

SOUTH AFRICA / JUDGMENT

Barnes and Another v Kushite Investment Holdings (Pty) Ltd and Others (41516/2017) [2019] ZAGPPHC 490 (20 September 2019) [2019] ZAGPPHC 490

COURT

North Gauteng High Court, Pretoria

BEFORE

D S Fourie

CASE / FILE NUMBER

41516/2017

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED

Case No. 41516/ 2017

20/9/19

In the matter between:

LEROY CURTIS BARNES

First Applicant

THABO MILTON NCALO

Second Applicant

and

KUSHITE INVESTMENT HOLDINGS (PTY) LTD

First Respondent

KUSHITE LIFESTYLE (PTY) LTD

Second Respondent

ANDILE CALEB MAKHUNGA

Third Respondent

BUYISIWE MAKHUNGA

Fourth Respondent

MOTLATSI MTHIMUNYE

Fifth Respondent

INRE:

KUSHITE INVETMENT HOLDINGS (PTY) LTD First Plaintiff

KUSHITE LIFESTYLE (PTY) LTD Second Plaintiff

ANDILE CALEB MAKHUNGA

Third Plaintiff

BUI SIWE MAKHUNGA

Fourth Plaintiff

MOTLATSI MTHIMUNYE

Fifth Plaintiff

LEROY CURTIS BARNES

First Defendant

THABO MIL TON NCALO

Second Defendant

REASONS

FOR ORDER GRANTED ON 8 AUGUST 2019

D S FOURIE, J:

[1] On 8 August 2019 I granted the following order:

"1. The application for leave to amend the plea in accordance with paragraph 2 of the notice of intention to amend dated 13 June 2019 is dismissed;

2. The application for leave to amend the plea in accordance with paragraph 22 of the notice of intention to amend dated 13 June 2019 is granted;

3. The applicants are to pay the costs of the application on an opposed scale, jointly and severally."

[2] These are my reasons why this order was granted.

BACKGROUND

- [3] The plaintiffs issued summons against the defendants in which they claim, inter alia, various declaratory orders. The pleadings have already been closed and the matter was set down to be heard on 12 August 2019.
- [4] On 17 July 2019 the defendants (as applicants) filed an interlocutory application for leave to amend their plea in accordance with paragraph 2 and paragraph 22 of their notice of intention to amend dated 13 June 2019. This application was argued before me on 6 August 2019 whereafter I granted the order referred to above. Shortly thereafter the parties agreed to postpone the trial sine die.
- [5] Only paragraph 1 of the said order is relevant. In terms thereof the application for leave to amend the plea in accordance with paragraph 2 of the notice of intention to amend, was dismissed. The proposed amendment related to the alleged lack of authority to institute the main proceedings.

THE NOTICES

- [6] On 29 June 2017 the defendants served their notice of intention to defend. A copy thereof indicates that it was already signed by the defendants' attorney on 21 June 2017.
- [7] Thereafter, on 13 July 2017, the defendants served a notice in terms of Rule 7(1) in terms whereof the authority and mandate of the plaintiffs' attorneys to represent the plaintiffs in these proceedings, was challenged. In the same notice the plaintiffs' attorneys were called upon to establish their authority and mandate by the filing of a proper power of attorney.
- [8] On 26 July 2019 the plaintiffs served a notice in terms of Rule 30/30A notifying the defendants that the Rule 7 notice was served outside the 10 (ten) day time period and is therefore an irregular step. The defendants did not respond to this notice.
- [9] On 29 August 2017 and to avoid wasting time and money in bringing an interlocutory application, the plaintiffs filed with the Registrar of this Court powers of attorney in respect of both the first and second plaintiffs as well as the underlying resolutions. On the same day the Registrar issued a certificate in terms of Rule 7(4) certifying that:

"... I have perused the resolution by the Board of Directors, power of attorney and original copy of identification by the plaintiffs pertaining to the following case number 41516/2017, and documents submitted to me, verified that such matter does exist and that authority to act in this matter has been conferred upon the practising attorney concerned ...".

- [10] It was pointed out in the plaintiffs' answering affidavit that from August 2017, the defendants did absolutely nothing to challenge the certificate or the attorneys' authority to act. According to the plaintiffs the defendants repeatedly engaged with and served processes on their attorneys of record without demur. These allegations are not denied in the defendants' replying affidavit.

THE PLEADINGS

- [11] On 12 September 2017 the defendants filed their plea. In paragraph 1.2 thereof they deny that "the first plaintiff has duly, lawfully and/or properly authorised and/or resolved to proceed with the action". Thereafter the matter was set down to be heard on 12 August 2019.
- [12] On 13 June 2019 the defendants served a notice of intention to amend their plea in several respects. On 1 July 2019 the plaintiffs objected to the notice of intention to amend.
- [13] The relevant part of the notice of intention to amend relates to paragraph 1 of the plea. In terms of the proposed amendment paragraph 1 of the plea should be deleted and substituted with a comprehensive plea regarding the absence of authorisation. Paragraph 2 of the notice to amend reads as follows:

"The defendants deny that KIH has duly, lawfully and/or properly authorised and/or resolved to proceed with the action and seek the relief that it does. The plaintiffs are specifically put to the proof in these regards."

- [14] The substance of the remainder of the proposed amendment can be summarised as follows: It is alleged that the plaintiffs' attorneys of record do not have the authority to institute and prosecute the plaintiffs' action on behalf of KIH (the first plaintiff) as its board of directors was inquorate at the time the decision to prosecute this action, was taken. For this proposition, the defendants place reliance on a shareholders agreement concluded among some of the plaintiffs and both of the defendants, read with section 71(1) of the Companies Act, 2008.
- [15] The plaintiffs objected by contending that this part of the notice of intention to amend does not introduce a triable issue and/or will render the plea excipiable in that:
- (a) allegations in respect of the first plaintiff's attorneys' authority to institute legal proceedings must be, and have been, dealt with in accordance with Rule 7. On 29 August 2017, the Registrar issued a certificate in terms of Rule 7(4), which certificate has not been challenged by the defendants;
 - (b) in any event, according to the plaintiffs, it is now settled law that objections to authority must be dealt with separately from the main proceedings in terms of Rule 7.

DISCUSSION

[16] In deciding whether to grant or refuse an application for an amendment the Court exercises a discretion. As a matter of general principle, an amendment will be allowed whenever such an amendment facilitates the proper ventilation of the real issues between the parties. However, an amendment will normally not be granted if there will be real prejudice to the other party which cannot be cured by an order for costs or a postponement (*Trans Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (N)). An amendment which would render the pleading excipiable or where the purpose is to obtain a tactical advantage at a late stage, will also not be allowed (*Cross v Ferreira* 1950

(3) SA 443 (C) and *Middleton v Carr* 1949

(2) SA 374 (A) at 386).

[17] The defendants wish to dispute, by way of an amendment, that the institution and prosecution of this action was duly authorised. According to them the board of the KIH was not quorate at the time it took the decision to prosecute this action.

[18] Rule 7(1) provides as follows in this regard:

"Subject to the provisions of subrules

(2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the Court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the Court that he is authorised so to act, and to enable him to do so the Court may postpone the hearing of the action or application. "

[19] Rule 7(4) also refers to the Registrar. It provides as follows:

"Every power of attorney filed by an attorney shall be signed by or on behalf of the party giving it, and shall otherwise be duly executed according to law; provided that where a power of attorney is signed on behalf of the party giving it, proof of authority to sign on behalf of such party shall be produced to the Registrar who shall note that fact on the said power."

[20] In the matter of *ANG Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP) it was contended, inter alia, that resolutions purported to be taken by the municipal council of the respondent were not properly taken because the council was not properly constituted. After having considered the authorities in detail, Gorven J said the following with regard to the applicability

of Rule 7 (par 22):

"I have doubts as to the accuracy of the distinction drawn by the learned Judge in De Klerk's case ... In addition, it is the authority of 'anyone acting on behalf of a party', not just an attorney, which, absent a challenge, is presumed to be valid ... It seems to me, therefore, that the Legislature intended the authority of 'anyone' who claimed to be acting on behalf of another in initiating proceedings, and not only attorneys, to be dealt with under Rule 7(1), and not by way of the application papers ... ".

[21] Of specific relevance to the present matter is the following dictum in par 27 of the same judgment:

"Whether or not the litigation has been properly authorised by the artificial person named as the litigant should not be dealt with by means of evidence led in the application. If clarity is required, it should be obtained by means of Rule 7(1), since this is a procedure which safeguards the interests of both parties. It frees the applicant from having to produce proof of what may not be in issue, thus saving an inordinate waste of time and expense in 'the many resolutions, delegations and substitutions still attached to applications'."

[22] In *Janse van Rensburg v Obiang & Another*

[2019] ZAWCHC 53 BinnsWard J also considered the provisions of Rule 7(1). The learned Judge said the following in this regard:

"It has been held, rightly so in my respectful view, that the production of a power of attorney is ordinarily sufficient to answer a challenge in terms of Rule 7(1) to an attorney's authority to act .. . Implicit in such finding is that it behoves a party that alleges that the proffered power of attorney does not meet the challenge to timeously make its position clear. A failure to do so gives the impression that the representation of authority constituted by the power of attorney has been accepted. Challenging the attorney's represented authority only much later in the litigious process would be inimical to the efficient administration of justice at the furtherance of which the rules in general are directed. Challenges to authority of an attorney to represent a litigant, if they are to be raised at all, should be raised promptly at the earliest opportunity, and once raised, taken to a determination without delay. Indeed, that, no doubt, is why there is a tenday time limit in terms of Rule 7(1)."

[23] I align myself with the dicta referred to above. In addition thereto, it must be pointed out that the wording of Rule 7(1) makes it clear that the subrule applies to both action and application proceedings. Therefore, the approach and principles referred to above should apply to both action and application proceedings.

[24] In the present matter the attorney acting on behalf of the defendants already knew about the identity of the parties and that of the attorney acting on behalf of the plaintiffs as early as 21 June 2017 when the notice of intention to defend was signed. The notice in terms of Rule 7(1) was only served on 13 July 2017, outside the 10 day period referred to in Rule 7(1). If the defendants still wanted to proceed with their challenge, they should have applied for leave to do so "on good cause shown" as required by Rule 7(1). No such leave was sought.

This should, in my view, already have been the end of this issue.

[25] Thereafter and to avoid a waste of time and costs, the plaintiffs' attorney in any event filed powers of attorney in respect of both the first and second plaintiffs, as well as the underlying resolutions with the Registrar, as they were called upon to do. On 29 August 2017 the Registrar issued a certificate in terms of Rule 7(4) certifying that, inter alia, that he/she has perused the resolution by the board of directors, power of attorney and original copy of identification in case number 41516/2017 and that "authority to act in this matter has been conferred upon the practising attorney concerned". No objection was taken thereto and again, in my view, this should also have been the end of this

issue, as the production of a power of attorney is ordinarily sufficient to answer a challenge in terms of Rule 7(1) (*Gainsford & Others v Hiab* 2000 (3) SA 635 (W) at 640).

[26] It was only on 12 September 2017, when the defendants filed their plea, that this issue regarding authority was raised again. The notice of intention to amend their plea was only filed on 13 June 2019, about eighteen months later. This was done shortly before the matter was supposed to go on trial.

[27] Issues about the authority of an attorney, or whether the litigation has been properly authorised by an artificial person named as the applicant or the plaintiff, should not be left until the last stage in the proceedings. The procedure provided for in Rule 7(1) should be followed at the earliest opportunity, without delay. This will safeguard the interests of both parties by having the issue determined at an early stage, thus saving an inordinate waste of time and expense (*ANG Umvoti Council Caucus v Umvoti Municipality*, supra, par 27). This, in my view, will not only be fair to both parties, but also beneficial to the efficient administration of justice.

[28] The defendants failed to follow this procedure properly. As a matter of fact, the issue about authority was raised on 13 July 2017, but out of time. The plaintiffs objected, but the defendants failed to take the matter any further. No doubt, this would have given the impression that the issue was no longer alive. Therefore, objectively spoken, *cadit quaestio* the question, or issue, fell away. The same happened when powers of attorney were filed with the Registrar and when he issued a certificate in terms of rule 7(4). Nothing happened thereafter. Again, *cadit quaestio*. The belated attempt to call this issue back into life and to raise it again in a plea would, under these circumstances, amount to a circumvention of the provisions of rule 7(1) and a defeat of the purpose thereof. It will allow a party to obtain a tactical advantage at a late stage. Such conduct will not be beneficial to the efficient administration of justice. Taking into account these considerations, the facts of this matter and the timing of the proposed amendment, I was of the view that it should not be allowed.

[29] For these reasons I decided to exercise my discretion against the defendants by not allowing the amendment and by ordering them to pay the costs of the application.

D S FOURIE

JUDGE OF THE HIGH COURT

PRETORIA

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