

SOUTH AFRICA / JUDGMENT

Mahomed N.O and Others v Al-Al Shaik N.O and Others (2023/007716) [2024] ZAGPJHC 190 (4 March 2024) [2024] ZAGPJHC 190

COURT

South Gauteng High Court, Johannesburg

BEFORE

Adams

CASE / FILE NUMBER

2023/007716

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE
NO: 2023-007716

DATE:

4th
march 2024

In the matter between:

MAHOMED,
GOOLAM YOUSUF N O
First Applicant
SURTEE,
YUSUF N
O
Second Applicant
LAHER,
ABDOOL RAHMAN ISMAIL N O Third
Applicant
SEEDAT,
MOHAMMED ALI YUSUF N O
Fourth Applicant
and
AL-AL
SHAIK, H E SALEH A AZIZ MOHAMMED
N O

First Respondent

MOALLA,

FAISAL HAMAD AHMED N O

Second Respondent

AL-LHEEDAN,

ABDAILAH F, N O

Third Respondent

ALARIFI,

MOHAMMED ABDULWAHED A. N O

Fourth Respondent

OTAIBI,

FAHAD FALEH MEGWAL AL N O

Fifth Respondent

Neutral

Citation: Mahomed N O and Others v Al-Al Shaik N O and Others (2023/007716) [2024] ZAGPJHC --- (4 March 2024)

Coram:

Adams J

Heard

on: 27 February 2024 – ‘virtually’

as a videoconference on Microsoft Teams.

Delivered:

4 March 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 4 March 2024.

Summary:

Civil procedure – Uniform Rule of Court

7(1) – authority of attorneys acting on behalf of respondents disputed by applicants

– validity and authenticity of Proxy

Form, appointing Proxy, disputed – Uniform Rule of Court 63, relating to authentication

of documents, discussed – rule 63(4)

applied – court accepts as sufficiently authenticated the Proxy

– document

shown to the satisfaction of court to have actually

been signed by the respondents – authority challenge and

dispute fail

and is dismissed.

ORDER

(1)

The first to fifth respondents’

response to the applicants’ notice in terms of Uniform Rule of Court 7(1), dated 25

March 2023, is declared to be adequate as

satisfying this Court that the respondents’ attorneys of record have the requisite

authority to represent them in these proceedings.

(2)

The applicants’ dispute of and

challenge to the respondents’ attorneys’ authority to act

on behalf of the respondents
are declared to be without merit and is
dismissed.

(3)

The 'Joint Proxy Form', dated 9
April 2023, by the first to fifth respondents, appointing Royal
Embassy of Saudi Arabia
Ambassador Sultan Al Angari as their proxy to
represent them in these proceedings and to instruct their attorneys
of record on
their behalf, is declared to be valid and of full force
and effect.

(4)

The first, second, third and fourth
applicants, jointly and severally, the one paying the other to be
absolved, shall pay the first
to the fifth respondents' costs
of this application relating to the rule 7(1) authority challenge.

JUDGMENT

Adams J:

[1]. This is an interlocutory application by the first to fourth applicants (the applicants) in the main application against the first to the fifth respondents (the respondents) in terms of Uniform Rule of Court 7(1). The applicants challenge the authority of Shaheem Samsodien Attorneys ('the respondents' attorneys') to act on behalf of the respondents in the main application, in which the applicants apply for an order that the King Fahad Islamic Centre Trust (the King Fahad Trust or simply 'the Trust') be terminated or dissolved in terms of s 13 of the Trust Property Control Act[1] (TPCA). Pursuant to the termination of the Trust, the applicants also pray for an order that all of its trust property be transferred to the Houghton Muslim Jamaat Trust (the Houghton Muslim Trust). In the alternative, the applicants pray for an order that the respondents be removed as Trustees of the King Fahad Trust in terms of section 20(1) of the TPCA.

[2]. The King Fahad Trust was created, and the Deed of Trust registered during 2006. The applicants (referred to by the parties as the South African Trustees) and the respondents (referred to as the Saudi Trustees) are all Trustees of the King Fahad Trust. The main application was issued on behalf of the applicants on or about 31 January 2023 and was ironically served by email on the 'respondents'

attorneys' shortly thereafter. The respondents delivered notice of intention to oppose the main application and on 1 March 2023 they gave notice of their intention to counter apply inter alia for an order declaring 'void and of no force and effect' and setting aside certain decisions made by the applicants during the existence of the Trust, for example: (a) the decision to appoint the Imam and the stipulation of his duties; (b) the decision of naming the Mosque the 'Houghton Mosque', and (c) the decision to call the Islamic Centre the 'Houghton Jumma Masjid, West

Street'. The respondents also applied for an order directing the applicants to account to them 'for all decisions taken by [the applicants] in relation to the trust assets, and the trust affairs from inception to date' and to provide the audited financial statements of the King Fahad Trust for the years ending 2014 to 2022.

[3]. On 25 March 2023, the applicants attorneys delivered a notice in terms of Uniform Rule of Court 7(1), challenging the authority of Shaheem Samsodien Attorneys to act on behalf of the respondents. The rule 7(1) notice reads in the relevant part as follows: -

'Kindly take notice that the first to fourth applicants dispute the authority of the first to fifth respondents' attorneys to act on behalf of the first to fifth respondents in these proceedings (i.e. in the main application and in the counter-application).

Take further notice that the first to fourth applicants require the first to fifth respondents' attorneys to produce to the Registrar, and to deliver a copy thereof to the first to fourth applicants' attorneys, proof of their authority to act on behalf of the first to fifth respondents, including (but not necessarily limited to) a power of attorney.'

[4]. The respondents' response to the said notice was to deliver a 'Joint Proxy Form' and an Updated 'Joint Proxy

Form', signed by all five respondents, in terms of which they 'appoint the Royal Embassy of Saudi Arabia Ambassador Sultan Al Angari as [their] proxy, to vote for [them] and act on [their] behalf at any of the meetings ... of the Trust that are convened at any time during [their] absence from the Republic of South Africa'. Importantly, the updated proxy goes on to provide as follows: -

'More particularly, Ambassador Sultan AI Angari is authorised to represent and defend the action instituted against the Trustees recorded herein by the applicants, Messrs Mahomed, Surtee, Laher and Seedat under case number 7716/2023, as well as launch a counter application against the abovementioned applicants under the aforesaid case number and to engage Shaheem Samsodien Attorneys to conduct the litigation to its end and generally for effecting the purposes aforesaid to do or cause to be done whatsoever shall be requisite as fully and effectively to all intents and purposes as we might or could do if personally present and acting therein.

... ...'

[5]. As already indicated, the proxy is signed by all of the respondents. The third respondent, Abdullah F Al-Lheedan, attached his signature on 9 April 2023, as did the fourth respondent, Mohammed Abdulwahed A Alarifi. The other three respondents did not date their signatures.

[6]. The respondents also delivered, as part of their rule 7(1) response, a Power of Attorney, signed by Ambassador Sultan Al Angari on 16 August 2023, nominating and appointing Shaheem Samsodien Attorneys as the respondents' attorneys. In the respondents' answering affidavit in the main application, the Ambassador also confirms under oath that he is duly authorised by the joint proxy to act on behalf of the respondents in the matter.

[7]. On the face of it, the respondents' attorneys are duly authorised to act in these proceedings on behalf of the respondents. The applicants, however, disagree. They persist with their authority challenge for the reasons elaborated upon later on in the judgment. The authority challenge and the arguments for and against it were heard by me as an interlocutory application on 27 February

2024. The issue to be decided by me in this interlocutory application is simply whether Shaheem Samsodien Attorneys are authorised to act in the main application and the counter-application on behalf of the respondents. Crystallised further, the issue to be considered by me is the validity and the effectiveness of the joint Proxy by the respondents in favour of the Ambassador.

[8]. Uniform Rule of Court 7(1) provides as follows: -

'7 Power of Attorney

(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).

[9]. As already indicated supra, the applicants do not accept that Shaheem Samsodien Attorneys are duly authorised by the respondents to act on their behalf in the main application. The challenge is primarily directed at the veracity and the authenticity of the updated joint proxy. The respondents contend that there is no indication ex facie the document that it was in fact signed by the respondents. It does not indicate where it was signed by the individual respondents, nor are the signatures by at least three of the respondents dated. Moreover, so it is contended by the applicants, the proxy and the signatures thereon by the respondents have not been authenticated and there is no way of telling whether indeed these are the signatures of the respondents. This ground of objection is therefore one relating to form.

[10]. Closely related to the foregoing arguments is the applicants' contention that there has not been compliance with the provisions of Uniform Rule of Court 63, which provides as follows:

'63 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 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 other person acting in any of the aforementioned

capacities or a pro-consul of the United Kingdom;

(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)

(2A) Notwithstanding anything in this rule contained, any document authenticated in accordance with the provisions of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents shall be deemed to be sufficiently authenticated for the purpose of use in the Republic where such document emanates from a country that is a party to the Convention.

(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 officer in charge of such public office, to have been actually signed by the person purporting to have signed such document.

(5)

[11]. On the assumption that the proxy was indeed signed outside of South Africa by the respondents, it can safely be said that there has not been compliance with the provisions of rule 63(2) in that the said instrument was not sufficiently authenticated as required by the said rule. This is, however, not the end of the matter. In terms of subrule 63(4), a court is entitled to accept as sufficiently

authenticated a document which is shown to the satisfaction of the court to actually have been by the person purporting to have signed such document.

[12]. As a matter of fact, I am satisfied that the proxy was indeed actually signed by the individual respondents. That is so because there is just no evidence to suggest otherwise. What is more is that the South African Ambassador to the Royal Embassy of the Kingdom of Saudi Arabia – a very senior government official in the Kingdom of Saudi Arabia – confirms under oath that he is authorised by the respondents to act on their behalf by the joint proxy. This implies that he confirms the signatures of the respondents on the updated joint proxy. By not accepting that the signatures on the proxy are those of the respondents, I would be saying that the ambassador is lying and misleading the court. That is a conclusion that I cannot possibly reach if regard is had to all of the circumstances in the matter.

[13]. The same line of reasoning applies to Shaheem Samsodien Attorneys, who confirms that they are authorised by the ambassador to act on behalf of the respondents by virtue of the joint proxy. Not accepting that claim by Shaheem Samsodien Attorneys implies that they are lying and misleading the court, which, again, is a proposition which cannot possibly be reconciled with the facts in the matter, especially the fact that the applicants' attorneys themselves have accepted, without more, that the said attorneys represent the respondents. Why else would they have served the application on them as the 'respondents' attorneys'.

[14]. The simple point is that, on the evidence presently before the court, there are two possible postulations – and only two – in relation to the signatures on the joint proxy and the authenticity thereof. The one is that the signatures were actually attached to the document by the respondents and that the respondents had appointed the ambassador as their proxy. The other postulation is that the signatures on the proxy is a fraud and a forgery and that the respondents never executed the said instrument. The implication of the latter possible scenario is that the ambassador and Shaheem Samsodien Attorneys are complicit in a serious fabrication and a forgery. As I said before, I cannot possibly come to that conclusion, which means that I accept, as a fact, that the joint proxy was in fact signed by the respondents. This, in turn, means that, as envisaged by rule 63(4), I accept as sufficiently authenticated the updated joint Proxy by the respondents in favour of the Ambassador. That then takes care of the first ground of the authority challenge by the applicants.

[15]. The second ground of the authority challenge by the applicants is based on a provision of the Deed of Trust of the King Fahad Trust, which provides as follows: -

'6. Absence of a Trustee

A trustee who is temporarily absent from the address from where the trust transacts its business, shall have the right to nominate a co-trustee by means of a written proxy to act on his behalf. If all the serving trustees are to be absent in this way, they shall have the right by way of a joint proxy to nominate a person or persons to act as trustees for the duration of their absence.'

[16]. The applicants contend that the foregoing provision specifically caters for the circumstances under which a Trustee may appoint a proxy and the manner in which such a proxy may be appointed. These circumstances are not present in casu, and therefore, so the argument on behalf of the applicants goes, the appointment of a proxy by the respondents to represent them in the litigation is invalid.

[17]. I disagree with this contention on behalf of the applicants. A contextual and purposive interpretation of the said clause leads me to the conclusion that the clause relates only to those instances in which a trustee acts in the process of transacting the business of the Trust. That is not the case in this litigation. Far from it – the litigation in casu relates to whether or not the respondents can and should continue acting on behalf of the Trust. The said clause 6 accordingly does not, in my view, assist the applicants in their authority challenge.

[18]. Accordingly, I conclude that the applicants' challenge to the authority of Shaheem Samsodien Attorneys to act on behalf of the respondents has no merit and should fail.

Costs

[19]. The general rule in matters of costs 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, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[2].

[20]. I can think of no reason why I should deviate from this general rule.

[21]. I am therefore of the view that the applicants should pay the first to the fifth respondents' costs of this application.

Order

[22]. Accordingly, I make the following order: -

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON: 27th February 2024 JUDGMENT DATE: 4th March 2024 FOR THE FIRST, SECOND, THIRD AND FOURTH APPLICANTS: Advocate Suhail Mohammed INSTRUCTED BY: Koor Attorneys, Houghton Estate, Johannesburg FOR THE FIRST TO THE FIFTH RESPONDENTS: Adv A Vorster INSTRUCTED BY: Shaheem Samsodien Attorneys, Sandown, Sandton

[1] Trust Property Control Act, Act 57 of 1988.

[2] *Myers v Abramson* 1951(3) SA 438 (C) at 455.

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