

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 8522/2020

In the matter between:

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| Bongani Thulani Dlodla NO | First applicant |
| Cyril Nkanyiso Dlodla NO | Second applicant |
| Protus Qaphelani Ngcobo NO | Third applicant |
| Sibongile Sphiwe Ntombela NO | Fourth applicant |
| Dudu Rachel Khanyile NO | Fifth applicant |
| and | |
| Nicholas Paul Isabelle | First respondent |
| Willem Vermaak | Second respondent |
| Vriendschap Boerdery NC (Pty) Ltd respondent | Third |
| Nico Willem Harris NO (trustee of the Mahamba Hlala Trust) | Fourth respondent |
| Nico Willem Harris NO (trustee of the Ed Maritz Merino Trust) | Fifth respondent |
| Nico Willem Harris NO (trustee of the JJS Maritz Merino Trust) | Sixth respondent |
| Henk Maritz | Seventh respondent |
| Alistair McMurray | Eighth respondent |
| Colin Hohls | Ninth respondent |
| Newco (Pty) Ltd | Tenth respondent |

Judgment

Lopes J

[1] The dispute in this application arises out the restoration to the Sakwa Dlodla Community ('the Dlodla Community') of 11 farms constituting 1 101.7752 hectares ('the farms'). In terms of an order of the Land Claims Court handed down on the 18th September 2019, the Minister of Agriculture, Land Reform and Rural Development was directed to acquire the farms for compensation, and to hold them in registered communal property trusts for the benefit of the Dlodla Community. The farms were previously owned by the first to third respondents (and the trusts of which the fourth to sixth respondents were trustees).

[2] The applicants are trustees of the Isiziwe Sakwa Dlodla Trust ('the trust'), created to receive registration of the farms for the benefit of the Dlodla Community. Only the first three applicants have brought this application, although all five of the current trustees are cited as applicants. I shall refer to the first three applicants as 'the applicants'. The farms were all viable fruit and sugar cane farms, and the first to sixth respondents operated the farms in terms of a Memorandum of Understanding ('the memorandum'), dated the 7th March 2020, which purports to have been concluded between the trust and the first to sixth respondents. It is the validity of the memorandum which is the central focus of this application.

[3] The beneficiaries of the trust are the households comprising the Dlodla Community, which all consisted of previously disadvantaged persons, whose rights in and to the farms were restored by the order of the Land Claims Court. The seventh to ninth respondents are persons named in the papers, and the tenth respondent is the name allocated to a company which was to have been formed

by the trust – it is unclear whether it was, in fact, incorporated. No relief is sought against the seventh to tenth respondents, and they are not important to the outcome of this matter.

[4] On the 10th December 2020 a rule *nisi* was granted in favour of the applicants, with interim relief, interdicting the respondents from concluding or renewing any contracts with the trust, directing them to cease all farming operations on the farms by no later than the 1st January 2021, and to allow nominated entities of the applicants, to enter onto the farms and conduct farming operations for the benefit of the trust. All profits generated by the farming operations of the persons nominated by the applicants, were to be paid into the trust account of the applicants' attorneys, and to be disbursed in accordance with further orders of this court. The rule was later extended until confirmed or discharged.

[5] Mr *Stokes SC*, who appeared for the applicants, recorded that no payments have been made into the trust account of the applicants' attorneys, and the applicants do not seek confirmation of that part of the rule. Mr *Camp*, who appeared for the respondents, recorded that the issue regarding the eviction of the first to sixth respondents was no longer relevant, because they had left the property pursuant to the order of this court on the 10th December 2020. Mr *Stokes*, however, indicated that the applicants persisted with the order of eviction, because the applicants feared that they might return.

[6] Various issues were raised in the papers, and in the practice notes delivered by the parties. The first of those issues was the authority of the trustees to represent the trust in bringing these proceedings. The deponent to the

respondents' answering affidavit, Alfred Thembinkosi Dlodla (Mr Dlodla), was the founder of the trust, having been mandated to appoint the initial trustees. He admits having signed the Trust Deed in which the applicants were nominated. The respondents do not deny that the five applicants were appointed as trustees of the trust by the Master of this court on the 12th November, 2018. A sixth respondent who was appointed with them, Nkosingiphile Dlodla, passed away on the 2nd July 2020.

[7] The respondents aver that the trustees were removed as trustees by way of a resolution passed at a meeting of the trust on the 20th June 2020, which was prior to the institution of this application on the 10th December 2020. In argument before me, Mr *Camp* accepted that any resolutions to dismiss the applicants as trustees which were passed at the meeting on the 20th June 2020, were invalid. He also conceded that the deponent to the respondents' answering affidavit, Mr Dlodla, was not a trustee, and that no person could validly act on behalf of the trust unless they were a registered trustee. I accordingly accept that the trustees have not been validly removed as trustees of the trust.

[8] The Trust Deed provides for a quorum of three trustees, and matters are to be decided by a majority of the trustees' votes. A record of a meeting of the trustees authorizing the institution of this application is annexed to the applicants' papers. The allegations recording the holding of that meeting, the resolutions passed, and the recording of the meeting are not disputed, save for the broad allegation that trustees were and are acting unlawfully, and their actions are invalid and in contravention of the wishes of the majority of the beneficiaries of the trust. Such broad and sweeping statements are unhelpful in determining the validity of their actions, and the respondents, and indeed, the

Dludla Community, have at all times been at liberty to bring applications for appropriate relief, should they have viewed the conduct of the applicants as in any way unlawful.

[9] In any event, any challenge to the authority of the applicants in this application, had to have been brought in terms of Uniform rule 7, and not in the affidavits. In *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA), Streicher JA dealt with a challenge to the authority to issue an application. At para 19, he stated:

‘...The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703(W) at 705C-J.)’

I accept, therefore, that the applicants have the necessary authority to represent the trust, and have validly brought this application.

[10] Both counsel before me were in agreement that no other persons, other than the trustees, were authorised to, or could have transacted or concluded agreements on behalf of the trust. The only remaining issues then, are:

- (a) whether the occupation of the farms, and the farming activities of the respondents, were authorized by the applicants in terms of the memorandum allegedly concluded on the 7th March 2020, as referred to in the papers. The memorandum provided for the erstwhile owners of the farms to carry on running them, for the benefit of the community and themselves; and
- (b) whether the applicants have demonstrated their necessary compliance with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998, and in particular, s 4(2) thereof, to entitle them to an order for eviction.

[11] Mr Dlodla avers in his answering affidavit that a resolution to adopt the memorandum was taken by ‘the Dlodla Community’ at a Special General Meeting of Members held on the 21st March 2020, after the trustees had negotiated the terms thereof with the outgoing landowners. No formal written notice of this meeting appears to have been given, no minutes of the meeting were taken, and no formal resolutions were prepared for signature. He also states that the first applicant, who was the chairman of the trust, authorised one Thami Dlodla (not a trustee) to sign the memorandum on behalf of the trust. In the next paragraph Mr Dlodla alleges that on the 7th March 2020 and at the Mthonjaneni Lodge (a guesthouse) the written memorandum was concluded between the trust and the first six respondents.

[12] Mr *Stokes* submitted that the resolution to conclude the memorandum was invalid because:

- (a) the farms vested in the trust;

- (b) the general meeting at which the resolution was taken, was a meeting of members of the Dlodla Community, according to the respondents;
- (c) the trust could only be bound by decisions of the trustees. This is in terms of s 6(1) of the Trust Property Control Act, 1988. An act by any other person purporting to bind the trust is void;
- (d) the Trust Deed provides for a category of ‘members’, comprising those heads of households which are beneficiaries of the trust, and for a register of members to be kept by the trustees. It was these members who allegedly voted at a Special General Meeting of members held on the 21st March 2020, for the conclusion of the memorandum, based on negotiations which had been conducted with the outgoing landowners of the farms. The members are not trustees, and could not have made a retrospective resolution binding on the trustees to conclude the memorandum;
- (e) the respondents aver that a member, one Thami Dlodla, who was not a trustee, was authorised by the first applicant to sign the memorandum on behalf of the trust, and he did so on the 7th March 2020 (some two weeks’ before the meeting pursuant to which the resolution was passed, was held!). The memorandum itself records at paragraph 15 that ‘This Memorandum of Understanding is agreed to on condition that the committee representing the Dlodla claimant community will obtain a mandate from the claimant community by no later than 10:00 on 6 March 2020. It is agreed that should such memorandum be obtained, this MOU will be signed on 9 March 2020.’; and

- (f) significantly, no minutes were taken at the meeting, and no formal resolution was prepared or signed. Mr Dlodla records further in his affidavit that ‘On 21 March 2020 and after the material terms of the MOU had been negotiated, we were given the mandate by the Dlodla Community to finalise and sign the MOU.’;
- (g) on the statements referred to above, the memorandum was signed before any resolution was taken, or authority was given by the trustees to do so. The memorandum is accordingly invalid.

[13] Mr *Camp* dealt with a previous interdictory application brought by Mr Dlodla and others as trustees of the trust, against *inter alia*, the first three applicants in this application (under Case No D4722/2020). That application was to prevent them from harassing or intimidating the first to sixth respondents in this application. That application was dismissed because, although Mr Dlodla and the five other applicants therein believed they were trustees, they were not, and their acts were void.

[14] I put to Mr *Camp* that the memorandum could not have been signed prior to the taking of the resolution. He submitted that the date of the meeting reflected in the answering affidavit, (the 21st March 2020) had to be wrong. He conceded that the signature of the memorandum had to have occurred after the taking of a proper resolution, in order for the agreement to be valid. Ultimately, he was unable to resolve the conflicting dates.

[15] Mr *Camp* submitted that although any resolutions passed at the meeting of the 20th June 2020 were invalid, that did not apply to the earlier meeting of the 21st March 2020 because the members were entitled to convene meetings and instruct the trustees as to their wishes.

[16] In addition, Mr *Camp* submitted that the *Turquand* rule was applicable to the present matter. He referred to Honoré's *South African Law of Trusts*, 6th Edition, by Cameron, De Waal and Solomon, Juta & Company (Pty) Ltd, 2018 at pages 385ff. The learned authors opine, however, that our courts have left open the question of the applicability of the *Turquand* rule to trusts. In any event, where, as in this case, the credibility of the conclusion of the memorandum itself is in serious doubt, and the legality of the authorisation of the signature on behalf of the trust is not established, no question of the applicability of the rule arises. The learned authors also raise the spectre of estoppel, but that was not raised, or dealt with. In my view, it would not, in any event, be applicable.

[17] There are difficulties in accepting the version of Mr Dlodla with regard to the meeting:

- (a) in the minutes of a meeting of the 20th June 2020 put up by Mr Dlodla (and although it is conceded that no valid resolutions could have been passed at this meeting), it is recorded:

‘Mrs S.S. Ntombela said according to previous quorumed TRUSTEE Meetings, held on 13th March 2020 the following was on the 21st March 2020 meeting where the community voted to sign the MOU with the farmers against SAFDA proposal, . . .’(sic);

- (b) in the memorandum, the date of the resolution authorising the conclusion thereof is recorded in manuscript as being the 8th March 2020. The date of each signature is manually recorded as the 7th March 2020;
- (c) the memorandum is signed on behalf of the trust by Thami Dlodla, (allegedly on the authority of the first applicant). Although the first applicant denies having given such authority, he would not have had the power in terms of the Trust Deed to do so, and if he purported to do so on the basis that Thami Dlodla was appointed as an alternate trustee, that would have had to have been in writing. No such writing was produced. The preamble records that Thami Dlodla signed in his capacity as ‘trustee’ and that he was ‘duly authorized by virtue of a resolution . . .’ of the trust ‘which is attached hereto marked Annexure ‘A’.’ He was not a trustee, and no such document was annexed to the memorandum, and it has never been produced;
- (e) there are three different dates alleged for the passing of the resolution to conclude the memorandum, (and an intention to pass the resolution by 10:00 am on the 6th March 2020) – but all of them are after the 7th March 2020, the date on which the memorandum was, *ex facie* the memorandum, signed by Thami Dlodla and the first to sixth respondents;
- (f) the conclusion of the memorandum was the function of the trustees, and could only validly have been done if a quorum of trustees had resolved to do so. There is no evidence, save for allegations by Mr Dlodla (which are denied), that such a resolution was considered or passed by the trustees. There can also be no

consideration of an ex-post facto ratification of either the resolution, or the signing of the memorandum, when the persons alleged to have passed the resolution were not trustees of the trust.

See: *Simplex (Pty) Ltd v Van der Merwe and Others* NNO 1996 (1) SA 111 (W) at 113G-114I.

Moosa NO & Others v Akoo & Others [2010] JOL 25872 (KZP).

Lupacchini NO and Another v Minister of Safety and Security 2010 (6) SA 457 (SCA), paras 1-3 and 10.

[18] Mr *Camp* submitted that I should approach the dispute on the basis laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634D-635C, where Corbett JA stated;

‘Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G, to be:

".... 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."

This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A-B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA 398 (A) at 430-1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G- 924D). 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 (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto* NO 1972 (3) SA 585 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, *supra* at 924A).'

[19] In this matter no request was made for a referral of the dispute to the hearing of oral evidence. In my view, the dispute falls to be resolved on the basis that I am satisfied that the allegations in the affidavits of the respondents are so confused and contradictory, that I have no option but to dismiss them as being clearly untenable. I cannot accept that they can be viewed as proper denial of the allegations of the applicants.

[20] The need for an eviction order is moot, because the interim relief granted on the 10th December 2020, directed all the respondents to cease all farming operation on the farms and directed them to allow the South African Farming Development Association and/or SAFDA FMSC (Pty) Ltd, or any other persons directed by the applicants to enter onto the farms and conduct farming operations. It is common cause that they did so, and that situation has, as I understand the position, prevailed since the 10th December 2020. I see no need to deal with that part of the order any further.

[21] In addition, further steps were required to have been taken to establish the identities of all the unlawful occupiers. Save for the second respondent, it was initially alleged that none of the respondents (excluding the individual respondent trusts) resided on the farms. No further clarity was provided.

[22] With regard to costs:

- (a) when the application was initially launched, the applicants sought an order for costs as part of the rule *nisi*, jointly and severally against all the respondents (see sub-paragraph 2.8 of the notice of motion);
- (b) when the application came before Maharaj AJ on the 10th December 2020, he granted a rule *nisi* with interim relief, without referring to costs. It would seem that he did so in error, because he referred to all the properties constituting the farms ‘as mentioned in 2.7 of the notice of motion.’, and apparently overlooked sub-paragraph 2.8, dealing with costs, and which was part of the original rule *nisi* sought;

- (c) the application then came before Vahed J on the 4th February 2021, and he granted a consent order (by initialling and dating an apparently agreed draft). The draft simply referred to the rule being extended until confirmed or discharged;
- (d) when the application was argued before me, on neither occasion was reference made to the issue of costs – at least I have no note of counsel doing so, and I am reasonably certain I would have done so had they mentioned the costs. The focus of the arguments was concentrated on the powers of the trustees and others, and I presume that the matter of costs was simply overlooked;
- (e) the driving force behind defending the application (and for the bringing of the previous application), certainly appears to have been Mr Dlodla. The other respondents all entered appearances to defend and made common cause with him, and none withdrew to endeavour to protect themselves against an order for costs. In addition, none of the parties made any attempt to use the assistance of government officials or departments to attempt to resolve the disputes which had arisen. They were, of course, entitled to settle their disputes in the courts, but then they cannot be heard to complain about the issue of costs. Mr *Stokes* recorded at the outset of his argument that the applicants sought no relief against the seventh to tenth respondents. I do not intend to make any order against the seventh to tenth respondents. It would be in accordance with justice that I direct the first six respondents to pay the costs of the application; and
- (f) if I am incorrect in either my assumption that the inclusion of costs was erroneously omitted in the order of the 10th December 2020, or

in my assumption that counsel merely overlooked the matter of costs in argument before me, and costs were deliberately omitted by agreement between the parties, then I am certain that the parties' legal representatives will be able to settle that issue without returning to court.

[23] I accordingly make the following order:

- (a) paragraphs 1.1, 1.2 and 1.3 of the rule *nisi* issued by this court on the 10th December 2020, are confirmed as against the first to sixth respondents. The remainder of the rule *nisi* is discharged; and
- (b) the first to sixth respondents, jointly and severally, the one paying, the others to be absolved, are directed to pay the costs of the application.

Lopes J

Date of hearings: 28th February 2022 and the 5th April 2022.

Date of judgment: 17th May 2022.

For the applicants: A Stokes SC (instructed by Cox Yeats).

For the respondents: AC Camp (instructed by Wynne & Wynne Attorneys).

