

SOUTH AFRICA / JUDGMENT

Government Employee Pension Fund v Gijima Holdings Pty Ltd (7435/2021) [2025] ZAGPPHC 112 (31 January 2025) [2025] ZAGPPHC 112

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

7435/2021

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`IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 7435/2021

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

DATE:

31/01/2025

SIGNATURE

N V KHUMALO J

In

the matter between:

THE
GOVERNMENT EMPLOYEE PENSION FUND
APPLICANT
and
GIJIMA
HOLDINGS PTY LTD
RESPONDENT

This
judgment was handed down electronically by circulation to the
parties' representatives by email. The date and time of
hand-down is deemed to be 31 January 2025
Authority
to act/institute legal proceedings granted by an agent exercising a
delegated authority –Delegated authority –what
constitute
proof thereof- Is it necessary that the delegation of authority
be confirmed by the principal.

JUDGMENT

Khumalo N V J

Introduction

- [1] This is an Application in terms of Rule 7 (1) of the Uniform Rules of Court, for an order declaring that Diale Mogale Attorneys, the attorneys acting on behalf of the Government Employees Pension Fund, the plaintiff in the main action instituted against Gijima Holdings, the Respondent/ Defendant in the main action, so authorised to do so.

Parties

- [2] The Government Employees Pension Fund ("GEPF"), cited as the Applicant herein is a juristic entity governed by the Government Employees Pension Law, 1996 (Proclamation 1 of 1996), as amended ("The GEP Law"). It is an independent pension fund that manages pensions and related benefits on behalf of qualifying government employees, and a separate juristic person from the Government. The Respondent, Gijima Holdings is a private limited company incorporated and registered in accordance with the Company Laws of South Africa.

Background

facts

- [3] The Applicant is the owner of two office buildings, namely Venus and Neptune situated in Kosmosdal, Centurion which buildings were rented out to the Respondent ("the leased properties") in terms of a lease agreement concluded and signed by the Respondent and

Mowana Properties (Pty) Ltd (“Mowana”), a property management company acting on behalf of the Applicant. The arrear rental owed by the Respondent on the properties form the subject matter of the main action instituted on behalf of the Applicant by Diale Mokgale Attorneys (“DMA”) on instructions by Mowana.

[4] The Respondent challenges DMA’s authority to act on behalf of the Applicant and in so doing had filed a Notice in terms of Rule 7

(1) demanding that DMA file the necessary documents that establishes its authority.

[5] Rule 7 (1) provides that:

“(1) 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.” (emphasis added)”

[6] In response to the Respondent’s Rule 7(1) Notice, DMA filed an affidavit deposed to by the managing director of Mowana, one Samuel Ramuhashi (“Ramuhashi”) (“Authority Affidavit”) stating that he was authorised by Mowana to depose to the Authority Affidavit on behalf of the Applicant and to confirm DMA’s authority to act on behalf of the Applicant and institute the action. A resolution by Mowana authorising Ramuhashi to depose to the Authority Affidavit, and the appointment of DMA to act on behalf of the Applicant and issue the Summons was filed with the Authority Affidavit. Also attached was a confirmatory affidavit by Mr Mpumelelo Madi, an asset manager at the Pensions Investment Corporation SOC Limited (“PIC”). Mr Madi confirmed the appointment of DMA to the panel of attorneys by the PIC and Mowana, and attaching the

appointment letter from both the PIC and Mowana.

[7] PIC is an asset management firm wholly owned by the government of South Africa, and established on 1 April 2005 in accordance with the Public Investment Corporation Act, 2004 (Act no 23 of 2004). It is common cause that the PIC is an investment manager of the Applicant’s property portfolio duly appointed as such by the Applicant, pursuant to its functions as an asset management firm. It therefore has the authority to represent and act as the Applicant’s agent, managing the Applicant’s property portfolio. A fact so highlighted in the Authority Affidavit. In that instance PIC’s actions in relation to the Applicant’s property folio, are binding to the Applicant.

[8] Ramuhashi explained in his affidavit that the Applicant wholly outsourced its investment and related activities in relation to the leased properties to the PIC. As the Applicant’s investment manager, the PIC is authorized to act as an agent in the management of the Applicant’s property portfolio, and as such employ attorneys to act on Applicant’s behalf, whilst also vested with the power to delegate that function. He also attached a copy of the

delegation of authority by the Applicant. The PIC had in line with that delegation of authority outsourced the whole of its property management function to Mowana in terms of a property management agreement (PMA) it concluded with Mowana on 11 March 2016. A copy of the extracted relevant parts of the PMA was attached to the particulars of claim as Annexure "C." The appointment was to be effective from 1 December 2015. In terms of the PMA Mowana is authorised to represent the Applicant in all matters related to the immovable properties owned by the Applicant including the two buildings rented by the Respondent. Hence its conclusion and signing of the lease agreement on behalf of the Applicant.

- [9] The PMA is further alleged to authorise Mowana "to take steps in respect of the rental enterprise, in the name of the Applicant in any court of law and to amongst other things, institute or defend any action or other proceedings, sign any documentation including affidavits and power of attorney to give effect to the foregoing." Whilst the attached delegation of authority edified on the appointment of external attorneys and legal Counsel.
- [10] A resolution passed and signed by Mowana directors, authorised Ramahushi (its managing director) to depose to the Authority Affidavit and the appointment of DMA to act on behalf of the Applicant and in so doing institute summons against the Respondent for the arrear rental owed in terms of the lease agreement. DMA was appointed on 21 August 2020 in terms of the delegated authority after recommendation by Beneke, Mowana's legal and compliance manager, followed by the regional asset manager's approval and confirmation by the PIC's asset manager on 17 August 2020. A confirmatory affidavit to those facts is also deposed to by Mr P J De Beer, a director at DMA.
- [11] Accordingly, the Applicant argued that DMA was as a result legally instructed by Mowana to represent the

Applicant/Plaintiff in all capacities, which was in accordance with Mowana's resolution. DMA is also alleged to have acted on behalf of and represented the Applicant in a host of other litigations since March 2019. On that basis it was submitted on behalf of Applicant that DMA's authority to act on behalf of the Applicant proven.

- [12] The Respondent rejected the Authority Affidavit, which resulted in the Applicant launching the Rule 7 Application, for the court to declare that DMA duly authorised to act on behalf of the Applicant. Ramuhashi deposed to the Founding Affidavit and Mr Yagashen Pillay, a director from DMA filed a confirmatory affidavit
- [13] Ramuhashi again highlighted the fact that the PIC had in terms of the PMA outsourced the whole of its property management function in relation to the Applicant's property portfolio to Mowana. Moreover, that the agreement authorises Mowana to represent the Applicant in all matters relating to immovable property owned by the Applicant, to take any steps in relation to the rental enterprise in the name of the Applicant in any court of law, sign any documents or affidavits to give effect to the action. He also referred to the delegation of authority matrix that covers the appointment of attorneys and sets out the function of

approving the selection, extracts thereof which were attached to the Authority affidavit.

[14] The Acting Executive Head: Property and Chief Operations Officer (COO) of the PIC, Mr Vuyani Wellington Hako (“Hako”) deposed to a confirmatory affidavit in support of the application, in which he confirms that the Applicant outsourced its investment and related activities to the PIC. Further that the PIC acts as the Applicant’s agent, and the Applicant is indeed bound by the PIC’s actions.

[15] Subsequent to the Applicant’s Rule 7 (1) Application, the Respondent served a Rule 35 (12) notice demanding that the Applicant make available for inspection the agreement signed by the Applicant appointing the PIC as its investment manager, notwithstanding that this was not in dispute. The Applicant refused to discover the document on the basis that it is not only confidential and commercially sensitive but also irrelevant for the purposes of compliance with Rule 7 (1) Notice as the relevant parts were extracted and filed. The Applicant however tendered the document to the court on the basis that it was highly sensitive. The Respondent also asked for a copy of the PMA between the PIC and Mowana.

[16] In opposing the Application the Respondent’s attorney, Mr Kahn deposed to the answering affidavit, disputing the authority of DM and of Mowana on the following grounds:

[16.1] That even though the Applicant is reflected to be a party to the Application purportedly represented by Mowana there is seemingly no document or affidavit attached to the Application that emanates from or is deposed to by an officer or representative of the Applicant that confirms that representation. The Respondent therefore argued that it is possible that the Applicant is not even aware of the Application.

[16.2] Ramahushi’s assertion that he has the relevant authority to represent the Applicant is disputed since nothing in the Application proves that he has such authority or anything that empowers Mowana so to act and more particularly to involve the Applicant in litigation in respect of the action, there being no such confirmation by the Applicant. The Applicant had dealt with the matter superficially from prior the institution of the main action and in the information made available in its Founding Affidavit.

[16.3] On the information deposed to in the Founding Affidavit and in the Authority Affidavit, it cannot be fairly or properly concluded that DMA is mandated to act on behalf of the Applicant in the action. Either the Applicant or DMA has to demonstrate or prove to the court that DMA has a valid mandate, or that Mr Ramuhashi is authorised to depose to the Authority Affidavit, since should it be found that DMA, as the purported agent, is not validly instructed, the Applicant has a right to assert that it is not bound by any of the purported agent’s actions or failure to take action.

[16.4] Furthermore, regarding its historical challenge of DMA's authority prior and post the institution of the action, and DMA's continued failure since then to establish such authority despite Mr Kahn's threats to from then onwards address further communications to Mowana, whilst continuing to exchange correspondence and interact with DMA post the institution of the action, it disputes that the onwards interaction was a confirmation or acceptance of DM's authority to act on behalf of the Applicant.

[16.5] If the court could not find that Mowana is in fact a sub-agent, properly mandated to act on behalf of the Applicant in this action then Ramahushi the deponent to the Founding Affidavit is not validly authorised to depose to the Founding Affidavit on behalf of the Applicant and therefore this Application not validly before court. Also most of the facts are not within the personal knowledge of Ramahushi and therefore cannot be to the best of his belief both true and correct.

[16.6] It is disputed that the resolution passed by Mowana directors is a valid resolution passed in a lawfully convened meeting as according to the CIPC report the Applicant has 6 directors whilst the resolution refers to 3 directors. It does not specify which of the 6 directors were factually present or present by proxy when the resolution was taken, if the meeting was quorate, timeous and a proper notice of the meeting issued. Further, even if the resolution was valid, it does not authorise Ramahushi to act on behalf of the Applicant but of Mowani, who ex facie the Founding Affidavit has no relationship with the Applicant. His deposing to the supporting affidavit on behalf of the Applicant and so bind the Applicant is therefore challenged. The resolution is further said to have no indication that the Applicant is aware of the action taken on its behalf. The presentation of the document as a valid resolution alleged to be an inadequate response to the challenge to DMA's authority. For that reason, the allegation that either the Applicant or Ramahushi has filed a document that constitutes or purports to constitute an enabling resolution pursuant to which DMA is authorised to act on behalf of the Applicant disputed.

[16.7] Moreover the Respondent disputes the delegation of authority attached to the Authority Affidavit on the basis that it fails to identify which of the many items referred thereto is of application against the Respondent's challenge of DMA's authority and why. The Respondent also justifies the request for and interrogation of copies of the documents/ agreements/resolutions referred to on the basis that it needs to be established if housekeeping arrangements and internal compliance requirements have been satisfied, specially of a party that is an organisation that is as vast as the Applicant and PIC. It denies that its act of serving the Rule 35 (12) on DMA has any significance to whether or not it accepts DMA's authority to act on behalf of the Applicant.

[16.8] Finally that, even though the Application is purported to be brought by the Applicant, DMA was in actual fact supposed to have brought the Application as it is the one required to prove that it is authorised to act on behalf of the Applicant. The Rule does not require that Applicant prove that DMA properly mandated to act on its behalf. As a result, the Respondent prays for a dismissal of the Application and a cost order against the Applicant, DMA and Mowana jointly and severally, the one paying the other to be resolved.

[17] In a lengthy reply, Ramahushi criticised the Respondent's opposition to the Application, seemingly also addressing its Rule 35

(12) contending that:

[17.1] the Respondent seeks disclosure of information in the PMA relating to the PIC's appointment of Mowana as a sub agent in the management of the leased property, which information is irrelevant and confidential as indicated in reply to Respondent's Rule 7 Notice. The agreement is commercially sensitive and there has been sufficient disclosure of what is relevant for the purpose of Rule 7. The reasons offered for Respondent's objections to DM's authority to act are contrived and such objection being an abuse of court process, designed solely to delay.

[17.2] Mr Kahn's probing of the validity of occurrences prior the Application in disputing DMA's authority is questionable, which brings doubt if the Respondent has indeed acquiesced to the opposition of the Application or Kahn on a fishing expedition or a frolic of his own. He has not specified why the court should not be satisfied with the documents already presented to it. The opposition to the Application is an abuse of the court process and Mr Kahn's approach inconsistent with the requirements provided by subrule 7, that the court must be satisfied that the authority existed at the time when proof of such authority is required. The risk being minimal that an attorney will act without authority, with the court honouring that approach that would lead to the elimination of many pages of resolutions, delegations and substitutions still attached to Applications.[1]

[17.3] He points out that Kahn seems not to accept the confirmation by the Acting Executive Head and COO of PIC Mr Hako, that the PIC's actions as the Applicant's agent are binding on the Applicant. Further that the Applicant has outsourced its investment and related activities to PIC whilst PIC has outsourced the whole of its property management function to Mowana in terms of the PMA. The agreement in turn authorises Mowana to represent the Applicant in all matters that relate to the immovable properties owned by the Applicant, to take any action /steps in respect of the rental enterprise, institute and defend any action and sign any documents including affidavits and powers of attorney to give effect to the mandate.

[18] Kahn is said to be oblivious to the fact that Ramahishu has set out on the delegation of authority, the relevant clauses of the delegation matrix and the relevant parties involved in the process, for which he was criticised by Kahn for attaching without explaining how it was to be interpreted and referred to, hence to be of no benefit or value. This was also confirmed under oath by the PIC's COO which the Respondent fails to address. In terms thereof "The PIC grants Mowana the signing authorities as reflected in this documentation in respect of the PIC portfolio which is currently managed by Mowana. He refers to the criticism as also highly confusing. The criticism against the delegation of authority that it does not advance the Applicant's case, he regards the criticism to be contrived and to make the purpose of Rule 7 not to make proof of authority cumbersome, impractical.

- [19] In response to Kahn's contention that it is possible that the Applicant is not aware of the proceedings instituted on its behalf, the Applicants points out that there is no reason for Kahn to believe that an application of this magnitude would have been launched unauthorised, since Kahn also served all processes and correspondence in these proceedings directly on the Applicant. A copy of a letter dated 3 May 2021 from Applicant's Principal Executive Officer is furthermore attached. It reads "the GEPF has instructed the PIC and or its managing agent, being Mowana properties to appoint attorneys to act on behalf of GEPF in taking the necessary legal steps to recover and collect arrear rental due by Gijima Holdings Pty Ltd in respect of it leasing and occupying space in immovable property belonging to the GEPF." The Respondent had also addressed all formal correspondence intended for the Applicant to the PIC, Mowana and DMA attorneys whilst taking an exception to the particulars of claim.
- [20] The Applicant points out that the Respondent accepts that the PIC is the Plaintiff's agent and that its CEO being the authorised representative has confirmed under oath that DMA and Mowana are authorised to act on behalf of the Applicant. However regards Kahn's reliance on the PGM Mines matter[2] to be misplaced and argue that the decision clearly wrong. Kahn had also failed to demonstrate the source of his alleged bona fide belief that DMA is not properly authorised to act on behalf of the Applicant.
- [21] Accordingly Kahn also in the letter dated 11 March 2021 accepted Mowana's authority by threatening to stop any further communication with DMA and to hence forth liaise with the Applicant at c/o Mowana, but now argue that this court cannot find that Mowana was a sub agent of the Applicant, which is an entirely different challenge to the one that was raised when the litigation was instituted.
- [22] On the question of the directors, the Applicant points out that Mr D Orapeleng Mosito is not a company director at Mowana but its company secretary as confirmed in the Affidavit he deposed to. Also that Ms Kholiwe Fana was appointed as director by the Board of Directors on 9 April 2021 and the formal notice only lodged on 21 April 2021. A resolution to authorise the action and appointment of DM was prepared by the Company Secretary and did not include Ms Fana as at the time the notice of amendment of directors was not yet lodged with the CIPC. As an act of caution a copy of another resolution signed on 14 February 2022, that includes Fana ratifying the resolution taken on 9 April 2021 was signed and attached. Ms Reitumetsi Michelle Molobi resigned as director on 19 May 2020 as reflected in the CPIC search report. He argues that the purpose of the Rule is not to establish the validity of the resolution as contended by Kahn unless if he can demonstrate the resolution's invalidity whereupon an investigation will eventuate.

- [23] On the argument that Ramahushi not authorised to depose to the Authority Affidavit in Reply to the Rule 7 Notice on behalf of the Applicant, he points out that the resolution specifically appoints him as the managing director of Mowana to depose to the Affidavit and appoints DMA to act on behalf of the Applicant. The error relating to the leasing manager has been confirmed by the COO of the PIC.
- [24] Finally on Kahn's demand of proof of the validity of the agreements entered into between the Applicant, PIC and Mowana, the Respondent argues that Kahn makes the demand without tendering proof for his perception that the agreements might be invalid. Similarly that Kahn's Rule 35 (12) request of the PMA a fishing expedition as he has been provided with an extract of the relevant provisions in the agreement that expressly set out the appointment and authority of Mowana, certified by Mowana's company secretary and confirmed under oath. The rest was not provided on the basis of commercial sensitivity and irrelevancy for the purpose of subrule 7 (1) proceedings. The information concerns inter alia, pricing, fee structure between agents, lists of clients, details of clients's respective rentals and properties, security sensitive information on occupancy by individual tenants like SARS, banks, certain Government Departments and details of respective residential leases and tenants. It reckons, since Kahn's firm describes itself as a deal maker and adviser, specifically in looking for and negotiating terms with landlords on behalf of the Respondent, it is not possible to prevent the firm from using the knowledge acquired from the PMA in the course of their advisory and deal making services.
- [25] The Applicant argued that the Respondent's opposition consists of abuse of the court processes and therefore costs for two Counsels should be granted against the Respondent on an attorney and client scale.

Issue to be determined.

- [26] The principal issue to be determined is whether there has been satisfactory proof that DMA duly authorized to act on behalf of the Applicant, the former's actions binding to the latter.
- [27] The secondary issue to be decided is whether the Respondent has made a case to compel the Applicant to produce documents listed in the Rule 35 (12) Notice for the purpose of establishing the validity thereof, to confirm the authority as per Rule 7 (1).

Legal framework

On Satisfactory proof of authority

- [28] It is trite that the remedy of a party to legal proceedings who wishes to challenge the authority of a person allegedly acting on behalf of his purported opponent is as provided in subrule 7(1) of the Uniform Rules of Court.[3]

[29] In terms of the subrule the authority of anyone acting on behalf of a party in legal proceedings may be disputed, whereafter, such a person may no longer act unless he satisfies the court that he is so authorized. It is therefore a key requirement that the person satisfies the court that he is so authorized to act, which can be done by bringing the Application in terms of subrule 7

(1) or by filing a power of attorney and or any documentation that will satisfactorily prove such authority to the court. The authority being crucial as it establishes whether a party in legal proceedings is properly before court.

[30] It is also important to note that in motion proceedings a challenge to the general authority is separate to the authority to depose to an Affidavit on behalf of a party, and subrule 7(1) a remedy to a party who wishes to challenge the general authority of a person who is acting allegedly on behalf of a purported Applicant. This was duly emphasized in Ganes,[4] and quoting from the judgment's headnote[5] that:

"In determining the question whether a person has been authorised to institute and prosecute motion proceedings, it is irrelevant

whether such person was authorised to depose to the founding affidavit. 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 that must be authorised. Thus, where, as in the present case, the motion proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the applicant and in an affidavit filed with the notice of motion, it was stated by the deponent thereto that he was a director in the firm of attorneys acting on behalf of the applicant and that such firm of attorneys was duly appointed to represent the applicant and such statement is not challenged by the respondent, it must be accepted that the institution of the proceedings was duly authorised. Such a finding will be strengthened if the respondent does not avail himself of the procedure provided by Rule 7 of the Uniform Rules of Court. (Paragraph [19] at 624G/H - 625A.)"

[31] It is noted that the confirmation of such authority not necessarily corroborated by the Applicant but however found to be sufficient under the said circumstances. Fleming DJP in Eskom[6] explained the application of the subrule as follows:

"the developed view adopted in Rule 7 (1) is that the risk is adequately managed at a different level. If the attorney is authorized to bring the Application on behalf of the Applicant, the application necessarily is that of the Applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorized. It is therefore sufficient to know whether or not the attorney acts with authority."[7] (my emphasis)

[32] In *Unlawful Occupiers Unlawful Occupiers, School Site v City of Johannesburg*[8] one of the arguments raised by the Appellant was the alleged failure by the Respondent to prove that the deponent to an affidavit was duly authorized to launch the Application on its behalf.

According to the Municipality's resolution the deponent was authorized to do so in consultation with the Municipality's Executive Director: Corporate Services or Director of Legal Services. The deponent in reply attached a resolution of the Municipality stating that he has consulted with the Executive in question in respect of the Application. The appellants raised the argument that the deponent had failed to prove that he had been duly authorised, because he did not say whether or not the Director of Legal Services agreed with him that the application should be brought. In that case Brand AJ opined that:

"The issue raised had been decided conclusively in the judgment of Flemming DJP in Eskom v Soweto City Council 1992

- (2) SA 703 (W), which was referred to with approval by this court in *Ganes and another v Telecom Namibia Ltd* 2004
- (3) SA 615 (SCA) 624I-625A. The import of the judgment in *Eskom* is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant, is provided for in rule 7(1). The ratio decidendi appears from the following dicta (at 705D-H): 'The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. ...The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant.

There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority,

should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority. As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7 (1) .”And (at 706B-D):

“ now that the new Rule 7(1) remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, i.e. by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That

question can, in my view, be answered only in the negative.” (my emphasis)

[33] Rule 7 (1) provides a procedure to be followed by a party who wishes to challenge the authority of anyone who instituted or defended any legal proceedings on behalf of a client if he was properly or duly instructed by a person authorised to do so. The instruction does not have to have been issued directly by the Applicant per se to the attorney but by a person who could validly issue such an instruction and by which the Applicant is to be validly bound. The origin of the instruction therefore being under scrutiny. If by an agent the court should be satisfied that such agent duly authorised to institute the proceedings on behalf of the Applicant. Hence it has been held that no distinction is to be drawn under the subrule between an attorney’s mandate to institute legal proceedings and an authority given to an agent by an artificial person to institute legal proceedings and an attorney appointed in those circumstances to act on behalf of the A (whereupon the agent’s mandate to the attorney would be binding on the artificial person). Hence reference is made to resolutions, delegations of authority and substitutions[9].

[34] The subrule is consequently to be applied if the authority of anyone acting on behalf of a party is challenged. It therefore in effect does not limit the challenge to only the authority of the attorney to act. The wording of the rule also contemplates a challenge to the general authority by one person to another to represent him in action or motion proceedings.[10] Contrary to what was found in the Wilge Hervormde Gemeente case[11], that the type of authority that is contemplated by the rule is not a general authority by one person to another to represent him in legal proceedings.

[35] In Erasmus Superior Court Practice[12] reference is made to a decision in the Western Cape, Cape Division (WCC) and of another in the Limpopo Division, Polokwane[13] where it was held that no distinction is to be drawn under this subrule between an attorney’s mandate to institute legal

proceedings and an authorisation given to an agent by an artificial person to institute legal proceedings. Accordingly, both authorities

can be challenged under subrule 7 (1).

[36] In Lancaster 101 supra reference is made to South African Allied Workers Union v De Klerk NO 1990

(3) SA 425, when Jansen J referred to Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957

(2) SA 347 (C) at 351 D-H, citing Justice Watermeyer’s following statement:

“I proceed now to consider the case of an artificial person, like a company or co-operative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before Court to show that the applicant has duly authorised the institution of notice of motion proceedings. (see for example Royal Worcester Corset Co. v Kesler’s Stores, 1927 C.P.D. 143; Langeberg Ko-operasie Beperk v Folscher and Another, 1950

- (2) S.A. 618 (C)). Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolution in the manner provided by its constitution. An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the company had resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport to be brought in its name have in fact been authorised by it. There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so (see for example *Lurie Brothers Ltd v Archache*, 1927 N.P.D 139, and the other cases mentioned in *Herbstein and van Winsen*, *Civil Practice of the Superior Courts in South Africa*, at pp. 37, 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. (“own emphasis”)
- [44] Given the above, I am not persuaded by Lancaster 101’s argument that a distinction is to be drawn between an attorney’s mandate to act, and an authorisation given to an agent that he or she is so authorised by the artificial person, to so act, in this case, to institute legal proceedings.
- [37] In case of an artificial person, verifiable information on the origin of the agent’s mandate to establish its authenticity is therefore crucial. The inquiry being whether satisfactory evidence has been placed before the Court to show that the Applicant has duly authorised the institution of the legal proceedings, which is what I find the challenge in casu to be all about. Can the agent’s authority be traced back to the Applicant thus a conclusion be made that the agent was so
- authorised to institute the legal proceedings on behalf of the Applicant.
- [38] The Respondent’s challenge on the authority of Mowana and DMA’s is from that perspective. The Respondent in actual fact disputes Mowana’s (referred to as a sub agent of the Respondent) representation of the Applicant as an agent to institute the proceedings against it on behalf of the Applicant, in that regard disagreeing that DMA duly mandated to institute the legal proceedings on behalf of Applicant. It then argued that there is nothing or no sufficient proof that Mowana’s authority originates from the Applicant or that Applicant agrees to the authority of DMA. In furtherance of that point the Respondent further stated that it is not for the agent to proclaim that he or she is authorized but for proof to be produced from the Applicant confirming the agent’s authority. Such proclamation was indicated to be sufficient in *Unlawful Occupiers*, if Rule 7 (1) is not invoked.

[39] On the information and documentation submitted by the Applicant, the Respondent went further to allege that as far as it is concerned the Applicant might not even be aware of the Application and therefore it disputes that Ramahushi who has deposed to the Authority Affidavit was duly authorised to do so by the Applicant. In that regard the Respondent cast its net so far with the hope of catching something. The objection wider than when it was initially

brought up in its Rule 7 (1) Notice. These are two more issues that Respondent added which can be summarily disposed that do not have to affect the merits of the case.

[40] Regarding Respondent's contention against Ramahushi's authority to depose to the Affidavit, it is irrelevant whether or not Ramahushi is authorised by the Applicant to depose to the Affidavit as upheld in Ganes and Eskom. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit on the facts relating to the issue between the parties. It is the institution of the proceedings and the prosecution thereof that must be authorised.[14]

[41] Nevertheless, Ramahushi, as a managing director of Mowana was duly authorised by resolution of Mowana, to act in its representative capacity as the alleged agent of the Applicant, to attest to Mowana's authority as delegated to it by the PIC, the Applicant's primary agent, to represent the Applicant in the management of the Applicant's property portfolio. In that case authorised to perform the legal acts relating to the property on behalf of the Applicant. Furthermore, he was to confirm Mowana's resolution taken in exercising its delegated authority, to instruct DMA to institute the related legal proceedings on behalf of the Applicant. That was the relevancy of Ramahushi's Affidavit, to depose to the facts or evidence that prove that the institution of the proceedings in line with its authority as delegated to it by the PIC. In addition, to attest to the fact that PIC duly authorised to delegate its authority to represent the Applicant as granted to it by the Applicant. The relevant documents were submitted to prove the authenticity of the mandate. It is not expected that DMA would have been aware of these facts and unfair to have expected it to deliberate extensively on its appointment. The point on the authority to depose to the affidavit was however not persisted with in the heads of argument therefore regarded to be of no consequence to the dominant issue of authority.

[42] The contention that there is nothing that indicates that DMA's mandate originates from the Applicant in that there is no document or affidavit deposed to by an officer or representative of the Applicant that confirms or proves that Applicant agrees to the authority of DMA, a situation the Respondent alleges raises a suspicion that the Applicant probably not aware of the Application, is unsustainable. The Respondent is being pretentious alleging to suspect that Applicant might not be aware of the Application as such allegation is made notwithstanding that its attorney served the documents on the Applicant and the correspondence in relation thereto on the Applicant. Mr Kahn continued advertently to serve further interlocutory notices, including an exception and a Rule 35 (12) on the Applicant, DMA and Mowana, after having challenged DMA's authority. It is important that

the challenge to authority be in good faith.

[43] As to the contention on the absence of a document or affidavit emanating from the Applicant's officials confirming or agreeing to Mowana's and DMA's authority to act on its behalf, the requirement according to subrule 7

(1) is that the person whose authority is challenged has to satisfy the court that he is so authorized at the time when the objection is raised. The Respondent initially challenged only DMA's authority, DMA expectant then to satisfy the court of its authority. However, the Respondent then amplified its challenge in its answering affidavit to include Mowana, and questioning the terms of the PMA. It also, due to absence of any direct authorization from the Applicant, questioned the PIC's authority to represent the Applicant and to delegate such authority. In so doing it effectively was disputing if Mowana was validly vested with any authority to act on behalf of the Applicant in instituting the action against the Respondent.

[44] I find it difficult to understand the Respondent's contention on the authority of the PIC and its power to delegate such authority when it has agreed that 'the PIC is an investment manager of the Applicant's property portfolio duly appointed as such by

the Applicant, pursuant to its functions as an asset management firm, vested with the authority to represent and act as the Applicant's

agent, in the management of the Applicant's property portfolio. Besides, the confirmatory affidavit of the PIC's COO, Mr Heko confirms PIC's authority to involve the Applicant in litigation with power to delegate such authority, which authority he confirms to have been delegated by the PIC to Mowana. These facts have not been disputed. Further that the PIC outsourced the whole of its property management function in relation to the Applicant's property portfolio to Mowana in terms of the PMA, and also that Mowana is in terms of the PMA authorised to represent the Applicant in all matters relating to the immovable property owned by the Applicant including the two properties, to take any legal steps necessary in relation to the rental enterprise in the name of the Applicant in any court of law, sign any documents or affidavits to give effect to the action. The relevant extracts of the contract that refers to PIC's power to delegate its authority in the management of the Applicant's property folio disclosed, together with the delegation of authority matrix on the appointment of attorneys that sets out the function of approving the selection.

[45] Mowana has in turn by resolution taken by its directors in the exercise of the authority delegated to it by the PIC, explicitly authorised DMA so to act in the matter and institute the action and Ramahushi to depose to any affidavit necessary. The resolution was taken by the directors in office at the time, as confirmed by Ramahushi that Mowani had only three directors at the time when the resolution was signed.

[46] Furthermore, it is further clear that, even if the authority was not in place when the litigation commenced, actions taken can be ratified subsequently.

Where authority is challenged in the answering affidavit, it is permissible to make out a case in reply. This was fully dealt with in *Smith v KwaNonqubela Town Council*. [15] The Applicant, as a party is entitled to do in reply, responded to the issues raised in the answering affidavit regarding the absence of a document or communication from the Applicant confirming the authority, by attaching a letter dated 3 May 2021 from the Applicant's Principal Executive Officer. The letter confirms the PIC's authority to represent the Applicant. It reads "the GEPPF has instructed the PIC and or its managing agent, being Mowana properties to appoint attorneys to act on behalf of GEPPF in taking the necessary legal steps to recover and collect arrear rental due by Gijima Holdings Pty Ltd in respect of its leasing and occupying space in immovable property belonging to the GEPPF."

- [47] The evidence and the documents submitted should then be sufficient to prove the authority matrix applicable. It can be accepted that finally the representative authority of Mowana and DMA's mandate to institute the proceedings on behalf of the Applicants is confirmed. Moreover, since the factual allegations on such authority are not only confirmed under oath by Hako the COO of PIC and Ramahushi, Mowana's managing director, but also by Mr Pillay, a director at DMA, and the pertinent official from the Applicant, plus the material extracts from the agreement attached. I am satisfied that there is satisfactory evidence that Mowana duly authorized to represent the Applicant and in that regard to have on Applicant's behalf properly and duly mandated DMA to institute the action on behalf of the Applicant
- [48] The persistence to demand the discovery of the PMA and the agreement between PIC and Applicant for the purpose of finding out if the dispute on authority can be sustained is unreasonable and cannot be permissible in these proceedings. It is a fishing expedition since the relevant extracts therefrom were submitted and do suffice, considering the reasons proffered for not furnishing the whole agreement. More so especially since there is no genuine contention on PIC's authority to act and bind the Applicant. The evidence placed before the Court show and confirm the Applicant's resolve that the legal proceedings pertaining to the management of its property folio as outsourced to the PIC be instituted at its instance.
- [49] In any event, Rule 7 (1) provides a procedure to be followed by a party who wishes to challenge the authority of anyone who instituted or defended any legal proceedings on behalf of a client if he was properly or duly instructed by a person authorised to do so. It is the instruction that is under scrutiny if it emanated from a person who could validly issue such an instruction on behalf of the Applicant and by which the Applicant is to be legally bound. The evidence does show that the Applicant has duly resolved to institute the proceedings and that the agents were duly authorized to institute the proceedings at its instance.

[50] In casu, replying to the Respondent's query on DMA's authority, as DMA would not be aware if the Applicant had indeed resolved to institute the proceedings, Ramahushi's Affidavit was filed in his capacity as the managing director of Mowana, the management agent representing the Applicant, to place evidence before the court or attest to the fact that PIC's authority to institute legal proceedings in the management of the Applicant's property portfolio had been delegated to Mowana. Further that as the

Applicant's sub agent it had by resolution authorised DMA's appointment to act on behalf of the Applicant and institute the action and Ramahushi' to depose to the Authority Affidavit. In the Affidavits Ramahushi explained that as a property management agent Mowana had concluded a PMA agreement with the PIC in terms of which PIC delegated to Mowana the authority to represent and manage the Applicant's property folio, which delegation included the authority to appoint attorneys to litigate on behalf of the Applicant. The Affidavit also made reference to the relevant clauses, detailing the delegation matrix-. The most important fact being the binding effect of PIC actions on the Applicant and the authority to delegate.

[51] The pointless insistence to access to the PMA so as to verify PIC's authority to delegate the power to instruct the attorneys on behalf of the Applicants, when the Respondent has accepted that the PIC is an agent of the Applicant with vested authority to appoint attorneys and that the PIC's actions binding on the Applicant was absurd. More so because the Respondent has been furnished with extracts of the relevant clauses in the PMA. It has failed to proffer a meaningful challenge to the PIC's authority to delegate its mandate. Finally, on Kahn's demand of proof of the validity of the agreements entered into between the Applicant, PIC and Mowana, the Respondent had correctly argued that Kahn makes the demand without tendering proof for his perception that the agreements might be invalid. Equally Kahn's Rule 35 (12) request of the PMA indeed a fishing expedition as the extract of the relevant provisions in the agreement expressly set out the appointment and authority of Mowana. The document is certified by Mowana's company secretary and confirmed under oath. As per Gainsford NNO v Hiab AB 2000

(3) SA 635 (W), the subrule does not prescribe the method of establishing authority where such authority is challenged. No obligation is placed on the court to investigate the validity of past acts in the context of the authority to act:

Rule 35 (12)

[52] In relation to Rule 35 (12), the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of a purported applicant is as provided in rule 7(1) – party not entitled to production of documents to challenge authority in the affidavits in the main application. The court will not make an order under Rule 35 (12) against a party to produce documents that cannot be produced, or are privileged or irrelevant but importantly that are required for a mere fishing expedition.[16]

Costs

[53] The attorney and client cost order cannot be considered as the Applicant was supposed to make its case for such costs in the Founding Affidavit to give the Respondent an opportunity to respond. It instead endeavoured to make a case for such costs in the replying affidavit.

[54] Under the circumstances the following order is made:

1. The Application is granted with costs, the costs to include the costs those attendant upon by the employment of two Counsels;
2. Diale Mogashoa Attorneys are authorised to act on behalf of the Government Employees Pension Fund (GEPF”);

N V Khumalo

Judge of the High Court

Gauteng Division, Pretoria

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G967

[1] Reference to Eskom

[2] PMG Mining (Pty) Ltd and Another v J D Chen and Others, unreported decision of Satchwell J in the Johannesburg Local Division Case no: 2016/19065X

[3] See para 5 Supra

[4] Ganes and Another v Telecom Namibia Ltd 2004

(3) SA 615 (SCA)

[5] Also from para 19 of the Judgment

[6] Eskom v Soweto City Council 1992(2) SA 703

[7] At 705 D-H

[8] Unlawful Occupiers, School Site v City of Johannesburg 2 005

(4) SA 199 (SCA) at 207E-H

[9] Eskom supra

[10] Eskom v Soweto City Council Eskom[10] 1992

(2) SA 703 (W) and in Unlawful Occupiers, School Site v City of Johannesburg 2 005

(4) SA 199 (SCA) at 207E-H

- [11] Wilge Hervormde Gemeente and Others v Nederduitsch Hervormde Kerk Van Afrika and Another (5167/2016)
- [2021] ZAGPPHC 329 (13 May 2021)
- [12] Volume 2 at D1 -96
- [13] Lancaster 101 (RF) 9Pty) Ltd v Steinhoff International Holding NV 2021 4 All SA 810 (WCC) at para [34]-[35] and [43] –[44] and Q4 Fuel (Pty) Ltd v Ellisras Brandstof En Olie Verspreiders (Pty) Ltd and Others (HCAA 08/2021) [2021] ZALMPPHC 81 (11 November 2021)
- [14] See footnote 5 supra
- [15] Smith v KwaNonqubela Town Council [2] (399/97)
- [1999] ZASCA 58; [1999] 4 All SA 331 (A) (10 September 1999)
- [16]

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