by the APPLICANT, unhindered access to the APPLICANT'S premises known as Pniel Farms 281, District of

Barkly-West, Barkly-West, Northern Cape Province with immediate effect;

- 2.2. *That the 1st to 13th RESPONDENTS be ordered to specifically return to the APPLICANT, its members, its employees and all persons so authorised by the APPLICANT, unhindered access to the APPLICANT'S premises commonly known as Pniel Estates as well as the section commonly known as Steffs Pniel;*
- 2.3 *That the 1st to 13th RESPONDENTS be interdicted from refusing in any way whatsoever, access to the premises mentioned in paragraph 2.1 and 2.2 herein above to the APPLICANT, its members, its employees and all persons so authorised by the APPLICANT;*
- 2.4 *That the 1st to 13th RESPONDENTS be ordered to immediately return to APPLICANT the following agricultural implements that are the property of the APPLICANT, alternatively that the APPLICANT had unfettered use and enjoyment of:*
 - 2.4.1 *Two (2) Tractors;*
 - 2.4.2 *Two (2) Trailers;*
 - 2.4.3 *Two (2) Ploughs;*
 - 2.4.4 *One (1) Ripper;*
 - 2.4.5 *Two (2) Planters; and*
 - 2.4.6 *One (1) "Bossie Kapper";*
- 2.5 *That the 1st to 13th RESPONDENTS be interdicted from inciting and/or allowing any other person to act in a manner set out in paragraph 2.1 – 2.4 herein above; and*
- 2.6 *That the 1st to 13th RESPONDENTS be ordered to pay the costs of this application; and*
3. *That the relief set out per paragraphs 2.1 to 2.5 herein above shall serve as interim relief with immediate effect, pending the final determination of this application."*

[3] A rule *nisi* was granted, primarily to afford the First to Thirteenth Respondents the opportunity to oppose the application and the *rule nisi* was subsequently extended on two occasions to enable the parties to file opposing and replying affidavits.

Factual Background

- [4] The object of this application may be described as Pniel Farms 281, District of Barkly-West which consists of various sections. The two sections that are relevant for purposes of this application are those commonly known as Pniel Estates and Steffs Pniel.

- [5] According to the Applicants, the property was awarded to the Applicant by the Public Shared Services Commission: Northern Cape after a successful land claim and the process of registering the Property into the name of the Applicant is in its final stages.

- [6] As a result, the Applicant avers that it has been running a successful game farming operation on Steffs Pniel and a crop farming operation on Pniel Estates, which operations are to the benefit of the members of the Applicant.

- [7] It is common cause that during 2015/2016 and after receiving a pivot as a donation from the Department of Agriculture, Land Reform and Rural Development, the 13th Respondent approached the Applicant with a request to install the pivot on Pniel Estates in order to grow maize and wheat for its own account and that the Applicant had agreed to this request.

- [8] During 2017, and after the Applicant had installed two of its own pivots on Pniel Estates, the initial agreement between the Applicant and the 13th Respondent referred to in paragraph 7 *supra*, was amended on 10 January 2018 as reflected in the minutes of meeting. The relevant portions of the minutes read as follows:

"Minutes of meeting held with Pniel Agri-Cultural Youth Co-operative on 10 January 2018 in Kimberley at 4 Bizet Avenue, Pescodia at 10 am.

AGENDA

1. *Pivots*
2. *Marnus De Beer*
3. *Salaries and Payments*
4. *Maintenance of vehicles and software*
5. *Closure*

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 farming project.

3. *SALARIES*

It was further resolved that the P.A.Y. Co-opt 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-opt, 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 R55 000.00 pm to the P.A.Y. Co-op for the salaries, as follows:

<i>Mr. Gillian April</i>	<i>R5 100.00</i>
<i>Mr. Meshack April</i>	<i>R5 100.00</i>
<i>Mr. James April</i>	<i>R5 100.00</i>
<i>Mr. Rhydwyn Solomons</i>	<i>R5 100.00</i>
<i>Mr. Norman Itumeleng</i>	<i>R3 000.00</i>
<i>11 other workers</i>	<i>R2 000.00 each</i>

It was also agreed that the outstanding debt for diesel, meetings and workshops attended by the P.A.Y. Co-opt and paid by the Pniel CPA be refunded to the Pniel C.P.A. after each harvesting of the crops under their pivot. This does not include the 20% that must be paid to the Pniel C.P.A. from the netto income of the P.A.Y. Co-opt from the proceeds of their pivot.

It was further agreed that the Pniel C.P.A and Mr Marnus De Beer will buy a third pivot, 50% to be paid by Mr De Beer and 50% by the Pniel C.P.A

This pivot will be erected on the Cottonfields side of Pniel to employ Cottonfields residents. The netto income profit sharings from the pivots will be as follow: 50% Pniel C.P.A, 40% De Beer and 10% Cottonfields.

4. MAINTENANCE OF EQUIPMENT

The maintenance of vehicles and farming equipment of the Pniel C.P.A will be paid by the Pniel C.P.A.

Employees must handle equipment, vehicle with care and must not mis-use the farming equipment and vehicles....."

Issues

[9] It is the Applicant's case that on 20 and again on 21 February 2019, the First Respondent had informed the deponent to the Applicant's founding affidavit via cell phone messages that all hunting operations on Steffs Pniel will be suspended with immediate effect and that no member or employee of the Applicant will be allowed on Pniel Estates as from the said dates. According to the deponent, members of the Applicant and employees were threatened with violence should they attempt to enter Pniel Estates.

[10] According to the Applicant, the First to Thirteenth Respondents have also taken possession of the agricultural implements which belong to the Applicant as set out in paragraphs 2.4.1 to 2.4.6 *supra*. The Applicant, its members and employees had free and unfettered access to Pniel Estates and the implements at all material times which access, by virtue of the First to Thirteenth Respondents' conduct, is currently being denied. The implements are a necessity to conduct farming activities.

[11] The Applicant's attorney addressed a letter to the First to Eleventh Respondents on 4 March 2019 in which the following *inter alia* were stated:

"...3. Dit is ons instruksies verder dat daar 'n ooreenkoms was dat u tussentyds ook kon gebruik maak van die landbou implemente van die CPA wie op die ander twee spilpunte (twee 22 hektaar spilpunte) besproei.

- ...8. *Op Donderdag 21 Februarie 2019 het u ook te kenne gegee aan die uitvoerende komitee en die CPA dat niemand meer op die gedeelte bekend as Pniel Estates mag kom nie en die besproeiingsboerdery wat bestaan uit die twee 22 Hektaar mielie spilpunte mag boer nie. U het telefonies kennis gegee daarvan en was u gesprek in hierdie verband opgeneem.*
9. *Ons opdragte is dat indien u enige van die werknemers of agente of verteenwoordigers of adviseurs van die CPA sal verhinder om voort te gaan met hulle boerdery aktiwiteite, 'n hof interdik gebring sal word ten einde u voornemende optrede te belet....*
11. *Dit is ook ons instruksies dat u nou weier om enige van die CPA se implemente aan hulle te oorhandig ter voortsetting van hulle boerdery aktiwiteite, waarvan 'n lys van die implemente vir u hierby aangeheg word.*
12. *Indien die lewering van die implemente nie plaasvind voor Dinsdag 12h00 nie, is dit ons instruksies om onmiddellik voort te gaan met 'n gepaste aansoek by the Hoog Geregshof of sou u dan versuim om die implemente sodanige sodanig te lewer, sal die regstappe teen u ingestel word sonder enige verdere kennisgewing.*
19. *Geliewe ook kennis te neem dat hierdie reëling met u as gevolg van u kontrak breuk en die optrede soos voormeld deurmiddel van u optrede soos vermeld gekanselleer word en word u ook kennis gegee om Pniel Estate te ontruim binne veertien dae vanaf datum van hierdie skrywe by gebreke daaraan waaraan ons kliënte die gepaste uitsettings bevele teen u sal bekom."*

[12] The Applicant states that the Applicant did not receive any positive feedback in response to the letter and therefore the conduct of the First to Thirteenth Respondents boils down to nothing more than an act of spoliation and the Applicant is therefore entitled to the relief claimed.

[13] In response thereto, it is the First to Thirteenth Respondents' case that:

13.1 On 21 February 2019, the First Respondent had phoned and messaged Andries, an employee of Steffs Pniel to inform him

that the First Respondent was instructed by the members of the community to stop providing the Applicant with water from the Thirteenth Respondent's water pump without compensation. He confirmed that he had informed Andries that the Applicant would not be granted access to the Thirteenth Respondent's water pump, but denies that hunting operations were suspended or that the Applicant's members and employees' access to the Pniel Estates was suspended as alleged by the Applicant.

13.2 All agricultural implements mentioned in this application belong to the Thirteenth Respondent and not the Applicant. These implements were bought by the Department for Thirteenth Respondent to conduct its agricultural farming and the Applicant has never had possession of the implements mentioned because the Applicant was never involved in the farming operations.

13.3 The Applicant, its members and employees' access to Pniel Estates were never refused. They were conducting business as usual on the property and continuing with their game farming operations without any obstruction from the First to Thirteenth Respondents.

13.4 The Applicant is not entitled to the relief claimed because the Applicant had failed to prove that the Applicant was in peaceful and undisturbed possession of the agricultural implements and that the First to Thirteenth Respondents had unlawfully deprived the Applicant of its access to Pniel Estates and Steffs Pniel.

[14] In reply, the Applicant denies that it was not involved in crop farming operations and attached two confirmatory affidavits of Mr. Marnus de Beer and Mr. Martin Bond to its replying affidavit, confirming that they

are assisting the Applicant in its crop farming endeavours in an advisory capacity.

[15] Although the Applicant admits that the Thirteenth Respondent does have a water pump on the premises, the Applicant states that this pump is hardly used since its capacity is not sufficient and the water pump on Pniel Estates was upgraded and paid for by the Applicant to cater for all three pivots on the property.

[16] The Applicant also denies that the agricultural implements are currently in the possession of the First to Thirteenth Respondent as the Applicant has had unfettered access to the items in question since the order of 8 March 2019 was granted.

Arguments of behalf of the parties

[17] Adv Olivier, on behalf of the Applicant, submitted that, based solely on the version of the First to Thirteenth Respondents, namely that the Applicant has always had unfettered access to Pniel Estates, an order in terms of prayers 2, 3 and 4 of the Notice of Motion would be in order and requested the Court to confirm the rule *nisi* in so far as these prayers are concerned.

[18] In respect of the agricultural implements, he argued that although the First to Thirteenth Respondents had stated that the Applicant never had possession of these implements by virtue of the fact that the Applicant was never involved in crop farming activities on Pniel Estates, the Applicant disputes the above and tenders evidence in the form of two confirmatory affidavits. As a result therefore and as a result of the contents of the minutes of the meeting referred to in paragraph 8 *supra*, he submitted that it supports the Applicant's

version of events and that on a balance of probabilities, the Applicant has proven its case in respect of the remainder of the relief sought.

[19] He submitted that the Court is not tasked with deciding the rights of the parties to the spoliated property, but is merely asked to make an order that the *status quo* be restored, in other words that the factual situation that existed before, be restored.¹

[20] Adv Tyuthuza, on behalf of the First to Thirteenth Respondents, argued that the Applicant failed to prove that the Applicant, its members or employees was in possession of the agricultural implements and that further access to the implements was restricted by the First to Thirteenth Respondents. In addition thereto, the Applicant failed to prove that the First to Thirteenth Respondents had unlawfully deprived the Applicant of its peaceful possession of Pniel Estates and as a result thereof, the Applicant's application should be dismissed with costs.

[21] She also submitted that it is clear from the papers that a factual dispute exists as to the Applicant's possession of the agricultural implements and the Applicant's involvement in crop farming on Pniel Estates, which cannot be determined by using motion proceedings, which the Applicant should have foreseen.

Applicable Law and application of Law to the facts

[22] The *mandament van spolie* has been described as a speedy and robust remedy designed to restore possession only, irrespective of the validity or otherwise of the underlying *causa* for the possession in order to prevent "self-help". Consequently, it does not involve the exercise of a discretion, as the subject of the act of spoliation must be

¹ Oglodzinski v Oglodzinski [1976] 4 All SA 179 (D) at 180

restored to the person from whom it was taken, irrespective of the question as to who is entitled in law to be in possession of such property.

- [23] The requisites of the mandament van spolie are set out in the matter of **Ngqukama v Minister of Safety and Security and others**:²

".....This unlawfulness, plus the other requirement for a spoliation order (namely, having been in possession immediately prior to being despoiled) satisfy the requisites for the order. All that the despoiled person need prove is that—

- (a) she was in possession of the object; and*
- (b) she was deprived of possession unlawfully."*

- [24] The only issues to be decided in this matter are whether the First to Thirteenth Respondents unlawfully deprived the Applicant of its possession of Pniel Estates and Steffs Pniel, as a result of the fact that the First to Thirteenth Respondents never disputed that the Applicant had undisturbed access to these properties and whether the Applicant was in possession of the agricultural implements as set out in paragraph 2.4 of the Notice of Motion

- [25] The Applicant relies on telephonic messages and threats as set out in paragraph 9 *supra*, to convince the Court that the Applicant was unlawfully deprived of "possession" of Pniel Estates by the First to Thirteenth Respondents, but fails to indicate what actions were taken by the First to Thirteenth Respondents to unlawfully deprive the Applicant from its possession of Pniel Estates and Steffs Pniel. Unfortunately, a mere threat of spoliation does not justify the granting of an order as set out in the matter of **Jigger Properties v Maynard NO and Others**³ which reads as follows:

² 2014 (5) SA 112 (CC) at [13]

³ 2017 (4) SA 569 (KZP) at [24] and [25]

"[24] *As for the ancillary issue as to whether a threat of spoliation amounts to an act of spoliation entitling a party to relief by way of a mandament van spolie, I make the following points. There are fundamental differences between the mandament van spolie which is aimed at the recovery of lost possession, and a final interdict to prohibit a threatened spoliation or dispossession. In the unreported judgment of Boruchowitz J (30 May 2014) in Outdoor Network Limited v Passenger Rail Agency of South Africa it was pointed out that the mandament van spolie cannot be invoked to prohibit a threatened spoliation – it is only available to a de facto possessor who has been despoiled. While possessory remedies to prevent a threatened spoliation were available in Roman law, namely the mandament van complainte and mandament van maintainue, these were not imported into South African law.*

[25] *In light of the above, I consider that even if the respondents reasonably and bona fide believed that their right of access to Y8 stemmed from a servitude or the purported exercise of a servitude ("gebruiksregte") or was an incident of possession or control of the premises, none of this justified the granting of a mandament van spolie on a mere threat of termination of that right. In my view, without an actual and wrongful deprivation of their purported right of possession did not justify the kind of relief they sought from the outset. It follows that a mere threat of dispossession can find no ground for relief through a mandament van spolie."*

[26] With regard to the Applicant's "possession" of the agricultural implements, both Counsel indicated that the agricultural implements as set out in prayer 2.4 of the Notice of Motion were the implements as referred to in the minutes of the meeting of 10 January 2018 and that the minutes of the meeting correctly reflected the decisions taken by the parties. They however failed to deal specifically with the relationship between the Applicant and First to Thirteenth Respondents.

[27] It appears from the papers, that some of the Respondents (First to Thirteenth Respondents) are employed by the Applicant and receive a monthly salary as set out in paragraph 8 *supra*. In paragraph 4 of the minutes of the meeting it was recorded that the employees of the Applicant must handle the farming equipment of the Applicant with care and must not mis-use the farming equipment and vehicles. In paragraph 3 of the minutes of the meeting, the parties agreed that: *"It was resolved that the Pniel C.P.A. pays the P.A.Y. Co-opt, their salaries for maintenance and work to be done on the pivots."*⁴

[28] If some of the Respondents (First to Thirteenth Respondents) are employees of the Applicant, they could never be in "possession" of the agricultural implements but could merely "hold" the agricultural implements on behalf of the Applicant. In Wille's Principles of South African Law,⁵ the following were stated:

"In view of the above, servants or agents who hold with the intention of merely holding for another (animus non sibi sed alteri possidendi) are not possessors because their animus does not entitle them to the protection of detention afforded to detentors with the animus ex re commodum acquirendi.

Physical control over a thing need not be exercised personally, but may be exercised indirectly, ie vicariously, through a servant or even a person who has the intention to derive some benefit for him- or herself from holding the thing. In the latter case, it is probable that the control of both the vicarious possessor and the actual detentor of a thing would be protected by the mandament van spolie."

[29] As a result of the above, the First to Thirteenth Respondents as employees of the Applicant could not unlawfully deprive the Applicant of its possession of the agricultural equipment.

⁴ Paragraph 2 of minutes of meeting – page 27 of indexed papers

⁵ Ninth Ed (2007) page 451

[30] The only possible alternative on the papers to the employer/employee relationship as set out above, is that there was an agreement between the parties that the First to Thirteenth Respondents could make use of the farming implements of the Applicant.⁶ If it is the Applicant's case that the agreement between the Applicant and First to Thirteenth Respondents had been cancelled in respect of the agricultural implements, as set out in paragraph 11⁷ *supra*, the Applicant still failed to convince the Court that it was in possession of the agricultural equipment. The mere fact that the First to Thirteenth Respondents are frustrating the Applicant's access to the agricultural implements does not satisfy the first requirement for the mandament van spolie. In this regard I refer to Wille's Principles of South African Law⁸, which reads as follows:

"..... This leaves the owner of the property with a rei vindication or a non-owner with a possessory remedy to claim return of the property and possibly damages. This view is to be preferred, although it is true that, since force is no longer necessary to ground a mandament, the refusal to surrender possession once the legal right that justifies detention (e.g. lease) has ceased, is unlawful and thus sufficient to ground an application based on spolie. But it is difficult to see how the applicant/lessor would establish the factual possession requirement, given that the lessee has factual possession and has not relinquished it. The applicant/lessor is unable, therefore, to satisfy the first leg of the requirement for the mandament van spolie. The only basis on which an applicant/lessor could claim to have been spoliated is to say that his or her entitlement to possession is being thwarted by the lessee. This claim is, of course, not admissible in spoliation proceedings, which may not consider the merits of competing claims."

[31] The Applicant has therefore failed to convince the Court that the First to Thirteenth Respondents has wrongfully deprived the Applicant of

⁶ Paragraph 3 of letter – page 31 of indexed papers

⁷ Paragraph 19 of letter

⁸ Ninth Ed (2007) page 457

its possession of Pniel Estates and Steffs Pniel and that the Applicant was in possession of the farming implements as set out in paragraph 2.4 of the Notice of Motion which are prerequisites to satisfy the requirements of a spoliation application.

[32] No reasons were advanced why the costs should not follow the event and I can find no reason to differ from the general principles in this regard.

I make the following order:

THE APPLICANT'S APPLICATION IS DISMISSED WITH COSTS.


AS SIEBERHAGEN
ACTING JUDGE

Obo the Applicants:

Adv. A.D. Olivier (oio Van de Wall Inc)

Obo the 1st to 13th Respondents:

Adv. T. Tyuthuza (oio Matlejoane Attorneys)