

SOUTH AFRICA / JUDGMENT

Janse van Rensburg v Obiang and Another (A338/2018, 22470/2015) [2019] ZAWCHC 53 (10 May 2019)

[2019] ZAWCHC 53

COURT

Western Cape High Court, Cape Town

BEFORE

Goliath, Binns-Ward, Fortuin

CASE / FILE NUMBER

A338/2018, 22470/2015

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Republic of South Africa

IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

First instance case no. 22470/2015

Appeal case no. A 338/2018

Before: The Hon. Ms Justice Goliath (Deputy Judge President)

The Hon. Mr Justice Binns-Ward

The Hon. Ms Justice Fortuin

Date of hearing: 3 May 2019

Date of judgment: 10 May 2019

In the matter between:

DANIËL WELMAN JANSE VAN
RENSBURG
Applicant
and
THEODORIN
NGUEMA OBIANG
First Respondent
THE
REGISTRAR OF
DEEDS
Second
Respondent

JUDGMENT

BINNS-WARD J (GOLIATH DJP and FORTUIN J concurring):

[1] The applicant obtained an order attaching certain immovable property owned locally by the first respondent (to whom I shall hereinafter refer simply as ‘the respondent’) for the purpose of founding the jurisdiction of this court to determine an action for damages since instituted by the applicant against the respondent arising out of the applicant’s allegedly unlawful detention in Equatorial Guinea. The respondent, who is the vice president of Equatorial Guinea, is being sued in the action in his personal capacity for acts perpetrated pursuant to the powers he exercised, allegedly unlawfully, as vice president and (according to the applicant’s particulars of claim) ‘de facto head of Equatorial Guinea’.

[2] On 2 July 2018, the Supreme Court of Appeal granted the respondent leave to appeal against the judgment attaching his property *ad fundandam jurisdictionem*. It directed that the appeal should be heard by the Full Court of this Division. The respondent subsequently delivered his notice of appeal on 30 July 2018, within the period afforded in terms of rule 49 of the Uniform Rules of Court. An application to the registrar for the set down of the appeal was filed by the respondent’s attorney on 24 October

2018. The appeal has been set down by the registrar for hearing on 29 July 2019.

[3] This judgment pertains to an application that the applicant instituted on 29 January 2019,[1] in which he has sought the following relief (I quote from the notice of motion):

1. That the ... respondent’s appeal is struck out;
2. That the ... respondent be ordered to pay the applicant’s wasted costs in the appeal;
3. That the ... respondent be ordered to pay the costs of this application;
4. That such further or alternative relief be granted to the applicant.

The application was brought under the case number of the attachment proceedings at first instance (case no. 22470/2015), notwithstanding that those proceedings had been concluded at that level, and any further proceedings in relation to the order that had been made therefore fell within the remit of the court exercising its appellate jurisdiction; hence the hearing of the application by a bench of three judges.

[4] The bases upon which the application was brought were given in the applicant’s supporting affidavit as –

1. the respondent’s ‘failure to deliver a lawful Power of Attorney as envisaged in terms of the Uniform Rules of Court’; and

2. the respondent's 'failure to put up sufficient (or any) security for the cost of the appeal before filing the record'.

I shall treat of them in the order in which they were stated.

Failure to file 'a lawful Power of Attorney'

- [5] The first of the aforementioned bases of the application was founded on the applicant's apprehension of the effect of rule 7(2) of the Uniform Rules, read with the provisions of rule 63 in respect of the authentication of documents executed outside the Republic for use within the Republic, in the context of the respondent's application to the registrar, in terms of rule 49(6), for the set down of the appeal.

- [6] Rule 7(2) provides:

The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorising him to appeal and such power of attorney shall be filed together with the application for a date of hearing.

and rule 63 provides (insofar as relevant for present purposes):

Authentication of documents executed outside the republic for use within the republic.

- (1) In this rule, unless inconsistent with the context—

"document" means any deed, contract, power of attorney, affidavit or other writing, but does not include an affidavit or solemn or attested declaration purporting to have been made before an officer prescribed by section eight of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963);

"authentication" means, when applied to a document, the verification of any signature thereon.

- (2) Any document executed in any place outside the Republic shall be

deemed to be sufficiently authenticated for the purpose of use in the Republic if it be duly authenticated at such foreign place by the signature and seal of office—

- (a) of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office abroad; or
- (b) of a consul-general, consul, vice-consul or consular agent of the United Kingdom or any person acting in any of the aforementioned capacities or a pro-consul of the United Kingdom; or
- (c) of any Government authority of such foreign place charged with the authentication of documents under the law of that foreign country; or

- (d) of any person in such foreign place who shall be shown by a certificate of any person referred to in paragraph (a), (b) or (c) or of any diplomatic or consular officer of such foreign country in the Republic to be duly authorised to authenticate such document under the law of that foreign country; or
 - (e) of a notary public in the United Kingdom of Great Britain and Northern Ireland or in Zimbabwe, Lesotho, Botswana or Swaziland; or
 - (f) of a commissioned officer of the South African Defence Force as defined in section one of the Defence Act, 1957 (Act No. 44 of 1957), in the case of a document executed by any person on active service.
- (2A) ...
- (3) ...
- (4) Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the office, to have been actually signed by the person purporting to have signed such document.
- (5) ...
- [7] Rule 49(6) provides that if an appellant does not timeously apply to the registrar for the appeal to be set down, the appeal shall be deemed to have lapsed. The respondent's application for the set down of the appeal was made timeously. It was made on his behalf by his attorney. As required in terms of the subrule, the attorney vouched his authority to make the application by filing a special power of attorney. On its face, the power of attorney purported to have been executed by the appellant at Malabo on 6 February 2018. Malabo is the capital of Equatorial Guinea. A copy of the document was attached to the applicant's supporting affidavit:

[SEE RTF and PDF VERSIONS FOR ANNEXURE]

- [8] It is evident that the power of attorney had not been authenticated in any of the ways provided for in terms of rule 63(2). The applicant raised an objection and gave notice in terms of rule 30(2)(b) that he considered that the service of the record and the filing by the respondent of a notice in terms of rule 49(6)(a) was an irregular step, in that the respondent had failed to comply with the rules of court in various respects. The applicant's notice was served on the respondent at the offices of Abrahams & Gross, his attorneys of record. Insofar as the basis for the application currently under consideration is concerned, the particulars of irregularity asserted by the applicant were stated as follows in his notice to the applicant to cure the defects (underlining in the original):

2. The power of attorney annexed to the Appellant's notice in terms of Rule 49(6)(a) is signed by a person named "Teodoro Nguema Obiang" whereas the Appellant is named and cited as "Teodorin Nguema Obiang".
3. In terms of the Appellant's notice in terms of Rule 49(6)(a) the Appellant is ordinarily resident in Malabo in the Republic of Equatorial Guinea.
4. The power of attorney (referred to above) does not state where it was signed.
- 4.1. If the power of was signed outside the Republic of South Africa the power of attorney is irregular in that it does not comply with the provisions of Rule 63(2)(a) or (b) of (sic) (c), alternatively
- 4.2. If the power of attorney was signed within the Republic of South Africa it is irregular within the meaning of Rule 7(4).

The applicant afforded the respondent a period of 10 days to remedy the alleged non-compliance with the rules. The respondent did not avail of the opportunity to file a power of attorney that had been authenticated in the manner provided in rule 63(2).

- [9] The applicant has not persisted in the papers in the application before us with the complaint based on the discrepancy between the name by which the respondent has been cited in the court papers (Teodorin) and that given on the power of attorney (Teodoro), although his counsel raised it in oral argument. The decision not to pursue it on the papers may well be because a basic Google search in regard to the identity of the vice president of Equatorial Guinea references numerous webpages on a wide variety of sites that state that the vice president is Teodoro (commonly called Teodorin) Nguema Obiang. Indeed, as pointed out by the respondent's counsel at the hearing, the learned judge at first instance referred to the respondent's full name in the judgment and gave his first name as 'Teodoro'. It was the applicant who cited the respondent by what it would seem is his nickname, Teodorin, in the litigious proceedings instituted in this country.
- [10] The first basis of the applicant's application for an order striking out the appeal is that the appeal has lapsed by reason of the application for set down in terms of rule 49(6) not having been supported by a power of attorney authenticated in the manner provided in terms of rule 63(2).[2] It is the absence of authentication in terms of rule 63(2) that is alleged by the applicant to result in the power of attorney that was filed by the respondent's attorneys not being 'a lawful Power of Attorney'. In my view, there is, for a number of reasons, no merit in the contention.
- [11] Firstly, it seems to me to be illogical to suggest that an appeal has lapsed when the responsible officer of court has accepted a timeously lodged application for it to be set down and has allocated a date for it to be heard. Those are factual considerations that cannot be ignored or wished away as if they had not happened. Close regard to the wording of rule 49(6)(a), which provides:

Within 60 days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within 10 days after the expiry of the said period of 60 days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.

shows that the application for the set down of the appeal has to be directed to the registrar. There is no requirement that the application must be 'delivered' within the meaning of that word as defined in rule 1 (i.e. filed and served); although I accept that in practice, and for good reason, it ordinarily will be. The power of attorney that must accompany the application if rule 7 is of application (as it was in the current matter) has only to be 'filed' – not delivered.

[12] In my view, in the given circumstances it was for the registrar, not the applicant, to be satisfied as to the authenticity of the power of attorney when deciding whether to accept or reject an

application for the set down of the appeal. And in that regard the registrar would not have been constrained by the provisions of rule 63(2); she could exercise a judgement as provided for in terms of rule 63(4) in deciding whether to be satisfied as to the authenticity of the document.[3] It matters not for the purpose of this discussion whether the registrar is properly to be regarded as a manifestation of a 'court of law' or a 'public office' within the meaning of rule 63(4).

[13] The registrar's actions in accepting and giving effect to the application for the appeal to be set down for hearing suggest that she must have been satisfied as to the authenticity of the power of attorney. There is no attack in these proceedings on the legality of the registrar's apparent exercise of judgement in accepting the power of attorney. The allegation that the appeal had lapsed, and accordingly should be struck out, has been advanced solely on the basis that the power of attorney was not authenticated in the manner provided in rule 63(2). For the reason just explained, that was to focus too narrowly on the specific subrule and to overlook the import of the rule read as a whole, as it should be. In my view, the application could not get out of the starting blocks if it did not make out a basis to impugn the registrar's decision, evidently in terms of rule 63(4), to accept the power of attorney.

[14] The second reason for rejecting the applicant's allegation that the appeal has lapsed is closely related to the first. The applicant's approach has been to imply that authentication of the power of attorney in terms of rule 63(2) was a peremptory requirement. The provisions of rule 63(4), referred to earlier, make it plain that it is not. See also Schmidt et al, Law of Evidence (LexisNexis, looseleaf edition SI-3) at 11-10, where - citing Kaplan v Kaplan 1936 WLD 51, Ex parte Melcer 1948 4 SA 395 (W), [4] Stift v Stift 1952 4 SA 215 (O),[5] Friend v Friend 1962 4 SA 115 (E),[6] Chopra v Sparks Cinemas (Pty) Ltd 1973 2 SA 325 (D),[7] Mountain View Hotel (Pty) Ltd v Rossouw 1985 2 SA 73 (NC), and Maschinen Frommer

GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd 2003 6 SA 69 (C)[8]

- the observation is made that the provisions of rule 63(2) are ‘purely regulatory, not peremptory’. And a party

cannot purport to require an opposing litigant to have its power of attorney authenticated in terms of sub-rule 63(2), merely by querying its authenticity. The opposing litigant is entitled, by virtue of the incidence of rule 63(4), to have the authenticity of the power of attorney accepted if the surrounding circumstances do not support the cogency of any challenge to it. That is the approach that the respondent has chosen to take in this matter.

[15] The third and fourth reasons for rejecting the applicant’s attack on the power of attorney are probably the most pertinent, for they go to the substance, rather than the form, of the matter, which is whether, as a matter of probability, the power of attorney was, as a matter of fact, actually executed by the respondent. After all, the evident purpose of the requirement in rule 49(6) that there should be a power of attorney is to prevent any person in whose name the appeal is being prosecuted by an attorney from thereafter denying that it was prosecuted with his authority and repudiating the result; cf. *Estate Matthews v. Ells*, 1955 (4) SA 457 (C) at 459G, *United Dominions Corp (SA) Ltd v Greyllings’ Transport* 1957 (1) SA 609 (T)[9] at 614D, *Hills v Taxing Master* 1975 (1) SA 856 (D)[10] at 859A-C, *Viljoen v Van der Walt* 1977 (4) SA 65 (T) at 66B, *Carlkim (Pty) Ltd and Others v Shaffer and Others* 1986 (3) SA 619 (N)[11] at 621E-F and *Marais v City of Cape Town* 1997 (3) SA 1097 (C) at 1099E. That purpose would be shown to have been served were the court in these proceedings to be satisfied on a balance of probability that the signature on the document was indeed that of the litigant, i.e. authentic. As already mentioned, if the court is satisfied by circumstantial evidence that the signature is probably authentic, the need for its extracurial authentication in the manner allowed by rule 63(2) does not arise.

[16] According to the unchallenged evidence of the respondent’s attorney, the power of attorney in issue was obtained in February 2018 after the applicant had objected to a previous power of attorney ostensibly signed by the respondent in November 2017. The basis for the objection was that the previous power of attorney did not indicate the place of its execution and the date in November on which it had been signed. The previous power of attorney had been furnished in response to a demand by the applicant, in terms of rule 7(1),[12] when *Abrahams & Gross*, the firm of attorneys currently on record for the respondent, were substituted as attorneys of record for the respondent for the purposes of prosecuting the appeal proceedings. *Abrahams & Gross* replaced the attorneys who had represented the respondent in opposing the attachment application at first instance.

[17] 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; see *South African Allied Workers’ Union v De Klerk NO and Others* 1990

- (3) SA 425 (E) at 436F-437B and Gainsford and Others NNO v HIAB AB 2000 (3) SA 635 (W) at 640D-F. 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 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 the 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 10-day time limit in terms of rule 7(1).
- [18] The applicant appeared to have been satisfied by the power of attorney when it was presented in February 2018 because he did not thereafter challenge the attorneys' authority to represent the respondent in the application for leave to appeal before the first instance judge or in the subsequent application for leave from the Supreme Court of Appeal. And he has also not done so, as far as we have been made aware, in respect of the delivery by the self-same attorneys of the respondent's plea in the related damages action pending between the parties.
- [19] Having, in the circumstances just described, given the impression that he had accepted that the respondent's attorneys of record were duly authorised by the respondent to represent him in pursuing an appeal against the judgment at first instance, I consider that it is no longer open to the applicant, without showing good cause, now to challenge the authenticity of the power of attorney on purely formal grounds as he has done in the application before us. This follows as a matter of logic, for if the genuineness of the power of attorney were accepted for the purposes of the applications for leave to appeal, why, in the absence of any reason being advanced by the applicant for only subsequently calling it into question, should its authenticity be doubted for the purpose of the appeal itself? It also follows, in my judgment, by reason of the effect of rule 7(1), the text of which has been quoted earlier in note 12.
- [20] The effect of not having pursued a challenge to the power of attorney produced in response to its notice in terms of rule 7(1) before further steps in the litigation were taken by the respondent's attorneys under its apparent authority is that, according to the tenor of the subrule, the applicant could thereafter only do so with the leave of the court on good cause shown. He has not sought the court's leave to challenge the power of attorney at this stage and he has also not shown good cause to do so. Indeed, the only basis for his belated complaint appears to be that the power of attorney lacks the adornment of beeswax and ribbons that it would have had had it been authenticated with an official's seal in the manner provided in rule 63(2). We have already pointed out that any conception that it had to be was misguided.

- [21] Mr Joubert sought in argument to suggest that the applicant had been entitled to look critically and afresh at the power of attorney when application was made for the set down of the appeal because the provision of a power of attorney was expressly required at that stage in terms of rule 7(2). The argument does not bear scrutiny. Accepting it would require reading rule 7(2) completely disjunctively from rule 7(1), which, if regard is had to the purpose of rule 7, is not justified. Ordinarily, there would have been no obligation on the respondent to furnish a power of attorney for the purpose of prosecuting his applications for leave to appeal and noting the appeal. He was required to furnish one in early 2018 only because the applicant demanded it in terms of rule 7(1). Having given a power of attorney then because the applicant demanded it, the authorisation was good according to its tenor, which was for the remainder of the litigious process in which the respondent was engaged at the instance of the applicant. The respondent was therefore not required to furnish fresh authorisation to his appointed attorneys when application was made for the set down of the appeal. In the circumstances the power of attorney that had been given in February 2018 was good for use for the purpose of satisfying the requirement of rule 49(6) later in the litigation.
- [22] Having chosen to accept the power of attorney without objection, when it was proffered in terms of rule 7(1), it was not open to applicant to challenge it later in the process, except perhaps on the basis of knowledge that it could not reasonably have been expected to have or been able to acquire when the document was provided. Any other approach would be to allow rule 7 to be used to disrupt the efficient conduct of the litigation. Rule 7 is not intended to permit successive challenges to the authority of attorneys whose warrant to act in the matter has already been vouched by a power of attorney to which no other party has raised timeous objection.
- [23] This is the third reason why the first basis for the application cannot be sustained.
- [24] The fourth reason for rejecting the first basis for the application is that the evidence shows that, as a matter of probability, the respondent did execute the power of attorney. There has been no suggestion that it was not the respondent who opposed the application for the attachment of his immovable properties. The applicant has himself maintained in the papers before us that the respondent will do anything to delay the determination of the applicant's action against him and will use his allegedly relatively limitless means to 'out-litigate' the applicant. The applicant's evidence in this regard is, if anything, confirmatory of the inherent probability that the person prosecuting the appeal is the respondent. After all, the action instituted by the applicant cannot be heard until the question of the effectiveness of the attachment of the respondent's property has been finally determined.
- [25] There is also the undisputed evidence of the respondent's attorney that he travelled to Equatorial Guinea in March 2018 to take instructions directly from the respondent. If the respondent was giving the attorney from Abrahams & Gross instructions, why should

anyone other than him have signed the power of attorney previously sent to him by the attorney? If he had not authorised the attorney to represent him, why should he give the attorney instructions in relation to the matter and why should the attorney travel all that way to see him? It is the inherent nature of these incidences of the probabilities that inspired remarks such as those made in comparable circumstances by Flemming DJP in *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at

- p. 705 that ‘the risk is minimal that an attorney will act for a person without authority to do so’, and by Brand JA in *Unlawful Occupiers of the School Site v City of Johannesburg* 2005 (4) SA 199 (SCA)[13] at para. 16 that ‘there is rarely any motivation for deliberately launching an unauthorised application’.

- [26] Furthermore, as pointed out by the respondent’s attorney, the signature on the power of attorney that purports to be that of the respondent is very similar to other examples of the respondent’s signature in the papers, the authenticity of which has not been challenged. I agree with the respondent’s attorney that the signature on the power of attorney has every appearance of being that of the respondent. The applicant’s counsel contended, however, that the respondent’s attorney’s evidence that the signature on the power of attorney corresponded with what he knew to be the respondent’s (undisputed) signature on other documents was inadmissible because the attorney was not a handwriting expert. This approach is not supported by the jurisprudence.
- [27] For example, in *Ex parte Holmes supra*, Selke J accepted the evidence of the brother of the person who had executed a power of attorney in the United States identifying the person’s signature, and in *In Re Estate Innes* 1943 CPD 257, Sutton J accepted the evidence of the tutor of a person who had executed a power of attorney in Addis Ababa, Abyssinia, as to the genuineness of the signature. In *Friend supra*, Munnik J was satisfied upon his own comparison on the return day of a rule nisi in divorce proceedings of the signature on the affidavit of non-return by the defendant deposed to in Bulawayo, Southern Rhodesia, with the signature on the defendant’s power of attorney,[14] presumably executed in South Africa, that the former had indeed been signed by the defendant. In none of these matters were the court’s findings inhibited by the absence of opinion evidence by a handwriting expert. Compare also the remark of Theron AJ (as he then was) in *United Dominions Corp supra*, at p. 613, that it did ‘not require the assistance of a handwriting expert to compare the signatures [on an incomplete power of attorney] with the signatures placed on [a subsequently completed power of attorney]’.
- [28] Handwriting comparison involves a judicial consideration of real evidence, and there is no rule that requires a court to have regard to expert evidence in making a determination on such evidence; although there will be situations, for example where an alleged forgery is in issue, in which a court will be hesitant to make a decision without the assistance of expert evidence; cf. *Schmidt & Rademeyer, Bewysreg* (4th ed) at pp. 329-330. In my judgment this case is not one of such situations. There is no indication in the evidence that the signature on the power of attorney is a forgery, nor that anyone would in the circumstances have

reason to forge it.

- [29] It is relevant, I think, in deciding the court's preparedness to make a determination on the basis of handwriting comparison without the assistance of expert evidence, to have regard to the fact that the matter under consideration is of a procedural, rather than substantive nature such as that in issue in *CRC Engineering (Pty) Ltd v JC Dunbar & Sons (Pty) Ltd* 1977 (1) SA 710 (W) on which Mr Joubert relied in argument. It is a determination whether the court should allow the respondent's case to be prosecuted on appeal by the attorneys who are on record as acting for him. And it falls to be made without any regard to the merit, or lack thereof, of the appeal. It is not the sort of matter in which a court should, in principle, be unduly fainthearted about acting on its own comparison of sample signatures without the assistance of expert evidence.

Failure to put up sufficient (or any) security for the cost of the appeal before filing the record

- [30] Turning now to the second basis for the application, which, it will be recalled, concerned the respondent's failure to put up security for the applicant's costs in the appeal.

- [31] Rule 49(13) provides:

- (a) Unless the respondent waives his or her right to security or the

court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that

obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.

- (b) In the event of failure by the parties to agree on the amount of

security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be.

- [32] The respondent, qua appellant, has not provided security for the applicant's costs in the appeal. The applicant suggested that security should be given in the sum of R750 000. The respondent does not agree that that is an appropriate sum, and has requested the taxing master (whom it would seem is the designated official in the registrar's office for fixing security if it cannot be agreed between the parties) to fix the sum of security to be provided. The taxing master has apparently advised that he will fix the sum closer to the date of the hearing of the appeal. There is nothing in the evidence to suggest that the respondent will not put up security in the amount to be fixed by the designated member of staff in the registrar's office. If he does not, that can be dealt with as a preliminary issue when the appeal comes up for hearing.

- [33] Rule 49 does not provide that should the appellant fail to furnish security within the period stipulated in the rule the appeal shall lapse. And any implication to such effect would in any event probably be unconstitutional; cf. *Shepherd v O'Neill* 2000 (2) SA 1066 (N).

[34] It was misdirected of the taxing master, if he has been correctly reported, to postpone the fixing of security until closer to the date of the hearing. It is clear that, in terms of the rules, security should be provided when the record is filed; and if that cannot be done because of a disagreement between the parties on the amount of the security to be provided, the amount should be fixed to enable security to be put up as closely as reasonably possible to the time provided in the rules. The appropriate course for the applicant to have taken in the described circumstances was to have approached the taxing master or the registrar and pressed for an early determination of the amount of security to be provided. In the unlikely event of the registrar, notwithstanding such an approach, unreasonably failing to discharge her duty in terms of rule 49(13)(b), the applicant would have been entitled to approach the court for an order directing the registrar to discharge the function provided in terms of the subrule. Having not taken the indicated steps, it was not appropriate in the given circumstances for the applicant to apply

instead for the appeal to be struck out.

[35] The second basis for the application can accordingly also not be sustained.

Order

[36] There is no reason why costs should not follow the result. I do, however, think that the respondent's engagement of two counsel, while it might well be reasonable for the purpose of the appeal, was luxurious for this application. The following order is made accordingly:

The application is dismissed with costs.

A.G. BINNS-WARD

Judge of the High Court

P.L. GOLIATH

Deputy Judge President

C.M. FORTUIN

[1] The application was set down for hearing on 13 February 2019, but was postponed for hearing before a full bench on 3 May 2019.

[2] The requirement in terms of rule 7 that a notice of appeal filed with the registrar in terms of rule 49 must be accompanied by a power of attorney is anomalous. There is no apparent reason for it to be a generally applicable requirement. A power of attorney is not required in respect of an appeal to the Supreme Court of Appeal or to the Constitutional Court, and since

1987 it has not been required of attorneys issuing out summonses or entering appearances to defend on behalf of their clients in the High Court to file powers of attorney. I am inclined to agree with the remark in Harms, Civil Procedure in the Superior Courts (LexisNexis) at §B7.6 that ‘The retention of these provisions [rule 7(2) and (3)] can be questioned’.

[3] See paragraph [6] above for the text of rule 63(4).

[4] Also reported at [1948] 1 All SA 583 (W).

[5] Also reported at [1952] 4 All SA 185 (O)

[6] Also reported at [1962] 4 All SA 274 (E). In Friend, Munnik J quoted, with approval, the following dicta of Selke J in *Ex parte Holmes & Co. (Pty) Ltd* 1939 NPD 301 at pp. 307-308: In this connection, Mr. Macaulay urged before me, that as it would appear that the object of the Rules is merely to ensure, so far as possible, the authenticity of documents executed outside the Union, provided their authenticity is established by reliable evidence tendered in the usual manner, that object seems to be attained. He submitted that if, for example, a person were on oath to satisfy this Court by oral testimony that the maker of such a power of attorney executed it in his presence, handed it over to him there and then, and that the document under consideration had been in his possession continuously ever since its execution, it would be taking altogether too narrow and technical a view of the situation if this Court were to reject the document, or to decline to recognise it. merely because it lacked the authentication required by the Rules. I think there is much to be said in favour of this line or argument, for after all, the Rules seem to me designed to be of practical assistance, and to apply them in the way which Mr. Macaulay condemns would be to turn them into something more in the nature of an impediment in many cases. On the whole I am disposed to think that a document authenticated in accordance with the Rules, furnishes, on its mere production from proper custody, *prima facie* proof of itself; and that it should be in a condition to do this, is the true purpose and effect of such authentication. But I am inclined to doubt whether sec. 24 of Act 27 of 1912, and the Rules made under it, take away or

diminish the right and duty of this Court, to consider, and give effect to, other evidence, tendered in proper form, directed to the proof of a document executed in a foreign place, even though that document be not authenticated as the Rules require; and, further, whether this Court, upon being thus satisfied as to the genuineness of the document, cannot give effect to it provided, of course, that the document is, apart from authentication, executed with proper formalities.

[6] Also reported at [1962] 4 All SA 274 (E). In Friend, Munnik J quoted, with approval, the following dicta of Selke J in *Ex parte Holmes & Co. (Pty) Ltd* 1939 NPD 301 at pp. 307-308:

In this connection, Mr. Macaulay urged before me, that as it would appear that the object of the Rules is merely to ensure, so far as possible, the authenticity of documents executed outside the Union, provided their authenticity is established by reliable evidence tendered in the usual manner, that object seems to be attained. He submitted that if, for example, a person were on

oath to satisfy this Court by oral testimony that the maker of such a power of attorney executed it in his presence, handed it over to him there and then, and that the document under consideration had been in his possession continuously ever since its execution, it would be taking altogether too narrow and technical a view of the situation if this Court were to reject the document, or to decline to recognise it. merely because it lacked the authentication required by the Rules. I think there is much to be said in favour of this line of argument, for after all, the Rules seem to me designed to be of practical assistance, and to apply them in the way which Mr. Macaulay condemns would be to turn them into something more in the nature of an impediment in many cases.

On the whole I am disposed to think that a document authenticated in accordance with the Rules, furnishes, on its mere production from proper custody, prima facie proof of itself; and that it should be in a condition to do this, is the true purpose and effect of such authentication. But I am inclined to doubt whether sec. 24 of Act 27 of 1912, and the Rules made under it, take away or

diminish the right and duty of this Court, to consider, and give effect to, other evidence, tendered in proper form, directed to the proof of a document executed in a foreign place, even though that document be not authenticated as the Rules require; and, further, whether this Court, upon being thus satisfied as to the genuineness of the document, cannot give effect to it provided, of course, that the document is, apart from authentication, executed with proper formalities.

[7] Also reported at [1973] 2 All SA 428 (D).

[8] Also reported at [2003] 1 All SA 453 (C).

[9] Also reported at [1957] 1 All SA 298 (T).

[10] Also reported at [1975] 2 All SA 296 (D).

[11] Also reported at [1986] 4 All SA 111 (N).

[12] Rule 7(1) provides: Subject to the provisions of sub-rules (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 satisfies 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.

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[13] Also reported at [2005] 2 All SA 108 (SCA) and on SAFLII as [2005] ZASCA 7.

[14] Prior to an amendment of the rules in 1987 a power of attorney was required in respect of the institution of any action by an attorney on behalf of a client or the delivery of any notice by an attorney of its client's intention to defend any action.

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