Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 694/2022

VAALHARTS WATER USERS' ASSOCIATION
t/a VAALHARTS WATER — Applicant

and

MOSIMANEGAPE GODFREY WILLIAMS — 1st Respondent

THE UNIDENTIFIED PERSONS ATTEMPTING TO TAKE UNLAWFUL OCCUPATION OF THE THE LAND BETTER KNOWN AS THE FARM GULDENSKAT NUMBER 36 PORTION 82, SITUATED ON THE SOUTHERN CORNER OF MAROELA AND SOETDORING STREET, JAN KEMPDORP — 2nd and Further Respondents

Coram: Lever J

JUDGMENT

LEVER J

1. This is the extended return day of a *Rule Nisi* issued out of this Court on the 5 April 2022. This matter is similar to the matter issued out of this court under case number 522/2022. Insofar as the applicant and first respondent in this application are concerned, they are the same parties as are involved in case number 522/2022. Both matters were argued before me in open court on the 7 October 2022. Mr Van Tonder represented the applicant in both matters and the first respondent appeared in person in both matters. The first respondent was the only person to oppose the confirmation of the *rule nisi* in this matter.

2. The *rule nisi* encompassed an interim interdict pending the return day, which was in the form of final relief. In terms of the said interdict, the respondents were interdicted, *inter alia*, from: taking occupation of the relevant property; erecting structures on the relevant property; entering the relevant property; and trespassing on the relevant property.

3. The relevant property in this matter is the same farm, but a different fenced off portion, being on the corner of Maroela and Soetdoring streets, Jan Kempdorp situated on the farm Guldenskat number 36 portion 82.

4. Aside from the incident relevant to the present matter taking place on a different portion of the farm and at a different time, the only other important difference between this application and the one brought under

case number 522/2022 is that the first respondent was identified as being directly involved right from the outset.

5. As the applicant seeks final relief, it must establish the well-known requirements for final relief. These requirements are: A clear right; An injury actually committed or reasonably apprehended; and the absence of any similar protection by any other ordinary remedy.[1]

6. As in the case of matter number 522/2022, the present application is clearly not an application for an eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[2] (PIE Act), as characterised by the first respondent in his answering papers.

7. Also, as in the case of matter number 522/2022, at the outset, the applicant sought condonation for the late filing of the replying affidavit. The first respondent did not oppose this application for condonation. After considering the application for condonation of the late filing of the replying affidavit, such condonation was duly granted.

8. The first respondent, in his answering affidavit, has clearly not dealt with the merits and factual allegations made in the applicant's founding affidavit. This means that in deciding questions where such facts and circumstances are relevant this court must make such decision on the unchallenged version of the applicant.[3]

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[1] Setlogelo v Setlogelo 1914 AD 221 at 227.
[2] PIE Act 19 of 1998.
[3] EBRAHIM & ANOTHER v GEORGULAS & ANOTHER 1992 (2) SA 151 (B) at 154D.

9. The first respondent in essence relies on what are best described as *legal points* in his opposition to the relief sought by the applicant. These are the same legal points relied upon in matter number 522/2022. These legal points will be summarised and dealt with hereunder.

10. The first respondent does not assert a right to build a residence on the relevant farm. He merely asserts that it is government land and that he is building a structure thereon.

11. The first and apparently main defence argued by the first respondent is that the present application is unconstitutional. The first respondent develops this argument by referring to Chapter 8 of the Constitution[4] and in particular s165 thereof. The said section reads as follows:

> "Judicial Authority
> 165. (1) The judicial authority of the Republic is vested in the courts.
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
> (3) No person or organ of state may interfere with the functioning of the courts.
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
> (6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts."

[4] Act 108 of 1996.

12. The first respondent relies specifically on section 165 sub-section (5). He argues that annexure 4 to his answering affidavit, that is the judgment of the Magistrate for the District of Frances Baard, held at Jan Kempdorp in case number 84/2020, decided the issues finally and everybody else is bound by that decision. In circumstances where the applicant does not appeal the said decision, the first respondent argues that even this court is bound by the learned Magistrates decision.

13. There are a number of difficulties with this argument. Firstly, the learned trial Magistrate in case 84/2020 never considered the merits of the matter. That matter was decided on technical legal issues. Secondly, such decision on a technical legal issue can never bind this court, especially if this court considers it to be incorrect. To hold otherwise would be tantamount to allowing an incorrect approach to a technical legal question to become entrenched in our law.

14. At the hearing hereof, there were two questions decided by the learned Magistrate in Jan Kempdorp in case 84/2020 that remained relevant. The first was the finding by the learned Magistrate that the deponent to the founding affidavit in case number 84/2020 had not established his authority to bring the application on behalf of the applicant. The second related to the fact that the piece of land concerned was located in the North-West Province and the Court for the District of

Frances Baard sitting in Jan Kempdorp fell under the Nothern Cape Province.

15. It is convenient to deal with the second issue first. At the hearing of this matter, Mr Van Tonder who appeared for the applicant herein, referred the court to the relevant proclamations that conferred jurisdiction on the Magistrates Court for the District of Frances Baard, held at Jan Kempdorp. The said court in Jan Kempdorp falls under the jurisdiction of this court and hence this court has jurisdiction. The first respondent accepted this and accordingly there is no need to take this question any further.

16. Turning now to the first question outlined above, in matter 84/2020 the learned Magistrate held that the Chief Executive Officer (CEO) of the applicant, who was also the deponent to the founding papers, had not established his authority to bring the application on behalf of the then applicant in that he had not supplied the court with a resolution or delegation to establish his authority to bring the said application. In reaching this conclusion, I believe the learned Magistrate was clearly wrong. The deponent to the present application before this court is the same CEO of the applicant. One merely has to look at the normal responsibilities of a CEO which would include litigating where the applicant would have a duty or an obligation to litigate, as will be shown hereunder. In the present circumstances the applicant clearly has an obligation to litigate. This is established by the terms of clause 11.2 of

annexure "FA2" to the present application, being the agreement between the department of Water Affairs and Forestry and the applicant. Hence the CEO not only has the right to bring the present proceedings he is obliged to bring them. Secondly, there is a process in the High Court where the authority to bring the application is challenged. This is the process contemplated in Rule 7 of the Uniform Rules of Court and this is now the only process in which the authority to bring the application may be challenged. The first respondent has not utilised rule 7.

17. In my view the CEO of the applicant clearly has the authority to launch the present application for an interdict. The rule requiring a person litigating in a representative capacity for a corporate entity has only two underlying reasons for its existence. Firstly, so that the corporate entity cannot walk away from the litigation if the outcome does not suit it. Secondly, so that the corporate entity involved does not get drawn into unwarranted litigation. In the present circumstances, it is only the first reason that can have any application to the first respondent. At the very least the CEO of the applicant has ostensible or apparent authority. The applicant has also attached the agreement between it and the owner of the scheme being the Department of Water Affairs and Forestry. It is clear from this agreement that the applicant has the obligation to maintain the scheme. This of necessity includes halting the construction of unlawful structures on the land. Clearly, this

establishes ostensible authority on the part of the CEO and in these circumstances the applicant cannot walk away from this litigation if an unfavourable order was given against it.

18. For the sake of completeness, in the light of the defences raised by the first respondent, I need to consider the doctrine of *res iudicata*. Mr Van Tonder submitted that case number 84/2020 relied upon by the first respondent, although it concerned the same area of the relevant farm, more significantly the relevant facts upon which an interdict was sought in that case and the present case took place approximately two years apart. Consequently, each application, ie case number 84/2020 and the present application relied upon a different set of facts. In these circumstances, Mr Van Tonder submitted that the first respondent cannot rely on the doctrine of *res iudicata*. In my view Mr Van Tonder is correct in his submission and the first respondent cannot rely upon the doctrine of *res iudicata* in these circumstances.

19. The first respondent has not shown a defence on the merits, he chose not to deal with the merits. The technical issues raised by the first respondent have no substance. In these circumstances one must consider whether the applicant has established its right to a final interdict.

20. The agreement between the applicant and the Department of Water Affairs and Forestry establishes the clear right on the part of the applicant.

21. The respondents, including the first respondent, have never asserted any permission to occupy or build a structure on the relevant farm. In fact, as already set out first respondent has not disputed any of the facts set out by the applicant on the merits. In these circumstances, the applicant has established the injury element of the test for final relief.

22. Mr Van Tonder submitted that in the present circumstances there was no other ordinary remedy that was suitable for the applicant to invoke. Having considered the submissions made by Mr Van Tonder I agree that there are no other ordinary remedies that the applicant could invoke in the circumstances.

23. In all of these circumstances the applicant is entitled to the confirmation of the *rule nisi*.

24. Mr Van Tonder moved for a special punitive costs order against the first respondent because of the first respondent mounting a frivolous and inappropriate defence as well as all the other matters where the first respondent has raised similar frivolous defences.

25. After considering the submissions made in regard to costs by both the applicant and the first respondent, I have concluded that there is no

reason why the costs should not follow the result. However, in the present circumstances I do not believe that a punitive costs order against the first defendant is justified. The first defendant will be ordered to pay the costs of this application on the ordinary party and party basis.

Accordingly, the following order is made:

1) The *rule nisi* issued out of this court on the 5 April 2022 be and is hereby confirmed.
2) A final order in the following terms is issued:
    a. That the first, second and further respondents, and any persons acting through them, are interdicted and prohibited from taking occupation of the property situated on the Southern corner of Maroela and Soetdoring Streets Jan Kempdorp, situated on the farm Guldenskat Number 36, Portion 82.
    b. That the first, second and further respondents are interdicted and prohibited from erecting any structures on the property y situated on the Southern corner of Maroela and Soetdoring Streets Jan Kempdorp, situated on the farm Guldenskat Number 36, Portion 82.
    c. That the respondents are interdicted and prohibited from entering the property situated on the Southern corner of Maroela and Soetdoring Streets Jan Kempdorp, situated on the farm Guldenskat Number 36, Portion 82.

d. That the first, second and further respondents are interdicted and prohibited from trespassing on the property situated on the Southern corner of Maroela and Soetdoring Streets Jan Kempdorp, situated on the farm Guldenskat Number 36, Portion 82, in terms of section 1 of the Trespass Act, Act 6 of 1959.

e. That the South African Police Service are directed and authorised to take all reasonable and necessary steps to give effect to this order.

3) That the first respondent, Mr Mosimanegape Godfrey Williams is ordered to pay the costs of this application on the ordinary party-and-party scale.

L. Lever

Lawrence Lever
Judge- Northern Cape Division, Kimberley.

REPRESENTATION:

Applicant: Adv AG Van Tonder oio HAARHOFFS INC.
Respondents: Mr MG Williams in person

Date of Hearing: 07 October 2022
Date of Judgment: 04 November 2022