

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: 2435/2021

In the matter between:

WELLEN WMJ

Applicant

and

**BUCKLANDS COMMUNAL PROPERTY ASSOCIATION First Respondent
(No.03/0559/A, No.03/0569/A)
Term 7 February 2016 to 7 February 2018**

**BUCKLANDS COMMUNAL PROPERTY ASSOCIATION Second Respondent
(No.03/0559/A, No.03/0569/A)
Term 8 April 2018 to 8 April 2020**

**BUCKLANDS COMMUNAL PROPERTY ASSOCIATION Third Respondent
(No.03/0559/A, No.03/0569/A)
Term 6 October 2019 to 16 October 2021**

**BUCKLANDS COMMUNAL PROPERTY ASSOCIATION Fourth Respondent
(No.03/0559/A, No.03/0569/A)
Term 7 February 2016 to 7 November 2021**

**BUCKLANDS COMMUNAL PROPERTY ASSOCIATION Fifth Respondent
(No.03/0559/A, No.03/0569/A)**

Term 6 February 2021 until continual

**BUCKLANDS COMMUNAL PROPERTY ASSOCIATION Sixth Respondent
(No.03/0559/A, No.03/0569/A)
Community members**

JUDGMENT

CHWARO AJ:

Introduction

[1] In this application, William Mario Joseph Wellen (*“the applicant”*) seeks to enforce two distinct court orders against the Bucklands Communal Property Association, cited herein as the first to sixth respondents, (*“the CPA”*). The applicant is a member of the Bucklands community. He claims to be a Paramount Chief/Griqua King for the areas of Griqua Land West, Albania, Northern Cape, though he has not been formally recognised as such in terms of the prevailing provincial and/or national legislative prescripts. Nothing of significance turns on this issue for purposes of adjudicating the dispute herein.

[2] The first order was granted by the Labour Court on 5 May 2015 in favour of the Director-General of the Department of Labour, acting on behalf of the applicant, against the Bucklands Community Development Trust (*“the Trust”*), in its capacity as the applicant’s employer for payment of an amount of R132 000-00 representing outstanding salary due to the applicant. The Labour Court made a compliance order that was issued against the Trust to be an order of court as contemplated in section 77A(a) of the Basic Conditions of Employment Act¹.

¹Act No. 75 of 1997

[3] The second order is a settlement agreement which was made an order of court on 7 December 2018 by Coetzee AJ in this Court². In that application, where the Trust and the CPA were cited as parties, the applicant sought an order for payment of what he considered to be professional services that he rendered to the Bucklands community in lodging a land claim which was successfully settled in favour of the community by the Land Claims Court.

[4] The application is opposed by the CPA, who has filed an opposing affidavit effectively dealing with one legal point, being that the relief sought by the applicant cannot be granted on the basis that the CPA was neither a party to the Labour Court proceedings nor the High Court proceedings, where the settlement agreement was made an order of court.

[5] At the heart of the dispute between the parties in this application is whether the applicant can enforce the respective court orders against the CPA under circumstances where in the Labour Court case, the CPA was not a party to the proceedings and in the High Court case, the CPA, though cited as a party, was not a signatory nor a party to the settlement agreement that resolved the dispute between the applicant and the Trust.

Background

[6] The genesis to the present dispute is the successful settlement of the land claim which resulted in the Bucklands community, through the CPA, being beneficial owners of nine portions of land following a settlement agreement that was obtained at the Land Claims Court. The initial land claim was lodged with the Land Claims Commission on 8 April 1997 in respect of 21 farms, however, the claim was settled in a manner that resulted in the following 9 farms subsequently being transferred to and registered in the name of the CPA:

²That application was launched out of this Division of the High Court by the present applicant against the Bucklands Gemeenskap Ontwikkelings Trust No: IT 94/97 and the Bucklands Gemeenskap Eiendoms Vereniging No:03/0569/A under case number 1912/2018

6.1. Portions 2 and 3 of the Farm Stratford No.154, district Herbert, Northern Cape province, and

6.2. Lot 255, Lot 256, Lot 258 (portions of Lot 153), Lot 271, Lot 272, Lot 273 and Lot 276 (portions of Lot 269), Bucklands Settlement, district Herbert, Northern Cape province.

[7] The CPA was duly registered as such by the relevant officer on 28 May 2003, and allocated registration number CPA/03/0559/A in accordance with the provisions of section 8(3) of the Communal Property Associations Act³.

[8] It appears that process leading towards the finalization of the claim on behalf of the Bucklands community was marred with challenges. During the initial stages of the process, the community opted to create a trust which was to coordinate all efforts aimed at the finalization of the claim. In that regard, the Bucklands Community Development Trust No: IT 97/97 was created, and the first trustees granted letters of authority by the Master.

[9] The Trust resolved to appoint the applicant on a full-time basis as Managing Director with effect from 28 January 2004 until 7 December 2017. Prior to such appointment, the applicant was employed as a Correctional Officer by the Department of Correctional Services and had to resign from his employment to take over his responsibilities with the Trust.

The Labour Court order: Case No: J1093/2014

[10] A dispute arose between the Trust and the applicant, in their respective capacities as employer and employee, relating to the failure by the Trust to pay the applicant his regular monthly salary as agreed. The applicant referred the dispute to the Department of Labour for intervention. The department issued a compliance notice contemplated in section 69 of the Basic Conditions of Employment Act ("the BCEA") against the Trust for payment of all outstanding salary with interest.

³Act No. 28 of 1996

[11] The Trust did not comply. The Director-General of the department, acting on behalf of the applicant, approached the Labour Court to make the compliance notice an order of court in terms of section 77A(a) of the BCEA⁴. That order was granted on 5 May 2015.

[12] Despite efforts undertaken by the applicant to enforce the court order against the Trust, which includes obtaining a writ of execution on 26 April 2016, to attach and remove movable assets of the Trust and an attempt by the Trust to cede its water use right to the applicant, it appears that the Trust has, to date, not fully complied with the court order granted by the Labour Court.

[13] It is against the foregoing factual matrix that the applicant has approached this Court seeking an order to enforce the Labour Court order against the CPA.

The High Court order: Case No: 1912/2018

[14] On or about 3 August 2018, the applicant instituted an application under case number 1912/2018 out of this Division of the High Court, primarily seeking payment for outstanding salaries and professional services that he rendered to the community. The applicant cited the Trust and the CPA as the first and second respondents respectively in that application.

[15] The application served before Coetzee AJ on 7 December 2018, where the settlement agreement concluded between the applicant herein and the trustees of the Trust was made an order of Court. Though the CPA was cited as a party in that application, the CPA was not a signatory nor a party to the settlement agreement.

Discussion

Authority to oppose the application on behalf of the CPA

⁴This was before the provisions of section 77A(a) were deleted by section 21 of the Basic Conditions of Employment Amendment Act 7 of 2018, with effect from 1 January 2019

[16] The affidavit filed on behalf of the CPA in opposing the relief sought by the applicant was deposed to by Julia Josi, who claimed to be the chairperson of the CPA. The applicant disputed Ms Josi's authority to act on behalf of the CPA and to that effect, filed a notice contemplated in rule 7(1) of the Rules of Court calling upon her to establish whether the CPA has properly authorised her to act on its behalf.

[17] The applicant is a lay litigant who might not be *au fait* with the technicalities relating to the true purpose of rule 7(1) notice. I will thus, in the interests of justice, proceed to deal with this aspect on an understanding that once they were served with the rule 7(1) notice, the first to sixth respondents' attorneys knew or ought to have known that such a notice, as a matter of law, sought to establish whether the CPA authorised the opposition of the application and appointed them to prosecute such opposition.

[18] During the hearing of the matter on 24 February 2023, the first to sixth respondents sought a postponement to enable them to file the necessary response to the applicant's rule 7(1) notice. At the hearing of the matter on 16 March 2023, the attorneys acting on behalf of the first to sixth respondents filed a resolution apparently taken by the executive committee of the CPA on 29 January 2023 authorising Van Heerden Attorneys to act on behalf of the CPA in opposing the application brought by the applicant and empowering Ms Josi to sign legal documents in such opposition.

[19] The applicant contended that no proper authorisation to oppose the application and appoint attorneys could be granted by an executive committee whose term of office has lapsed. In his view, the executive committee that purported to have resolved to authorise the opposition of the application was not entitled to do so on the date mentioned in the resolution simply because their term of office expired on 6 February 2018 and there was no annual general meeting that was held that would have elected a new executive committee to office.

[20] *Ms Stanton*, counsel for the respondents, conceded that in the absence of an explanation from Ms Josi or any member claiming to be part of the

executive committee of the CPA justifying their continued stay in office beyond 6 February 2018, she could not take the point any further.

[21] The CPA was registered in accordance with the provisions of the Communal Property Associations Act. In terms of this Act, all registered CPA's ought to adopt constitutions which comply with the principles enunciated in section 9 of the same Act, providing for fair and inclusive decision-making process, equality of membership, democratic process, fair access to the property of the association and accountability and transparency. The CPA did adopt a constitution and clause 6.4 thereof provide that the term of office of the executive committee is two years.

[22] Since the executive committee where Ms Josi was elected as chairperson was elected during the annual general meeting held on 7 February 2016, it follows that their term of office expired on 6 February 2018. In the absence of any explanation justifying their continued stay in office beyond the said date, it follows that the executive committee that purportedly resolved to oppose the application and authorise Ms Josi as indicated above, had no basis to act as such as their term of office has expired.

[23] I agree with the applicant that in the absence of an executive committee in office, it was incumbent on the general membership of the CPA, at a duly convened meeting, to have decided upon the opposition of his application and authorised the attorneys either to oppose or not oppose his application. In the result, the authority to oppose the application on behalf of the CPA has not been established and it follows that the application stands as unopposed.

[24] Our law is trite that the authority required in terms of rule 7(1) is not about whether the deponent to the affidavit is authorised but relates to the decision taken by the body or institution, as the case may be, to oppose the application and appoint attorneys to give effect to that authorisation.⁵

⁵Games v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at para 19 and Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705C-J

[25] Since there was no executive committee which was lawfully elected to hold office as at 29 January 2023, it follows that there could not have been a lawful and/or valid and proper authorisation given to the attorneys to oppose the application and file the opposing affidavit.

Enforcement of the Labour Court order against the CPA and the community

[26] It is common cause that the CPA was not a party to the proceedings initiated by the Director-General of the Department of Labour against the Trust to make a compliance order issued by the department an order of court. The CPA was neither informed of the court order nor resolved to be bound by the court order that was obtained against the Trust. In any event, the court order related to the employer-employee relationship that existed between the applicant and the Trust at the time, exclusive of all other third parties.

[27] During his presentation before this Court, the applicant correctly conceded that this Court has no jurisdiction to enforce compliance with an order granted by the Labour Court against the CPA, where the CPA was not a party to the said proceedings and in the absence of an agreement concluded between the Trust and the CPA, rendering the latter liable for the obligations of the former.

[28] It follows that this Court is neither empowered nor enjoined to entertain enforcement proceedings relating to an order granted by the Labour Court against a party who was not ordered to comply with the order in general or in relation to a particular aspect. The relief sought by the applicant in respect of this aspect falls to be dismissed.

Enforcement of the settlement agreement which was made an order of court against the CPA

[29] In as far as the enforcement of the settlement agreement that was made an order of court is concerned, the applicant contends that though the settlement agreement was concluded between him and the Trust, as represented by the trustees, the members of the community, who are beneficiaries of the Trust and the CPA, are well aware of the fact that the Trust was formed as a temporary measure to manage the affairs of the community until the formation of the CPA, which would take over the affairs of the Trust. He further posits that the order can be enforced against the CPA as it was cited as a party in the proceedings which resulted in the settlement agreement being made an order of court.

[30] On being pressed to demonstrate any written agreement akin to a pre-incorporation contract as it is understood in company law and which might have been concluded on the basis of his submission as aforesaid, the applicant was unable to do so.

[31] That the parties to the settlement agreement were aware that such an agreement was concluded with the exclusion of the CPA is not in dispute. This is further buttressed by what is contained in paragraph 29 of the settlement agreement, providing as follows:

“2de Respondent Mnr. Clifford van Nel Bloukop:

Tweede Respondent se verteenwoordiger Mnr. Clifford van Nel (Bloukop), het byvoorbeeld aan haar Edele, Regter Sieberhagen, op 30 November 2018, genoem dat hulle nog steeds nie deur Department Landlike Ontwikkeling en Grondhervorming, hulle Registrasie papiere as wettige BCPA Komitee lede Termyn: 08 April 2018 tot 08 April 2020 en of 10 Julie 2018 tot 10 Julie 2020, ontvang het nie. Hulle sal eers by ontvangs van genoemde dokumente, instaat wees, om enige Skikking, met Klaer te bespreek”⁶

⁶The relevant paragraph is reproduced as it is, with its grammatical errors and my loose translation to English reads thus: “ The Second Respondent’s representative, Mr. Clifford van Nel (Bloukop) has, for example, on 30 November 2018 informed the Honourable Judge Sieberhagen that they still have not received their registration documents as a lawful BCPA Committee members for the term :08 April 2018 to 08 April 2020 and/or 10 July 2018 to 10 July 2020 from the Department of Rural Development and Land Reform. They will only be able to discuss any settlement with the complainant upon receipt of the said documents”

[32] On a proper construction of the above paragraph, it is inescapable to conclude that the applicant and the trustees who appended their signatures to the settlement agreement, unequivocally conveyed that though the CPA was cited as a party to the application that was settled in accordance with the terms of the settlement agreement, the CPA was, *per se*, not a party to the settlement agreement as it was not represented by its lawful structure by then.

[33] This conclusion is consistent with the point taken by the applicant in disputing the authority to oppose the application on behalf of the CPA since the term of office of the executive committee of the CPA expired on 6 February 2018 and that subsequent thereto, no executive committee was lawfully elected to office. It follows that in the absence of a resolution by the general membership of the CPA to be bound by the terms of the settlement agreement signed on 3 December 2018, the CPA cannot be said to be a party to the settlement agreement.

[34] The contention by the applicant that the CPA is a successor in title to the Trust is without any merit. The applicant has not pleaded any facts supporting such an assertion nor could I find any independent facts, gleaned from the numerous attachments to the founding papers, supporting the applicant's assertion.

[35] That the applicant and the individual trustees, representing the Trust, were entitled to enter into a settlement agreement and make it an order of court is not in dispute. In **PL v YL**⁷ the court held as follows regarding settlement agreements that are made orders of court:

"When a settlement agreement is concluded in the context of a civil action its aim is to relieve the court of its duty to decide the issues in the action. Where it has the effect of disposing of the issues between the parties as raised by the action itself, it would in most instances constitute a compromise (transactio). A compromise is subject to the common law principle of contract. The implication is that the

⁷2013 (6) SA 28 (ECG) at paras 9-10

agreement may be enforced by any party thereto or resiled from by any party on the same grounds as those applicable to contracts in general. Where the parties agree to resolve their dispute in this manner one of two things may happen. They may agree to withdraw the action, in which event any dispute regarding compliance with the settlement agreement must be dealt with as constituting a breach of contract. The enforcement of any remedy available to the aggrieved party, such as specific performance, can only be achieved by the commencement of a new action. Because the original action had been terminated, the court cannot, and does not play any active role in the supervision of the enforcement of the settlement agreement.

The parties may, however choose to agree to ask the court to give judgment on the issues raised by the action in accordance with the terms of their settlement agreement. One of the advantages of this arrangement is that the court retains jurisdiction over the matter in the sense that it has the inherent power or authority to ensure compliance with its own orders. This enables the parties, in the event of a failure by any one of them to honour the terms of the order, to return directly to the court that made an order, and to seek the enforcement thereof without the necessity of commencing a new action..."

[36] One assumes, without deciding, that the Court that considered the terms of the settlement agreement concluded between the applicant and the Trust, satisfied itself that it was competent for it to make the settlement agreement an order of court as it was capable of being enforced amongst them and it terminated the *lis* between them.

[37] I make this observation without casting any aspersions on the order made but having due regard to the general primary objectives of the land restitution legislative programme, which was enacted pursuant to the provisions of section 25 (7) of the Constitution, being to restore the dignity and rights of the dispossessed. The role that the relevant department ought to play in ensuring that the assets of the communities who are beneficiaries of restitution are protected and benefit the entire community without favour, cannot be over-emphasised. It is also trite that the supervisory role that the

Master of the High Court is expected to play, in ensuring that trustees execute their duties for the benefit of the trust in general, must be considered.

[38] Having made the above observations, it is an acceptable commercial practise that agreements concluded between willing parties be honoured, for as long as such agreements are not against public policy or offend against any constitutional provision.

[39] Once the settlement agreement is made an order of court, it carries the status of an ordinary judicial order⁸ which was described in the following terms in **Lurlev v Unifreight General Services and Others**⁹:

“The ordinary sort of judgment or judicial order has at least two functional components. First of all, it is a command to the party at whom it is aimed, coupled in an appropriate case with a warrant to the sheriff to enforce the command. Secondly, it regulates the legal relationship between the parties and settles their mutual rights and obligations to the extent necessary for its grant. That, after all, is what makes its effect res judicata..”

[40] On the basis of the authorities referred to above, it is open to the applicant to seek enforcement of the order against the Trust and pursue all available options to ensure that the Trust honours its obligations in terms of the settlement agreement, which was made an order of court.

[41] The applicant did not enter into any agreement with the CPA in relation to the dispute that was raised in Case Number 1912/2018 and paragraph 29 of the settlement agreement expressly excluded the CPA from being bound by the terms of such an agreement. Simply put, the resolution of the dispute in the above case was between the applicant and the Trust, thus the *lis* between them has become *res judicata*.

⁸In *Eke v Parsons* 2016 (3) SA 37 (CC) at para 29, the Constitutional Court stated that “[o]nce a settlement agreement has been made an order of court, it is an order like any other...”

⁹1978 (1) SA 74(D) at 79A

[42] The CPA was not part of the settlement agreement and I find no basis to attribute the obligations emanating from what is essentially a contractual relationship between the applicant and the Trust, to the CPA.

Conclusion

[43] Though the practise of resolving disputes between litigants through settlement agreements is widely recognised and encouraged¹⁰, once the settlement agreement becomes an order of court, it assumes the status of a judicial pronouncement that may only be enforced against those who are parties to the agreement and against whom the order is directed. The party who was not part of the settlement agreement which was made an order of court can simply regard it as a nullity if an attempt is be made to enforce it against such a party.¹¹

[44] Except for the contents of paragraph 29 of the settlement agreement, the applicant has not demonstrated that there were efforts made, in the absence of an executive committee, to convene the general membership of the CPA to allow them to consider and decide upon whether they consent to the CPA being bound to the settlement agreement concluded between the applicant and the Trust, and if so, to what extent.

Costs

[45] Though the applicant is successful in disputing the authority of the attorneys to oppose the application on behalf of the CPA, given the outcome that I have reached on the merits, an appropriate order is that each party must bear its own costs.

Order

[46] In the premises, the following order is made:

¹⁰Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others 1978 (1) SA 914 (A) at 921C

¹¹See Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer 2004 (5) SA 373 (SCA) at para 24

- 1. The first to sixth respondents are non-suited as there was no authority granted by the Bucklands Community Property Association to the attorneys to oppose and prosecute the opposition of the application instituted by the applicant.**
- 2. The application is dismissed.**
- 3. Each party to bear their own costs.**

**O.K. CHWARO
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY**

DATE OF HEARING: 16 March 2023

DATE OF JUDGMENT: 24 March 2023

REPRESENTATION:

For the Applicant: In person

**For the First to Sixth Respondents: Adv. A. Stanton
Instructed by:
Engelsman Magabane Incorporated,
Kimberley**