
SOUTH AFRICA / JUDGMENT

PFC Properties Proprietary Limited and Another v Commissioner, South African Revenue Services (81483/2019) [2021] ZAGPPHC 419 (17 June 2021)

[2021] ZAGPPHC 419

COURT

North Gauteng High Court, Pretoria

BEFORE

Joubert

CASE / FILE NUMBER

81483/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 81483/2019

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

PFC
PROPERTIES PROPPRIETARY LIMITED
First Applicant
(registration
number: 2003/026791/07)
PFC
INTERGRATION PROPRIETARY LIMITED
Second Applicant
(registration
number: 2006/038122/07)
and
THE
COMMISSIONER, SOUTH FRICAN
REVENUE
SERVICES
Respondent

JUDGMENT

JOUBERT AJ

1. In November 2019, the Commissioner for the South African Revenue Services (“the Commissioner”) instituted an action against, inter alia, PFC Properties (Pty) Ltd and PFC Integrations (Pty) Ltd, the second and third defendants in the action and the applicants in this interlocutory application (collectively referred to herein as “the applicants”).
2. The remaining defendants in the action are the Trustees for the time being of the PDR Trust (namely Paul de Robillard, Brita de Robillard and Francois Petrus Jakobus le Roux), the BDR Trust (being Paul de

Robillard, Brita de Robillard and Clifford Edward Alexander), the De Robillard Family Trust (being Paul de Robillard, Brita de Robillard and Clifford Edward Alexander) and the liquidators of two companies in liquidation, Doltek Enterprises (Pty) Ltd and Lonrho Fresh (Pty) Ltd.

3. The relief sought by the Commissioner in the action is set out below:

“64.1 It is declared that Paul de Robillard is guilty of an offence/s in terms of section 214(1) of the 2008 Companies Act.

64.2 It is declared that Paul de Robillard is delinquent in terms of section 162(5) of the 2008 Companies Act.

64.3 It is declared that Paul de Robillard is personally liable for the debts of Doltek in terms of section 424 of the 1973 Companies Act.

64.4 It is declared that Paul de Robillard is personally liable for the debts of Doltek in terms of section 22 as read with section 77 and section 218(2) of the 2008 Companies Act.

64.5 It is declared that Paul de Robillard is personally liable for the debts of Doltek in terms of section 155, 157 and/or section 184 of the TAA, alternatively section 97 of the Income Tax Act, further alternatively section 48(6), 48(9) of the VAT Act;

64.6 It is declared that Paul de Robillard personally alternatively Paul de Robillard and the Second, Third, Fourth, Fifth, Sixth, Seventh and Eight Defendants, jointly and severally, further alternatively, Paul de Robillard and the responsible Defendants, jointly and severally, be liable for all the debts of Doltek as aforesaid, the one or more paying the other or others (as the case may be) to be absolved.

64.7 Such debts amount to R109,318,771.16 calculated as follows:

64.7.1 the sum of R78,471,311.42, comprising custom duties, value-added tax and forfeiture charges payable to the Commissioner as per SARS's letter of demand at annexure "B" hereto;

64.7.2 the sum of R30,847,459.74 comprising income tax and value-added tax payable to the Commissioner as per SARS' letter of audit finalization SARS at annexure "C" hereto.

64.8 It is declared that Paul de Robillard personally alternatively Paul de Robillard and the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eight Defendants, jointly and severally, further alternatively Paul de Robillard and the responsible Defendants, jointly and severally, be liable for the Plaintiff's costs, the other or more paying the other or others (as the case may be) to be absolved.

64.9 Further and/or alternative relief."

4. The action was instituted on 30 October 2019. The attorneys of record for the Commissioner is reflected in that summons to be Klagsbrun Edelstein Bosman de Vries Inc ("Klagsbrun").
5. On 3 December 2019, the applicants entered their notice to defend the action and on 10 December 2019, delivered a notice in terms of rule
7. The notice reads as follows:

"PLEASE TAKE NOTICE that the Second Defendant & Third Defendant disputes the authority of Plaintiff's attorneys of record to act for Plaintiff and that such attorneys may no longer act unless the Court is satisfied that they are so authorized to act on behalf of Plaintiff in this action" (sic),

(the "rule 7 notice").

6. On 14 February 2020, Klagsbrun delivered a reply to the applicants'

rule 7 notice, enclosing a special power of attorney dated 13 February 2020 signed by Mr. Bavuma, an employee of the Commissioner.

The special power of attorney reads as follows:

"I, the undersigned,

SIPHO EDWARD BAVUMA

employed by the South African Revenue Service ("SARS") as a Group Executive Delivery and Support at SARS' offices situated at Bronkhorst Street, Brooklyn, being an officer as envisaged in section 3(1) of the Income Tax Act, Act 58 of 1952 ('the Income Tax Act') section 5(1) of the Value-Added Tax Act, Act 89 of 1991 ('the VAT Act') and section 11(1) of the Tax Administration Act, Act 28 of 2011 ('the TA Act'), exercising the powers conferred and the duties imposed by or under the provisions of the said Acts under the direction, control and supervision of the Commissioner of SARS ('the Commissioner'),

and being duly authorized by the Commissioner to do so, do hereby confirm the nomination, constitution and appointment of KLAGSBRUN

EDELSTEIN BOSMAN DE VRIES INCORPORATED, 220 Lange Street, New Muckleneuk, Pretoria, duly represented by RONKE NYAMA or any other

director, associate, professional assistant or employee of KLAGSBRUN EDELSTEIN BOSMAN DE VRIES INCORPORATED, with the power of

substitution, and in so far as it is necessary nominate, constitute and appoint the aforesaid KLAGSBRUN EDELSTEIN BOSMAN DE VRIES

INCORPORATED, to be the Commissioner and SARS' lawful attorney and agent and in their name, place and stead act as attorneys and indeed to do whatever may be necessary to assist the Commissioner and SARS in his/her discretion to perform their duties in terms of the said Acts and the other Acts administered by the Commissioner in relation to PAUL DE ROBILLARD and the entities with him, including, but not limited to, act as attorneys on behalf of the Commissioner in case number 81483/2019 in the Gauteng Division of the High Court, Pretoria and in any other matter that may arise as a result of the litigation by the Commissioner against or issued by Paul de Robillard against the Commissioner",

(the "special power of attorney").

7. The applicants continued to dispute the delegation to and authority of Mr. Bavuma to appoint Klagsbrun to act on behalf of the Commissioner after receipt of the special power of attorney. The present application was therefore instituted on 27 February 2020.
8. In terms of their notice of application, the applicants seek the following order:
 - "1. That the Respondent be and is hereby directed within five (5) days of the granting of this Order, to comply with the Applicant's Rule 7 notice dated the 10th of December 2019.*
 2. That in the event that the Respondent fails to comply with paragraph 1 supra, the Applicants be and are hereby granted leave to enroll the matter for the Respondent's claim to be dismissed;
 3. That the Respondent pays the costs of the application on the attorney and client scale;

4. Further and or alternative relief.”
9. The Commissioner’s answering affidavit was only served on 5 November
2020. In that affidavit the Commissioner provided, as an annexure, a copy of a letter addressed by Klagsbrun on 19 March 2020 to the applicants’ attorneys, to which it attached a document entitled “Authority in terms of section 6(2) of the Tax Administration Act, 28 of 2011” which, it alleges, confirms that Mr. Bavuma is duly authorised by the Commissioner to exercise the powers and duties of a Senior SARS official as contemplated in section 11(1) of the Tax Administration Act (referred to herein as the “authority”).
10. The authority referred to, reads as follows:

“Office of the Commissioner

AUTHORITY IN TERMS OF SECTION 6(2) OF THE TAX ADMINISTRATION ACT, ACT 28 OF 2011
TO EXERCISE ALL POWERS AND DUTIES OF A SARS OFFICIAL AS CONTEMPLATED IN SECTION
11(1) OF THE TAX ADMINISTRATION ACT, ACT 28 OF 2011

I, the undersigned,

EDWARD CHRISTIAAN KIESWETTER,

In my capacity as Commissioner of the South African Revenue Service duly appointed as such and under the powers granted to me in terms of section 6(2) of the Tax Administration Act, Act No 28 of 2011 (‘the Act’), hereby confirms the authority of Sipho Bavuma, as Senior SARS official, to exercise the powers and duties of a SARS official as contemplated in section 11(1) of the Act.”

11. The Commissioner seeks:
 - 11.1 an order dismissing the application;
 - 11.2 a cost order de bonis propriis against Mr Jasat, and
 - 11.3 an order that the applicants’ attorney (Mr. Jasat) may not recover any fees from the applicants relating to this application and that Mr. Jasat be ordered to repay any fees already paid to him by the applicants, alternatively on the applicants’ behalf.
12. Having read the answering affidavit of the Commissioner, together with the annexures thereto, the applicants’ stated the order that they seek in their practice note as follows (although their notice of application was not amended):

“6.1.1 The Applicants seek:

6.1.1 an order that KEBD be directed to comply with the applicants’ Rule 7 notice dated 10 December 2019, within 15 days of the date of service of this order; alternatively

6.1.2 an order that it be declared that the Special Power of Attorney, dated 13 February 2020, signed and executed by Mr. Sipho Edward Bavuma and the SARS Commissioner's Delegation dated 19 March 2020, do not constitute proper authorization of Mr. Bavuma to mandate KEBD to act for SARS in the action.

6.1.3 an order that the Respondent pay the applicants' costs of the application."

KLASBRUN'S AUTHORITY

13. Rule 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.

...."

14. Eksteen J stated as follows in *Firststrand Bank Limited v Fillis and Another*:^[1]

"[11] What was in issue in that matter was the authority to lodge the petition, not the authority to depose to an affidavit. It is important to recognise that the Pretoria City Council matter concerned a petition to the Supreme Court Appeal which was decided in 1962 in accordance with the Rules of Court which applied

at the time. The authority to prosecute any action in the High Court is governed by rule 7 of the Uniform Rules of Court. Prior to 1987 the rule required the attorney acting on behalf of a plaintiff to file a power of attorney with the registrar before the issue of summons. The extent of the mandate of the attorney was to be set out in this document. Where the power of attorney was signed on behalf of the party giving it proof of the authority to sign on behalf of such party had to be produced to the registrar who then noted it.

^[12] In 1987 the Uniform Rule of this Court were considerably revised. In terms of the revised rule 7 of the Uniform Rules of Court a power of attorney establishing the authority to act on behalf of a litigant need no longer be filed as a matter of course. If, however, an attorney's authority to act on behalf of a party is challenged, then in terms of rule 7 of the Uniform Rules of Court, the attorney is required to satisfy the Court that he is properly authorised to act on behalf of the litigant. Until he has done so he is precluded from acting further. In order to do so he is required to produce proof of his mandate, usually a power of attorney, and, where necessary, an appropriate resolution authorising the signature of the power of attorney."

15. The test is therefore whether the court is satisfied that Klagsbrun has shown that it is authorised to represent the Commissioner in these proceedings. The rule does not require that the applicants be satisfied, or that the authority be established on a balance of probabilities.
16. The bases on which the applicants continue to dispute that the special power of attorney and the authority issued by the Commissioner do not constitute sufficient evidence of Klagbrun's authority on the following bases:

16.1 the Commissioner's authority dated 19 March 2020 (to which the applicants refer to as a "delegation") was provided after the institution of the rule 7 interlocutory application;

16.2 when the special power of attorney dated 13 February 2020 was furnished, the Commissioner did not offer any evidence to indicate that the Commissioner had delegated any powers to Mr. Bavuma;

16.3 the authority dated 19 March 2020 simply purports to confirm "the authority of Sipho Bavuma, as Senior SARS official, to exercise the powers and duties of a SARS official as contemplated in section 11(1) of the Act", and

16.4 the applicants argue that this statement does not constitute a delegation under section 6(2) of the Tax Administration Act, as read with section 6(1) thereof, providing for the Commissioner's powers, nor does it establish Mr. Bavuma as being a person who was or is entitled to exercise the Commissioner's power on his behalf, as is contemplated in terms of section 11(1) of the Tax Administration Act. Further, the applicants contend, the document does not specifically authorise Mr. Bavuma to have instituted the action or to have mandated Klagsbrun to do so on behalf of the Commissioner.

The date on which authority must be shown to exist

17. The parties agreed that rule 7 does not require a litigant to satisfy the court that its legal representative had the requisite authority at the commencement of performing his legal duties on behalf of his client and that it would be sufficient for such authorisation to be shown to exist at the time of the consideration of the application.[2]
18. There is therefore no merit in the first complaint that the authority was only provided after the institution of this application.

Mr. Bavuma's Special Power of Attorney

19. The rule does not prescribe the specific manner in which an attorney would be required to produce proof of its authority. Possible means include a written power of attorney, a resolution by a company. It is also open to a party to apply for an order, such application obviously being underpinned by the necessary proof, for an order authorising the person to act on behalf of the party concerned.[3]

20. The basis on which the applicants disputed Klagsbrun's authority to act when presented with the special power of attorney of Mr. Bavuma, was that:

"12.5 Annexure 'FJ4' falls short of providing the necessary information and documentation authorizing Bavuma to sign the special power of attorney and to instruct Klagsbrun.

12.6 Neither proof of any delegation of power in favour of Bavuma nor his acceptance of such delegation has been attached."

21. In *Eskom v Soweto City Council* it was stated:[4]

"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. (Compare Viljoen v Federate Trust Ltd 1971 (1) SA 750 (O) at 752D – F and the authorities there quoted.)

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 authorized. 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). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions." (Emphasis added.)

22. It appears therefore that all that was required of Klagsbrun is to satisfy this court as to its authority to represent the Commissioner. It did not need to go beyond an authority issued to it by the Commissioner (as its client) or an official of the Commissioner in order to ensure that, that person was duly authorised so to instruct the attorneys. The queries raised by the applicants in respect of Mr. Bavuma's authorisation to provide the power of attorney is beyond what an enquiry in terms of rule 7 requires.
23. In my view, therefore, the special power of attorney provided in response to the rule 7 notice constituted sufficient proof to satisfy me that Klagsbrun had been authorised to represent the Commissioner in the institution of the main action.

The document issued by the Commissioner

24. The applicants' complaint in respect of the authority provided by the Commissioner dated 19 March 2020 is, as stated above, as follows:

24.1. The document, in terms of its wording does not constitute a delegation under section 6(2) of the Tax Administration Act. Section 6(2) provides as follows:

“Powers and duties which are assigned to the Commissioner by this Act must be exercised by the Commissioner personally but he or she may delegate such powers and duties in accordance with section 10”; and

24.2. The document does not establish Mr. Bavuma to be a person who was or is entitled to exercise the Commissioner’s power on his behalf, as contemplated in terms of section 11(1) of the Tax Administration Act. Section 11(1) provides:

“No SARS official other than the Commissioner or a SARS official duly authorised by the Commissioner may institute or defend civil

proceedings on behalf of the Commissioner...”

25. In argument, counsel for the Commissioner pointed out that counsel for the applicants proceeds from the incorrect point of view that the document provided by the Commissioner, as part of its answering affidavit, constitutes a “delegation” as provided for in section 11(2) of the Tax Administration Act. >
26. This authority, the Commissioner contends, constitutes acceptable proof that Klagsbrun has been authorised to represent the Commissioner in the main action and further, that Mr. Bavuma, the SARS official, was duly authorised by the Commissioner to furnish Klagsbrun with a power of attorney.
27. In *Unlawful Occupiers of the School Site v City of Johannesburg*[5] the Supreme Court of Appeal held, with reference to the decision in *Ganes v Telecom Namibia Limited*[6] (in turn citing with approval the Eskom decision (supra)) held:[7]

“[16] However, as Flemming DJP has said, 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, only be answered in the negative.” (Emphasis added.)

The relevant quotation from the Eskom judgment has already been set out above.

28. Certainly, when the special power of attorney is to be duly considered with the wording of the authority provided by the Commissioner as part of the answering evidence in this application, I am satisfied that such authority exists.
29. I do not agree with the interpretation that this document does not satisfy the requirements of a “delegation” in terms of the Tax Administration Act. On its clear wording, the document does not purport to be a delegation. It simply states to be an “authority”. It “confirms the authority of Sipho Bavuma.... to exercise the powers and duties of a SARS official as contemplated in section 11(1) of the Act”. It is signed by the Commissioner himself.
30. Section 11(1) has been quoted above.
31. On its clear wording, the authority falls within the scope of section 11(1).
32. In addition to the above, Klagsbrun has also provided details of how its firm has also represented the Commissioner in proceedings related to this action, including several insolvency enquiries where the applicants were involved.
33. As was stated in *Unlawful Occupiers* (supra) at para [16]:

“.....

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.”

34. Having reasonably considered the evidence before me, it also appears to me to be inconceivable that it would have been possible for Klagsbrun to institute the action and be able to obtain supporting documents, such as it has been able to do, from the Commissioner’s office, without the Commissioner being aware and having agreed to the institution of these proceedings.
35. I therefore hold that I am satisfied that Klagsbrun has been duly authorised to represent the Commissioner in the main action instituted under this case number.

Costs

36. I now turn to a consideration of the costs order to be made herein. Initially, both parties sought a punitive costs order against each other. It is only the Commissioner, however, who persists in seeking a punitive costs order.
37. The basis on which the Commissioner contends such a costs order is appropriate, is the following:
 - 37.1. the Commissioner contends that this application is an abuse of process and was brought with ulterior motives namely to derail and delay the main action, and

37.2. it is contended that the applicants were well aware of Klagsbrun's authority to represent the Commissioner from its principals', the de Robillards, involvement in previous but related proceedings where, it is claimed, the De Robillards and their associates engaged in abusive and frivolous court processes.

38. In argument before me, counsel for the Commissioner accepted that the service of a notice in terms of rule 7 was a procedural entitlement.

39. Even if it can be said that, reasonably speaking, the applicants did not have reason to doubt Klagsbrun's authority to represent the Commissioner, it was within the Commissioner's powers not to let this issue drag on for as long as it has.

40. I have set out above the timeline according to which the Commissioner acted since the applicants served their notice in terms of rule 7. It took the Commissioner two months to respond to the rule 7 notice and, once this application was served, some eight months to file its answering affidavit.

41. It was open to the Commissioner / Klagsbrun immediately upon the applicants' failure to accept the special power of attorney from Mr. Bavuma, themselves to institute an application seeking a declaratory order that the power of attorney was sufficient to satisfy the court as to Klagbrun's authority. At the very least, the Commissioner and/or Klagsbrun could have moved this matter forward with far greater alacrity.

42. The complaints that this application has caused a delay in prosecution of the action can therefore not solely be laid at the feet of the applicants. I am therefore not inclined to make a punitive costs order. It is my finding that the costs should nevertheless follow the result.

43. I therefore make the following order:

43.1 the application is dismissed;

43.2 based on the documentation before me I am satisfied that Klagsbrun Edelstein Bosman de Vries Inc is duly authorised to represent the Commissioner, South African Revenue Services in the action instituted under case number 81483/2019, and

43.3 the applicants are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

I JOUBERT

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: CJ Hartzenberg SC Instructed by: Jasat & Jasat Attorneys Counsel for the Respondent: WH Pocock Instructed by: Klagsburn Edelstein Bosman Du Plessis Inc Date heard: 4 May 2021 Date of judgment: 17 June 2021

[1] 2010

(6) SA 565 (ECP) at paras [11] to [12] (at 568H – 569B).

[2] Johannesburg City Council v Elesander Investments (Pty) Ltd 1979 (3) SA 1273 (T).

[3]

See in this regard Administrator, Transvaal v Mponyane 1990 (4) SA 407 (W) at 409; Firststrand Bank Limited v Fillis (supra) at 569A – B; Mall (Cape) (Pty) Ltd v Marino Ko-operasie Beperk 1957

(2) SA 347 (C) and Johannesburg City Council v Elesander Investments (Pty) Ltd 1979 (3) SA 1273 (T) at 1279C – D.

[3]

See in this regard Administrator, Transvaal v Mponyane 1990 (4) SA 407 (W) at 409;

Firststrand Bank Limited v Fillis (supra) at 569A – B; Mall (Cape) (Pty) Ltd v Marino Ko-operasie Beperk 1957

(2) SA 347 (C) and Johannesburg City Council v Elesander Investments (Pty) Ltd 1979 (3) SA 1273 (T) at 1279C – D.

[4] 1992 (2) SA 703 (W) at 705D – H.

[5]

2005 (4) SA 199 (SCA).

[6]

2004 (3) SA 615 (SCA) at 624I - 625A.

[7] At 206F – H.

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