

SOUTH AFRICA / JUDGMENT

K.S.M obo B.M.M v Road Accident Fund [2023] ZAGPPHC 493; 62283/21 (28 June 2023) [2023] ZAGPPHC 493

COURT

North Gauteng High Court, Pretoria

BEFORE

A.M. Mtembu

CASE / FILE NUMBER

62283/21

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No.: 62283/21

REPORTABLE

OF INTEREST TO OTHER JUDGES

REVISED

In the matter between.-

K S M obo B M M Applicant And THE ROAD ACCIDENT FUND Respondent

Date of hearing 08/06/2023

JUDGMENT

MTEMBU AJ

Introduction

[1] This is an application whereby the applicant (the plaintiff in the main action) challenged the authority of the State Attorney to represent or act for the Road Accident Fund (the defendant in the main action).

[2] In the notice of motion, the applicant sought an order in the following terms:

-1 The Respondent, must within 10 days of service of this court order, via

email, attend to the following:

1.1 Comply with Rule 7(1) by filing Power of Attorney confirming the Authority of State Attorney to represent the Road Accident Fund.

2. Should the Respondent fail to comply with paragraph 1 above, the following is ordered:

2.1 The Respondent's defence be struck out.

2.2 The Applicant is granted permission to enrol the matter on the default

judgment.

3 The Respondent to pay the Applicant's taxed attorney and client costs of this application.

4. Further and/or alternative relief."

[3] The applicant's challenge as such was premised on a notice dated 29 June 2022 issued by the applicant in terms of Rule 7(1) of the Uniform Rules of Court. This Rule 7(1) notice was served on the respondent calling upon it to furnish the power of attorney envisaged under the said Rule authorising its attorneys to act on behalf of the respondent in this matter. In response to the Rule 7(1) notice, the respondent filed and served on the applicant a reply stating that in terms of Rule 7(5), no power of attorney is required to be filed by the State Attorney in any matter in which the State Attorney is acting as such by virtue of the provisions of the State Attorneys Act 56 of 1957.

Brief

background

[4] The applicant before this court served summons on the respondent claiming compensation for damages suffered as a result of a motor vehicle collision which allegedly occurred on 18 July 2010 at or near Bankhara Road, Kuruman in Northern Cape province. Consequently, the respondent served its notice of intention to defend on 27 June 2022 and in doing so appointed the Office of the State Attorney as its attorneys of record. This was followed by a notice in terms of which the applicant required the respondent to file a Power of Attorney.

The parties' submissions

[5] The applicant contends that the respondent's reliance on Rule 7(5) is misplaced. In support of this contention, the applicant submits that in terms of the State Attorney Act 56 of 1957, the State Attorney will act on behalf of the Government of the Republic. The RAF is not part of the Government as contemplated in section 3(1) of the State Attorney Act. The submission goes, the State Attorney may also act on behalf of the administration of any province,

subject to such terms and conditions as may be arranged between the Minister of Justice and Constitutional Development and the Administration concerned, in terms of section 3(2) of the State Attorney Act.

- [6] Mr. Geach SC, appearing on behalf of the applicant, submitted that Rule 7(5) does not absolve the State Attorney from complying with Rule 7(1) of the Uniform Rules. In support of this contention, I was referred to a Labour Court case of Bukalo Village Council v Labour Commissioner[1] which held that it is not necessary for the Government Attorney to file a power of attorney when representing the government, and in this matter, it was argued, the State Attorney is not acting for the Government but for an independent juristic entity. I was also referred to a decided case of Shilubana and Others v Nwamitwa[2], where the State Attorney represented parties not falling in the province of the State Attorney Act, and subsequently, the State Attorney withdrew as an attorney of record.
- [7] On the other hand, the respondent contends that it duly replied to the Rule 7(1) notice by serving a notice indicating that in terms of Rule 7(5) of the Rules of Court, no power of attorney is necessary where the defendant is represented by the State Attorney. The applicant's persistence in compliance with Rule 7(1) is premature, the respondent contends. Mr Mukasi, appearing on behalf of the respondent, submitted that the purported exclusion of the RAF from the entities that can be represented by the Office of the State Attorney is completely misplaced. In support of this contention, Mr Mukasi submitted that in terms of section 3(3) of the State Attorney Act, a State Attorney may represent an institution such as the RAF. The RAF is an Organ of State which falls under the authority of the Minister of Transport, a member of the executive arm of the Government. It also performs a function of social responsibility which has an impact on the public interests, so went the submission.

Discussion

- [8] This matter centres on the question of the authority of the State Attorney to represent the RAF. Therefore, the court is enjoined to determine whether Rule 7(5) is applicable to the State Attorney when purporting to represent the RAF. Put simply, whether the State Attorney Act empowers the Office of the State Attorney to represent the RAF in litigation.
- [9] In addressing the question at hand, it is apposite that I revisit Rule 7 of the Uniform Rules of the Court. Rule 7(1) provides that:

"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. "

- [10] The purpose of Rule 7(1) is to establish the mandate of the attorney concerned or acting on behalf of a party instituting or defending

legal proceedings. Rule 7(1) provides a remedy for a respondent who wishes to challenge the authority of an attorney allegedly acting on behalf of a purported applicant.[3]

[11] However, there is an exception to this rule, if the attorney concerned is the State Attorney. Rule 7(5) provides that:

"(5)

(a) No power of attorney shall be required to be filed by the State Attorney, any deputy state attorney or any professional assistant to the State Attorney or a deputy state attorney or any attorney instructed, in writing, or by telegram by or on behalf of the State Attorney or a deputy state attorney in any matter in which the State Attorney or a deputy state attorney is acting in his capacity as such by virtue of any provision of the State Attorney Act, 1957 (Act 56 of 1957)".

[12] It is manifest that in terms of Rule 7(5), where the State Attorney is acting under his authority in terms of the State Attorney Act 56 of 1957, he shall not be required to file a power of attorney in terms of Rule 7(1).[4] The scope of authority of the State Attorney is set out in section 3 of the State Attorney Act.

[13] Section 3 provides that:

- (1) The functions of the offices of State Attorney shall be the performance in any court or in any part (of the Republic of such work on behalf of the Government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers.
- (2) There may also be performed at the offices of State Attorney like functions for or on behalf of the administration of any province, subject to such terms and conditions as may be arranged between the Minister of Justice and Constitutional Development and the administration concerned.
- (3) Unless the Minister of Justice and Constitutional Development otherwise directs, there may also be performed at the offices of State Attorney like functions in or in connection with any matter in which the Government or such an administration as aforesaid, though not a party, is interested or concerned in, or in connection with any matter where, in the opinion of a State Attorney or of any person acting under his or her authority, it is in the public interest that such functions be performed at the said offices.

[14] In *Zuma v Democratic Alliance and Another*,^[5] the SCA dealt with the interpretation of section 3(3) of the State Attorney Act. The SCA stated the following:

Section 3(3) permits the State Attorney to perform the same functions: (i) in or in connection with any matter in which the government though not a party "is interested or concerned in" or (ii) in connection with any matter where, in the opinion of the State Attorney or of any person acting under his authority, it is "in the public interest" that such functions be performed. To fall within the scope and ambit of section 3(3), it must be evident that the performance of functions by the State Attorney, in matters where the government is not a party, is justified by the government's

interest or concern in the matter or that it is in the public interest that the State Attorney assume the functions.

- [15] In order for the State Attorney's office to provide legal assistance in cases in which the government is not a party, it must be justified by the government's or public's interest. The SCA in the Zuma[6] matter set out the requirements as to what constitutes government or public interest for purposes of providing legal assistance by the State Attorney's office. Whether the government or the public has an interest, for the purposes of providing legal assistance by the State Attorney's office, must entail: (1) at least an assessment of the nature of the proceedings; (ii) the issues arising for determination; and, (iii) whether there is a legitimate reason for government to support a position taken in the matter by a party other than government.
- [16] The applicant's contention that the respondent's reliance on Rule 7(5) is misplaced in that Rule 7(5) is not applicable to the State Attorney when acting for the RAF and that the RAF is not part of the Government as contemplated in section 3(1) and/or section 3(3) of the State Attorney Act cannot succeed. I regret to disagree with the applicant's counsel that Rule 7(5) does not absolve the State Attorney from complying with Rule 7(1) of the Uniform Rules.
- [17] This, in my respectful view, would be illogical to argue on the contrary that the RAF does not fall within the scope and ambit of section 3(3) of the State Attorney Act. First and foremost, it is common cause that the RAF's core mandate to compensate road accident victims is contained in the Road Accident Fund Act 56 of 1996. The RAF is established in terms of section 2 of the Road Accident Fund Act 56 of
1996. Its object is to pay compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles'.?[7] It uses public funds to achieve the purposes assigned to it by the Act.[8] Its resources and facilities are to be 'used exclusively to achieve, exercise and perform the object, powers and functions of the RAF, respectively'.[9]
- [18] The Constitution Act 108 of 1996 contains the modalities for how the RAF must carry out its fundamental mandate, as it is evident that the RAF is an Organ of State, as defined in section 239[10]. Section 195 of the Constitution provides for principles that govern public administration by Organs of State, such as the RAF. These principles include, inter alia, that Organs of State must: promote efficient, economic, and effective use of resources; must be development-oriented; and must respond to people's needs. Plasket J in *Mlatsheni v Road Accident Fund*"[11] succinctly puts it:
- "The very purpose of their existence is to further the public interest, and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust".
- [19] I, therefore, agree with the respondent's counsel that the RAF is performing a function of social responsibility in nature and its

financial well-being has an impact on the public who are serviced by the RAF and as such, apart from the Government, in the opinion of the State Attorney or of any person acting under his authority, it is in the public interest that such functions be performed at the said office. The State Attorney is obliged to act only if it is in the government's interest or the public interest to do so.

[12]

[20] Keightley J in *Minister of Police v Kunene and Others*^[13] stated that:

"Given that its powers derive from statute, as a matter of course, it seems to me, the State Attorney would normally wear the mantle of authority as a representation to the outside world, and to other attorneys that it deals with, that it is mandated to settle and compromise claims on behalf of Organs of State that it represents. For this reason, ordinarily, it would be difficult for an Organ of State to avoid being held bound by settlements reached by the State Attorney even if these are against its express instructions: it would be held bound by at least the principle of ostensible authority. It is for this reason that the State Attorney has been held to have a broader discretion to bind State parties than that of private attorneys." [My Emphasis]

[20] The above also denotes that the courts have generally accepted that the State Attorney is well suited to represent the Organs of State, of which the RAF is one of them.

[21] It follows that the authorities referred to by the applicant afford no assistance to her case as they are obviously distinguishable. It, therefore, follows that in these proceedings, the State Attorney is acting for the RAF within the scope of his duties in terms of section 3(3) of the State Attorney Act. The applicant's request flies in the face of Rule 7(5). Consequently, any suggestion that the State Attorney is not authorised to act for the RAF is misconceived and is devoid of any legal basis.

Costs

[22] What remains is the question of costs. The general rule is that the successful party should be given his costs, and this rule should not be departed from, except where there are good grounds for doing so. In this matter, there is nothing that warrants deviation from the general rule.

Order

[24] Consequently, the following order is made

(i) The application is dismissed with costs.

A.M. MTEMBU AJ Acting Judge of the High Court of South Africa Gauteng Division, Pretoria

"This judgment was prepared and authored by the Judge whose name is reflected herein, duly signed, and is submitted electronically to the Parties/their legal representatives by email. This judgment is further uploaded to the electronic file of this matter on Case Lines by the Judge or his Secretary. The date of this judgment is deemed to be 28 June 2023."

Counsel for the Applicant: Adv BP Geach SC Adv FHH Kehrhahn Instructed by: Mduzulwana Attorneys Inc Counsel for the Respondent: Mr T Mukasi Instructed by: The State Attorney, Pretoria

- [1] 2022(1) NR 99 (LC). This is a case from a foreign jurisdiction, Namibia
- [2] 2009
- (2) SA 66 (CC)
- [3] See *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 6241— 625A, where the SCA cited with approval the decision in *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C-J; See also *ANC Umvoti Council v Umvoti Municipality* 2010 (3) SA 31 (KZN) at 42D
- [4] See also *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v Director of the Financial Intelligence Centre* [2017] 4 All SA 150 (GP) at para 26; see also *Dlamini v Minister of Law and Order and Another* 1986 (4) SA 342 (D)
- [5] [2021] 3 All SA 149 (SCA) at para 37
- [6] *Ibid* at para 39
- [7] Section 3 of the Road Accident Fund Act 56 of 1996
- [8] *Ibid* s 5
- [9] *Ibid* s 7
- [10] *In Road Accident Fund v Duma and Three Similar Cases* 2013
- (6) SA 9 (SCA), the SCA confirmed that the RAF is an organ of state as defined in s 239 of the Constitution
- [11] 2009
- (2) SA 401 (E) at para 16,
- [12] *Zuma v Democratic Alliance and Another* [2021] 3 All SA 149 (SCA) at para 42
- [13] [2020] 1 All SA 451 (GJ) at para 43

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