

SOUTH AFRICA / JUDGMENT

Magotsi v Magotsi N.O and Others (2604/2024) [2025] ZAECQBHC 6 (4 March 2025) [2025] ZAECQBHC 6

COURT

Eastern Cape High Court, Gqeberha

BEFORE

Ronaasen

CASE / FILE NUMBER

2604/2024

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE DIVISION,
GQEBERHA

Case

No.: 2604/2024

Date

Heard: 24 October 2024

Date

Delivered: 4 March 2025

In the matter between:

ROBERT
MOSES MAGOTSI
Appplicant
and
BEVERLY
MUNYASIA MAGOTSI N.O.
First Respondent
MONICA
SAAYMAN N.O.
Second Respondent
HISTOTO
INTERNATIONAL CONSULTING CC
Third Respondent

JUDGMENT

RONAASEN AJ

Introduction

The main application

[1] On 16 July 2024 the applicant launched an application out of this court (“the main application”) seeking to have:

1.1. the estate of the Magotsi Family Trust (IT 0066/2011) (“the trust”) placed under provisional sequestration; and

1.2. the third respondent, a close corporation, placed under provisional winding-up.

[2] In the main application the first and second respondents were cited in their capacities as trustees of the trust.

[3] It is common cause that the trust, through its members, holds the entire membership interest in the third respondent.

[4] For reasons which will become apparent, the main application has yet to be determined.

The rule 7 dispute

[5] Uniform Rule 7(1) provides as follows:

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 authorized so to act, and to enable him to do so the court may postpone the hearing of the action or application.

[6] On 26 July 2024 an attorney’s firm, Nicole Lawrence Inc, (“the trust’s attorney of record”) delivered notices of the first and second respondents’ intention to oppose the main application.

[7] An opposing affidavit in the main application, deposed to by the first respondent, was delivered on 3 September 2024. The delivery of this affidavit prompted the applicant to serve what is described as a “Notice in terms of Uniform Rule 7(1)” (“the notice”). The notice reads as follows:

PLEASE TAKE NOTICE THAT the Applicant herewith disputes and challenges the authority of the First Respondent's to act on behalf of the Magotsi Family Trust IT 0066/2011 and Histoto International Consulting CC and to depose to an affidavit on its behalf and Nicole Lawrence Inc (attorneys) authority to act and oppose these proceedings.

Therefore, hereby request that they provide the Applicant with a response and the following documentary proof, within ten (10) days of the date of service hereof:

- (a) Beverly Munyasia Magotsi proffers in the answering affidavit "I am the First Respondent in this matter"
- (i) Does she depose on this affidavit in her personal capacity?
- (ii) If so, on what basis or grounds is she opposing this application as the Application is against the Trust (First and Second Respondent) and Histoto (Third Respondent); and
- (iii) Identity of the party she purports to represent and her representative capacity.
- (b) Copies of the powers of attorney and mandate granted to Nicole Lawrence Inc (if any);
- (c) Copies of the resolutions taken by the Magotsi Family Trust IT 0066/2011 authorising the First Respondent "on her personal capacity" and her Attorneys: Nicole Lawrence Inc. to act and oppose these proceedings (if any);
- (d) Notices of meeting of trustees (stating purpose of meeting);
- (e) Copies of trustees meeting minutes (if any); and
- (f) Copies of Histoto (Third Respondent) notice of meeting and members resolutions (if any).
- [8] On 25 September 2024 the applicant, despite the challenge posed in the notice, and which challenge had at that date not been resolved, delivered a replying affidavit.
- [9] The main application had been set down for hearing on 24 October 2024. In view, however, of the challenge posed in the notice, the rollcall judge directed that the challenge would first be determined on that date and that the main application would be re-enrolled for hearing after such determination. The respondents were directed to respond to the notice prior to the hearing, which they duly did. I shall revert to their response later.
- [10] This judgment is therefore concerned solely with the issues raised by the notice.

Summary of case in respect of his rule 7(1) challenge and the issues to be determined

- [11] The applicant's case centres around the contention that the first respondent, who deposed to the opposing affidavit, did so in her personal capacity and merely as an interested party and that, in that capacity, she could not represent the trust. By parity of reasoning, so the applicant contends, the trust could not have validly appointed its attorney of record to represent it in the main application.

- [12] The applicant accepts that the notice was not delivered within the 10-day period envisaged in rule 7(1) and that accordingly he was obliged to obtain relief from this Court, on good cause shown, to raise his challenge.
- [13] I shall approach this application from the standpoint that whether the applicant has shown good cause for making his challenge out of time will be determined by the merits of his challenge. Thus, the essential issues for me to determine are whether the first respondent was entitled to represent the trust in opposing the main application and, to that end, to appoint the trust's attorney of record to act on its behalf in the proceedings.

The judgment of the Western Cape High Court

- [14] During the first half of 2024 the first and second respondents, in their capacities as trustees of the trust and, in the case of the first respondent also in her capacity as the guardian of three minor beneficiaries of the trust, launched proceedings in the Western Cape High Court, under case number 11552/2024, against the applicant and an attorney representing him. Pursuant to this application the Western Cape High Court, on 30 May 2024, granted an interim order, in the form of a rule nisi, in favour of the first and second respondents, in terms of which, pending the return day, the applicant was interdicted from acting on behalf of the trust and all his powers as trustee of the trust were suspended. The applicant disclosed this in his founding affidavit in the main application.
- [15] On 4 October 2024 the Western Cape High Court confirmed its rule nisi and directed that the applicant be removed as a trustee of the trust by the Master, Gqeberha.

Legal principles and their application to the facts of this matter

- [16] In approaching a challenge of this nature, the following passage from Erasmus

- Superior Court Practice/Volume 2, D 1 Rule 7-7, RS 23, 2024 commends itself to me:

It is submitted that, regardless of what procedure is followed in challenging the authority of a person acting for a party, the challenge should be raised promptly at the earliest opportunity, and should be bona fide. The grounds on which the challenge is based should be stated clearly and unambiguously, and with sufficient detail in order for both such person and party, as well as the court, to fully understand the challenge, and for such person and/or party to satisfy the court that such person is authorized to act. A bare denial of authority would not suffice.

- [17] It has now been established by our courts that the remedy of a party who wishes to challenge the authority of a person allegedly acting on behalf of party to litigation is to be found in rule 7(1) and not by a textual analysis of words or averments in affidavits or pleadings. By way of example, I refer to the judgment of the Supreme Court of Appeal reported as *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at [14]-[16]. At [16] it was emphasised that, "After all there is rarely any motivation for deliberately launching an unauthorised application." By the same token it is difficult to conceive why someone, such as a trustee of a trust, who clearly has an interest in an

application brought against the trust, would in an unauthorised manner oppose the relief sought against the trust, particularly where such relief is drastic relief in the form of the sequestration of the estate of the trust.

- [18] In this matter the applicant confines his challenge to the authority of the first respondent by a textual analysis of the first respondent's words, "I am the First Respondent in this matter." These words are used by her in the opening paragraph of her opposing affidavit. He concludes from the use of the words that the first respondent had deposed to the opposing affidavit in her personal capacity, as an interested party, and not in the capacity in which she was cited, namely as a trustee.
- [19] In the founding affidavit in the main application, the applicant cites the first respondent compositely, ".....as the Trustee for the Time Being...." of the trust. The founding affidavit thus states that the first respondent is a trustee of the trust. In the opening paragraph of her opposing affidavit the first respondent simply confirms just that, i.e. that she is a trustee of the trust by confirming her identity as the first respondent as cited. In responding to the individual paragraphs in the founding affidavit the first respondent, in her opposing affidavit, admits the citation of herself as a trustee of the trust. It is therefore impossible to comprehend how the applicant could conclude that the first respondent was deposing to the opposing affidavit personally and simply as an interested party. No factual basis for the conclusion is advanced.
- [20] In response to the notice the first and second respondents produced a resolution passed by them, as trustees of the trust, on 19 September 2024 ("the resolution"), which reads as follows:

RESOLUTIONS PASSED BY THE TRUSTEES OF THE MAGOTSI FAMILY TRUST

MASTER'S REFERENCE NO. IT0066/2011

19 SEPTEMBER 2024

THE TRUSTEES RESOLVED THAT:

1. The active Trustees, Beverly Mogotsi and Monica Saayman, are authorized to oppose, on behalf of the Trust, the Application launched by Robert Magotsi under case number 2604/2024;
2. That active Trustees, Beverly Mogotsi and Monica Saayman, are authorized to appoint legal representatives on behalf of the Trust for the aforementioned purpose; and
3. That the active Trustee, Beverly Mogotsi, is authorized to provide instructions to the legal representatives on behalf of the Trust in the pending Application under case no. 2604/2024.

SIGNED AT PORT ELIZABETH ON THIS 19 DAY OF SEPTEMBER 2024.

- [21] It is trite the trustees of a trust are obliged to act jointly in the conduct of the affairs of the trust. By virtue of the interim order of the Western Cape High Court of 30 May 2024 the first and second respondents were the only trustees of the trust. On the date this matter was heard the applicant had been removed as a trustee by virtue of that Court's order of 4 October 2024. Therefore, the resolution meets this requirement and satisfies me that the first and second respondents, as the only trustees of the trust, had validly resolved to oppose the main application, to appoint an attorney to represent the trust in opposing the main application and that the first respondent be authorised to give effect to the resolution. The resolution, furthermore, had the effect of ratifying anything that had hitherto been done in respect of the trust's opposition to the main application.
- [22] The resolution, in the circumstances, also applied in respect of the third respondent.
- [23] It follows that the trust's attorney of record had been validly appointed to represent it and the third respondent in the main application and also in the present proceedings.
- [24] The applicant's challenge clearly had no merit as it proceeded from a wholly flawed premise.
- [25] I need to address, briefly, the form of the notice. Rule 7(1) requires a party wishing to invoke its operation to simply dispute the authority of the person acting on behalf of the other party. It is then for that person to satisfy the Court that he/she/it is authorised to act on behalf of the latter party. It is not for the party invoking the rule to prescribe the manner in which the person whose authority is challenged must satisfy the Court. In this case the notice was incoherently framed in the form of interrogatories and requests for documents and was therefore irregular.

Costs

- [26] The respondents have asked that I dismiss the applicant's challenge to the authority of the first respondent with a punitive order for costs.
- [27] The applicant's challenge to the authority of the first respondent, in my view, was spurious and entirely without merit. The respondents were put to the unnecessary expense of resisting the baseless challenge. The challenge was poorly formulated, had no factual basis and was a bare denial of authority. It cannot be said to have been bona fide. It simply had no prospect of success. Accordingly, a punitive cost order is warranted.

Conclusion and order

- [28] In the light of my conclusion that the challenge to the authority of the first and second respondents had no merit, I make the following order:
1. It is declared that the Magotsi Family Trust ("the trust") had validly resolved, through its trustees, to oppose the application brought by the applicant under case number 2604/2024, to appoint legal representatives to represent the trust and the third respondent in opposing the said application and to authorise the first respondent to give effect to this resolution.

2. The applicant is directed to pay the respondents' costs of opposing his challenge to the first respondent's authority, made in terms of Uniform Rule 7(1), on the scale as between attorney and client.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances: Mr Y Mphahlwa for the applicant,

of Mphahlwa and Co Inc., 6th Floor, Hycastle House, No. 58 Loop Street, Cape Town, c/o Z Ngqeza Attorneys, Suite 10, Adderley Arcade Building, 710 Govan Mbeki Avenue, Northend, Gqeberha

Adv M Abduroaf for the respondents

Instructed by Nicole Lawrence Inc, 50 Keerom Street, Cape Town, c/o Peter McKenzie Attorneys, 39 Beetlestone Road, Gelvandale, Gqeberha

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